INTERNATIONELLA HANDELSHÖGSKOLAN
HÖGSKOLAN I JÖNKÖPING

Fundamental Rights in the European Community and their effect on the principle of supremacy

With special reflection on the new Constitution for Europe

Master's thesis within EC law

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Jönköping May 2006

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De grundläggande fri- och rättigheterna i den Europeiska Gemenskapen och deras påverkan på företrädesprincipen

Med reflektioner om den nya Konstitutionen för Europa

Magisteruppsats inom EG rätt

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Framläggningsdatum 31 Maj 2006

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Datum: **2006- 05- 22**

Ämnesord **EG, Mänskliga rättigheter, företrädesprincipen, Konstitutionen för Europa, Konstitutionens förändringar, stadga för grundläggande fri- och rättigheter, Europa konventionen för de mänskliga rättigheterna, påverkan på företrädesprincipen.**

Sammanfattning

Företrädesprincipen och skyddet av de mänskliga rättigheterna inom den europeiska gemenskapen har varit förbundna från början av deras existens. Efter det att EG domstolen utvecklade företrädesprincipen var domstolen tvungen att beskriva och utveckla gemenskapens skydd av de mänskliga rättigheterna. Detta då några av medlemsländerna tyckte att gemenskapen saknade tillräckligt skydd av de grundläggande fri- och rättigheterna som skyddas i ländernas konstitutioner. Därför valde de att bortse från eller tolka principen annorlunda än EG domstolen. På grund av detta utvecklade domstolen skyddet för de mänskliga rättigheterna som en del av gemenskapens grundläggande principer. Dessa principer är influerade av medlemstaternas konstitutionella traditioner samt av internationella konventioner. Den av domstolen mest använda konventionen är den Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (Europakonventionen).

Utöver det att EG domstolen valt att hänvisa till och använda sig av Europakonvention, så har även den domstol som upprättats av konventionen, Europadomstolen, valt att i vissa domar döma om EG:s skydd av de mänskliga rättigheterna. Eftersom alla medlemstaterna av gemenskapen, men inte gemenskapen själv, även är signatärer av konventionen så är skyddet av de mänskliga rättigheterna inom gemenskapen påverkat av de domsluten. Företrädesprincipen, vilken tidigare påverkades av medlemstaternas konstitutionella invändningar, är på detta sätt även påverkad av en yttre instans.

EG/EU har länge bestritt ett tillträde till Europakonventionen och ett uttalande från EG-domstolen år 1996 sa också att ett sådant tillträde var omöjligt utan att först ändra fördraget. EU har även valt att skapa ett eget rättighetsdokument, Den europeiska unionens stadga om de grundläggande rättigheterna. Men i den nya Konstitutionen för Europa kommer den förut ickebindande stadgan att ingå. Konstitutionen gör det även möjligt för EU att ansluta sig till Europakonventionen. Företrädesprincipen är även den en del av Konstitutionen vilket innebär att den för första gången är del av den skriftliga EG rätten. Alla dessa förändringar kommer att påverka företrädesprincipen och dess funktion samt tillämpning.

Master's Thesis in EC Law

Title: **Fundamental Rights in the European Community and their effect on the principle of supremacy- With special reflection on the new Constitution for Europe.**

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Date: **2006-05-22**

Subject terms: **EC, human rights, principle of supremacy, Constitution for Europe, changes and effects of the Constitution, binding Charter of Fundamental Rights, European Convention on Human Rights and Fundamental Freedoms, affect on the principle of supremacy.**

Abstract

The principle of supremacy and the protection of human rights within the European Community have been interlinked from the beginning of their existence. After the ECJ's development of the principle of supremacy the Court had to create the Community's protection of human rights as a defense to a threat from some of the Member States. The Member States felt that the Community lacked a sufficient protection of fundamental rights, which were an important part of their constitution, and hence disregarded Community law as superior. As a result the ECJ developed the Community's protection of fundamental rights as a part of the Community's general principles. Those principles were inspired by the constitutional traditions of the Member States and of international agreements. The international agreement most relied on by the Court is the European Convention on Human Rights and Fundamental Freedoms (ECHR).

In addition to the ECJ using the ECHR the court established by that convention- the EctHR-has judged in cases relating to the EC's protection of human rights. Since all the Member States of the Community also are signatories to ECHR, but not the Community itself, the protection of human rights within the Community is affected by those decisions. The principle of supremacy, which before was affected by the constitutional objections in the Member States of the Community is now affected by another external organ.

The EU/EC have for a long time rejected an accession to the ECHR and the ECJ in 1996 held that such an accession was impossible without changing the Treaty. The Union also created their own human rights document, the Charter of Fundamental Rights. However, the new Constitution for Europe includes the previously non binding Charter as well as makes the accession to the ECHR possible. The Constitution also for the first time puts the principle of supremacy in writing. All these new changes in the constitutional document of the Union affect the principle and creates a possible threat to its function and use.

Innehåll

Abbreviations

A.G.	Advocate General
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJHA	Cooperation in the Fields of Justice and Home Affairs
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECommHR	European Commission of Human Rights
ECJ	Court of Justice of the European Communities
ECSC	European Coal and Steel Union
EEC	European Economic Community
EU	European Union
Euratom	European Atomic Energy Community
GATT	The General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
note	footnote
UN	United Nations
UNDHR	Universal Declaration of Human Rights
WTO	World Trade Organization
p.	page
pp.	pages
para.	paragraph
paras.	paragraphs

1 Introduction

1.1 Background

A proposal for a new simplified document, which would replace the existing treaties of the European Union and Community, was first made in 2003. Although, the origin of the proposal dated back to the Nice meeting in 2000. There the European Council adopted a Declaration for the Future of the Union.[1] The purpose was to draw attention to the aim and features of the Union and to initiate a debate about the future.[2] A year later, in Laeken (Belgium), a Convention was set up with the aim to develop and present a document with recommendations for the future of the Union. At the same time a Declaration was made which announce the challenges for the Union. The Leaken Declaration recognizes a need for a more democratic and transparent Union. The Union also needs to make clearer the separation of powers between itself and the Member States.[3] The Convention was composed of representatives of the Member States, the European Parliament and the Commission.[4] It finalised its work in 2003 with the draft Treaty establishing a Constitution for Europe. The new and simplified treaty proposal was presented for the Member States who first seemed unable to reach an agreement. However, during the Irish presidency in the first half of 2004 a modified document was presented which the Member States could agree upon. As a result the Heads of States and Governments of the Member States signed the Treaty establishing a Constitution for Europe[5] on the 29th of October 2004.[6]

The Constitution is divided in four parts. The first part set up the aim and principles of the Union. The Second part contains the Charter of Fundamental Rights of the European Union. The third part deals with the Union's policies and includes among other things the four freedoms and the competition rules. The last part contains general and final provisions such as the repeal of the earlier treaties.

The new Constitution contains many new and debated changes and some sections are particularly discussed. The inclusion of the previously non binding Charter of Fundamental Rights is one of those. Another is the proposed accession to the European Convention for the Protection on Human Rights and Fundamental Freedoms (ECHR).

Within and outside the European Union (EU) there has existed for a long time a debate whether or not the EC should accede the ECHR. The debate was tense in some countries, especially in Germany, which believed that the Union itself lacked a sufficient protection of human rights. The Union itself, in the shape of the Court of Justice of the European Communities (ECJ), first seemed resistant to acknowledge any such accusation. But later

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[1] Weatherill, *Cases and Materials on EU Law,* 2006, p. 16

[2] *Declaration on the Future of the Union to be included in the final act of the conference,* available at http://europa.eu.int/constitution/futurum/documents/offtext/declaration_en.pdf 2006-03-22.

[3] The Future of the European Union- Laeken Declaration available at http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm 2006-03-22.

[4] The Future of the European Union - Laeken Declaration.

[5] The Treaty Establishing a Constitution for Europe.

[6] Weatherill, pp. 22-23.

on they developed their own human rights policy, as part of the Community's general principles.[7]

The ECJ has through its case law explained and developed other concepts of Community law with no explicit basis in the Treaty, the supremacy of Community law being one of those (the general principles and the concept of supremacy can be seen as illustrating the Courts teleological method of interpretation[8]). The rule demonstrates the absolute nature of EC law, prevailing over national law. The principle of supremacy has been respected by most countries; however it has been disapproved of in some national courts as unconstitutional.[9] The tense relationship between the courts dissolved more or less simultaneously as the ECJ's policy on human rights developed. Yet the problem seems to arise once more in the debate surrounding the new Constitution for Europe[10]. The new Constitution includes a new article that for the first time puts the principle of supremacy in writing.[11]

1.2 Purpose

The purpose of this thesis is to examine the position of human rights within the European Community and if the Member States' high regard and protection of those rights in any way is a threat to the supremacy of Community law. The focus will be on the new Constitution of the European Union and its possible changes for the human rights development within the Community. Will the incorporation of the previous non binding Charter of Fundamental Rights of the European Union[12] into a binding Constitution for Europe affect the principle of supremacy? And what effect will the proposed Union accession to the ECHR have?

1.3 Method

To achieve the paper's purpose the legal sources of the European Union will used. The hierarchy of the sources are acknowledged, giving the Union and Community Treaties a higher legal status. Other, non- legally binding material published by the Union or Community, such as the Charter of Fundamental Rights and its explanations[13], are also taken into consideration. Since the subject area is highly developed through the case law of the ECJ the cases, although not binding,[14] are given much consideration.

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[7] Hartley, *The Foundations of European Community Law*, 2003, pp 135-136.

[8] Weatherill, p. 89 and Alter, *Establishing the Supremacy of European Law- The Making of an International Rule of Law in Europe,* , 2001 p. 20.

[9] Hartley, 2003, p. 135. For a detailed review on the Member States acceptance of both the principle of supremacy and direct effect see Slaughter, Stone, Weiler (eds.), *The European Courts & national Courts- Doctrine and Jurisprudence: legal change in its social context,* 1998 and Alter *Establishing the Supremacy of European Law- The Making of an International Rule of Law in Europe,* 2001.

[10] The Treaty Establishing a Constitution for Europe.

[11] Article I-6.

[12] Charter of Fundamental Rights of the European Union.

[13] Document 4473/00 CONVENT 49 of 11.10.2000.

[14] The judgments by the Court are officially only binding in the case in which they are given, but are usually observed in the following cases. Bernitz and others, *Finna Rätt*, 2004, p. 62. The ECJ was at first reluctant to

The thesis also uses doctrine in the form of books and articles that clarify and give opinion on the subject.

1.4 Delimitation

Even though the second and third pillar of the European Union contains reference to human rights in some way, they will not be taken up in this thesis except when a description of the Union as an entity is required. Even if some national court cases will be discussed, a discussion on particular national legislation will be omitted from this thesis. The scope and meaning of the specific fundamental rights discussed will not be taken up in this thesis.

1.5 Outline

The second chapter of this thesis examine the meaning of human rights and the development of international and regional treaties protecting those rights. The third chapter deals with the principle of supremacy as a basic principle of Community law. The development of the principle will mainly be looked at by examining the case law of the European Court of Justice. Chapter four gives an overview of the development of the Community's human rights policy. The fifth chapter discusses the response, to the principle of supremacy and the protection of the fundamental rights, in the Member States. The sixth chapter discusses the relationship between the ECHR and the EU, and the seventh chapter deals with the Charter of Fundamental Rights and the Constitution for Europe. The last chapter concludes and analyses the thesis' problems and results.

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cite previous cases, even when complete sections of previous judgments were repeated. This has changed and the Court now in general cites precedents. Hartley, 2003, p. 77-78.

2 Human Rights

2.1 Development

Human rights as an idea of rights that are basic and absolute is an age old thought. This historical idea is build on the idea that all human beings are given inalienable rights which protects the individual against the state.[15] These rights are usually divided into civil rights, the so- called first generation, and social rights, the second generation. Civil rights are based on the historical idea of human rights and include, among others, the right to life, the right to fair trial, and the freedom of speech. Examples of social rights are the right to work and the right to education. Lately new sets of rights have developed so-called third generation rights. These rights are more debated, but are often understood to include the right to peace, minority rights and environmental rights.[16]

Human rights are often phrased in terms of basic rights, rights of citizens and fundamental rights. For some these terms hold the same meaning, for others not. There is also a disagreement which rights can be seen as individual, that is to say rights which the individual only posses on his/her own, or collective, rights that apply to people collectively. Civil and political rights are sometimes categorized as individual rights, while economic and social rights are categorized as collective rights. Human rights are by some used as describing the basic idea of inalienable rights, whereas fundamental rights are seen as the central principles against which all other rights are evaluated.[17]

After the Second World War human rights received more international attention. As a response to the war the Universal Declaration of Human Rights (UDHR) was drafted, in 1948, in form a resolution by General Assembly of the United Nations (UN). [18] The Declaration emphasises the equality and dignity of all human beings[19]. The UDHR as well as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are usually referred to as the International Bill of Rights.[20] Unlike the UDHR the two Covenants are legally binding after ratification. However the UDHR are usually seen as belonging to International Customary law.[21] Customary law is those principles that are "generally accepted as law".[22]

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[15] Although, the idea of human rights as universal and independent are not an unquestioned theory. Hartley sees human rights as "*the values held most strongly by the dominant group in the countries in question at the time in question.*" Hartley, *European Union Law in a Global Context Text Cases and Material*, 2004, p. 268. See discussion in chapter 4.7.

[16] Malanczuk, *Akehurst´s modern introduction to international law*, 2004, pp. 209-210.

[17] Betten &Grief, *EU Law and Human Rights*, 1998, pp.6-7.

[18] Ibid., pp. 209-213.

[19] Universal Declaration of Human Rights, Art. 1.

[20] Smith, *International Human Rights*, 2005, p. 38.

[21] Malanczuk, 2004, pp. 213-216.

[22] Ibid. p. 39.

In addition to the International Bill of Rights many other human rights document, protecting the individual or a specific group, has been drawn up under the UN system. The UN Charter itself mentions the protection and respect for human rights already in its preamble. Additionally Article 1 declares one of the aims of the organisation to be the support and promotion of respect for fundamental freedoms and human rights.[23] The UN has several specific documents protecting numerous human rights areas. Some of the most important ones are the conventions against slavery[24], the convention against torture[25] and the child convention[26].

Human right also receives protection in form of several regional organisations and conventions. Europe, which was the region in which the protection of human rights was first acknowledged and safeguarded under an intergovernmental organisation, will be examined in the next section. Other regions have also developed highly respected human rights organisations and treaties. The Organisation of American States, which has 35 member states, has concluded both the American Declaration of Rights and Duties of Man and the American Convention on Human Rights.[27] In Africa the Organisation of African Unity, which was created in 1963, has produced the African Charter on Human and People's Rights.[28] The Arab countries, under the umbrella of the League of Arab States, have drafted a Charter of Human Rights.[29]

2.2 Europe

In Europe three organisations developed after the Second World War; the European Coal and Steel Union (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The ECSC come to an end fifty years after its conclusion, in 2002.[30] The two remaining communities are today normally referred to as the European Community (EC), the first pillar of the European Union (EU). The Second pillar of EU, entail the Common Foreign and Security Policy (CFSP) [31] and the third the Co-operation in the Fields of Justice and Home Affairs (CJHA) [32]. The original organisations of the EC did not make any reference to human rights in their statutes and seemed to have excluded the topic from their area of interest. However, as a result of intense reactions in the Member States to the absence of human rights protection the Community developed its own human rights defence. The development of that human rights doctrine will be described in chapter four.

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[23] Charter of the United Nations Article 1.3.

[24] Slavery Conventions 1926, 1956.

[25] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

[26] Convention on the Rights of the Child, 1989.

[27] Betten & Grief, pp. 24-25 and http://www.oas.org/ 2006-04-04.

[28] Betten & Grief, pp. 25-26.

[29] Ibid., p. 26.

[30] Hartley, 2004, pp. 9-12.

[31] Treaty on the European Union, Title V.

[32] Treaty on the European Union, Title VI.

A fourth and entirely separate organisation, the Council of Europe was developed some years before the others. The Council of Europe has its seat in Strasbourg and consists of three main bodies, the Parliamentary Assembly, the Committee of Ministers and a Secretary- General.[33] The Member States of the Council of Europe signed the Convention for the Protection on Human Rights and Fundamental Freedoms, or simply the European Convention (ECHR), in 1950, only a few years after the making of the UDHR. The both documents resemble each other, although the ECHR are more detailed.[34] The ECHR establishes in its Article 19 the European Court of Human Rights (ECtHR). The Court is set up to receive complaints against the Contacting Parties (i.e. states) in breach of the Convention. Complaints were originally only allowed to be lodged by other Contacting Parties, or if the states had optioned for it, by individuals. After an amendment individual complaints are now compulsory.[35]

As previously seen the relationship between the European Union and the Council of Europe has become interlinked in the question of human rights protection within Europe. The relationship and its consequences will be further described in the following chapters.

[33] Betten & Grief, p.23-24.

[34] Malanczuk, p. 217.

[35] Malanczuk, p. 219. Article 34 of the ECHR makes available the individual complaint procedure.

3 European Community- General Principles

3.1 Background

As before mentioned the EC's human rights doctrine was developed through the general principles of Community law. The ECJ's building and development of those rights will be explained in chapter five.

The general principles of Community law are developed through the doctrine of the ECJ and also include, among others, the principle of legal certainty[36], the principle of proportionality and the principle of equality.[37] Even though these principles are not explicitly mentioned in the Treaty[38] they are still a source of law. The principles are binding on the institutions of the Community and have the effect of making incongruous Community measures unlawful.[39] The general principles are inspired by the Members States' national legislation, but may have different meaning in Community situations. A general principle of Community law does not have to be established in all the Member States' legal systems.[40]

3.2 Supremacy

As previously stated the supremacy of Community law was also developed through the case law of the ECJ. It was developed in some early cases of the Court. As mentioned before (chapter 1.1) the notion of supremacy resembles the general principles of Community law as it lacks any explicit basis in the Community Treaty.

3.2.1 Costa v ENEL[41]

The *Costa v ENEL* case concerned an Italian man, who claimed that Italian law that nationalised the company ENEL was contrary to Community law. The problem was that while the ECJ received a reference for preliminary ruling by an Italian district court, the Italian Constitutional Court declared the case outside the jurisdiction of the ECJ. The Constitutional Court did not hold Community law as superior to national legislation. This led the ECJ to establish its principle of supremacy. [42]

The ECJ responded to the Italian Constitutional Court's decision by declaring that the Community Treaty[43] had "*created its own legal system which, on the entry into force of the treaty, be-*

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[36] Which itself is composed of other standards, such as non retroactivity, legitimate expectations and vested rights. See Hartley, 2003, pp. 146-151.

[37] Hartley, 2003, pp. 153-154.

[38] The principle of proportionality may be found in the wording of Art. 5(3) EC which states that "*Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".*

[39] Tridimas, *The General Principles of EC Law*, 1999, p. 4.

[40] Ibid.

[41] Case 6/64 Flaminio Costa v Ente Nazionale per L´Energia Elettrica (E.N.E.L.).

[42] Alter, 2001, pp.16-19.

[43] Then EEC Treaty.

came an integral part of the legal systems of the Member States and which their courts are bound to apply."[44] The ECJ in addition explained the legal nature of the Community that made it take priority over national law. The Community had received legal power from the Members States, who by doing so limited there own ability in certain spheres. [45]

The ruling and development of the principle was a natural consequence of the ECJ's doctrine of direct effect, which under certain criteria give individuals right to call upon Community provisions before national courts. In the case *van Gend en Loos* [46], which was the first case in which the ECJ explained the principle of direct effect, the Court had already settled that the Community is a "new legal order", an order that not only give Member States rights and obligation but also individuals.[47] The individual's right to challenge national laws, using directly effective EC provisions, would not have any value unless Community law has priority over national law. [48]

The principle of supremacy did not only declare the priority of Community legislation, it also demanded from the national courts to follow this standard in its own rulings. In *Costa v ENEL* this was not clearly expressed, instead this rule was manifested in a later case, *Simmenthal.*[49]

3.2.2 Simmenthal

This case involved a company, Simmenthal SpA, which imported meat from France to Italy. When passing the border importers were required to make a payment for veterinary and public health examinations. This fee was based on an Italian law from 1970. Simmenthal argued that the requirement was contrary to EC law[50]. The Italian Government in their turn claimed that the Italian law was completed following the EC legislation, hence it surpassed that legislation. Their position was based on the principle *lex posterior derogat priori*. The principle pronounces more recent law to prevail over older one in case of conflict. [51]

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[44] Case 6/64

[45] Ibid., "*By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.*".

[46] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.

[47] Ibid.

[48] Alter, pp. 18-19.

[49] Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA.

[50] In particular the EC Treaty and Council Regulation No 805/68 on the common organization of the market in beef and veal.

[51](Lex posterior derogate priori- The rule of later in time) The principle is laid down in the 1969 Vienna Convention on the Law of Treaties, articles 30, 41 and 58. The Vienna Convention entered into force after the original Community treaties and is subsequently not directly applicable. But, the Convention is usually seen as a part of customary international law and may because of that still be of use in Community situations. The rules in the Convention on the subject of conflicting treaties are worthy of note in the debate around the possible accession to the ECHR (see Chapter 6.1).

Italy also argued that even if EC legislation was superior to national law, the national courts could not fail to apply the national law until it was affirmed unconstitutional by the Italian Constitutional Court.[52]

The ECJ replied that a national court do have to apply Community legislation, although the conflicting national law are implemented afterwards. The supremacy of Community law makes national laws consequently inapplicable when Community law becomes directly applicable.[53]

The Court's judgment made clear that when EC law is directly applicable (or have direct effect) it overcomes contradictory national laws.[54] Whether or not the principle of supremacy also puts a duty on the states to annul those national laws is unclear. Even if the law is not applied in a particular case it will create uncertainty and are of course inapplicable in a Community situation. Although, the law may be applicable in situations falling outside the sphere of EC law. [55]In some cases the ECJ has explained that such a situation does not oblige the Member States to annul the law.[56] However, it has also made clear that a "*competent body of the Member States"* should "*remove that legal uncertainty insofar as it might affect rights deriving from Community rules*.[57]

The ECJ's development of the principle of supremacy was (as mentioned under chapter 1.1) not accepted in some Member States and among legal scholars. The Court's interpretation of Community law and the legal basis of the principle were both criticised.[58]

3.2.3 Legal Basis for the Principle of Supremacy

In lacking an explicit reference in the EC Treaty, to the principle of supremacy, a number of implied or intended grounds in the Treaty have been considered. As mentioned before (chapter 1.1) the Court's creation of the principle is viewed as an application of the teleological interpretation method.[59] The teleological interpretation meant that the ECJ interpreted the non- mention of a hierarchy, between the Community law and the national law, not as a confirmation of the non-existence of supremacy but instead as support that the

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[52] Case 106/77, para 6.

[53]Ibid., paras. 17 and 21.

[54] Hartley, 2003, p. 228. Although, provision that are not directly effective can as well come to impinge on the reasoning of the Member States' courts. The principle of indirect effect (case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen) and the principle of State liability (case C-6&9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic.) require the courts to always interpret the national laws in the light of Community law and gives a possibility of Member States to be held liable for not protecting Community law.

[55] Steiner, Woods & Twigg-Flesner, *Textbook on EC Law,* 2003, pp. 70-71.

[56] Joined cases C-10/97 to C-22/97 Ministerio delle Finanze v IN.CO:GE´90 Srl and others

[57] Case C-264/96 Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer, para. 34.

[58]Alter, pp. 20-21.Much of the same disapproval was addressed to the Court's development of the general principles of Community law. This will in some part be describe in the context of fundamental rights under chapter 4 & 5.

[59] See note 21.

Treaty did not deny the existence.[60] The nature and purpose of the Community was instead emphasised in the Court's line of reasoning. The Community nature was original and based on the Member States transference of powers to the Community. The purpose was used to ensure that the aims of the Community did not become fruitless.[61] The Court recognizes that the Member States have decided to sign the Treaty and also to follow it (Article 10 EC). The Treaty also sets up institutions which can create legally binding legislation (Article 249 EC), institutions that are monitored by the established Commission (Article 226 EC).[62]

Article 234 EC establish the procedure of preliminary ruling. The Article can be seen as the basis for the principle of direct effect and in extension also the principle of supremacy.[63] The ECJ itself made reference to the article in the *Costa v ENEL* case when stating that "*[T]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 234[177] is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise."*[64] A danger with this statement is that it can be interpreted as declaring that all treaty articles are directly effective. This is not the case and only those articles that do have direct effect have priority to national law.[65]

What is generally perceived as an implicit reference to the principle of supremacy is Article 220 EC. The Article declare that: "*[T]he Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed."* The word *law* is considered to mean more than just the Treaty.[66]

Also Article 230 EC can be seen as a justification for the general principles. The Article set up the basis for annulment of Community measures. It states that the ECJ has jurisdiction in any breach of the EC Treaty or other *"rule(s) of law relating to its application*". The last phrase is, just as the word law in Article 220, viewed as meaning more than merely the Treaty.[67]

As said before the absence of a reference to any supreme authority of Community law in the Treaty is changed with the new Constitution. Its Articles I-6 reads: *"The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States."* [68] Some would argue that the tension between the ECJ and the Member States, especially regarding the Member States Constitutions, continues to exist even after the codification of the principle. The mentioning of 'the law of the Member

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[60] Alter, page 20.

[61] Steiner, Woods & Twigg- Flesner, p. 67

[62]Ibid., p 68

[63] Ward, *A Critical Introduction to European Law,* 2003, pp, 80-81.

[64] Case 6/64.

[65] Hartley, 2004, p. 151. However see also note 53.

[66] Hartley, 2003, p. 134.

[67] Ibid.

[68] Treaty establishing a Constitution for Europe.

States' do not make the relationship any clearer.[69] However, the drafting Conference made a declaration on the meaning of the Article, stating that it shall reflect the previous case law of the ECJ.[70]

3.3 Concluding Remarks

The reaction in the Member States, to the supremacy principle, seems to be based on a conditional approach founded on their respective constitution. The approach is often separated in two questions. The first refers to whether or not the Community has sufficient protection of the fundamental rights, enshrined in most Member States constitutions, whereas the other review the Community's competence to rule on its own powers. [71] The first mentioned condition will be explained more in the next two Chapters.

The structure of the Community provides for the ECJ to itself rule on the limits of its powers, based on Articles 292 and 230 EC (and Article 146 Euratom). The Court also has affirmed this in its case law. The ECJ is the only interpreter of Community law and the only one to test the legality of the law. [72] The Member States reasoning were instead that the Union had received its powers from them; hence the final verdict had to remain with them. The reasoning still exists and can be a consequence of the move from unanimous vote to qualified majority vote in the legislation process. When a Member States no longer can veto a decision it may instead rely on the conditionality argument.[73] This line of reasoning can be seen in the judgments of some constitutional and supreme courts of the Member States.[74] Their interpretation is based on the idea that the legality of the Community institutions and acts are a creation of the democratic process in the Member States, with the result of making the Member States the ultimate guardians of that legality. If the Community, when creating new legislation, go beyond its conferred competence the Member States then have the right to declare those acts *ultra vires*[75].[76]

As mentioned before another condition was expressed in the acceptance of the supremacy principle, the condition that the Community would respect and protect fundamental rights. This challenge led the ECJ to establish its own human rights doctrine. As described by one

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[69] Nergelius, EU: s nya grundlag -Från maktbalans till rådsdominans (EU's new constitution – From balance of power to council domination), 2004, p. 27.

[70] Declarations concerning provisions of the Constitution annexed to the Constitution, Declaration 1, on article I-6.

[71] Cramèr, *Does the Codification of the Principle of Supremacy Matter,* 2006, pp. 60-62

[72] Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost, paras 15-20.

[73] Cramèr, p. 63.

[74] See Chapter 5.1 and the judgment of the German Constitutional Court in Case 2 BvR 2134/92 and 2153/92 Manfred Brunner and others v European Union Treaty. See also judgment by the Danish Supreme Court Case I-361/1997 Hanne Norup Carlsen and others v Prime Minister Poul Nyrup Rasmussen. For an English version of the latter judgment see Oppenheimer A., *The Relationship between European Community Law and National Law: The Cases, vol 2.* 2003, pp.175-192.

[75] 'Beyond powers'. When an organ or government act outside its legal boundaries or the power given to it by its members/people.

[76] Cramér, pp. 63-64.

author, *"[P]ut it differently, the EU's painfully constructed legal order and the supremacy of EU law heavily depend on the ECJ's ability to protect human rights."*[77] The ECJ who first was reluctant to make any judgment on the human rights protection was, as a result of the Members States reaction, forced to change its standpoint. The following chapter will illustrate the transformation of the Court's case law relating to fundamental freedoms and its close connection with the principle of supremacy.

[77] Scheeck, *Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance*, 2004, p. 15.

4 The Human Rights Development within the Community

4.1 The Original Doctrine

The original treaties of the ECSC, the EEC and the Euratom did not include any reference to human rights. This may reflect the fact that these bodies where much more a response to the economic collapse after the Second World War, unlike that of the Council of Europe.[78] It may also be a sign of the organisations wanting to give the nationals of the Member States their protection at home, so that Community would not infringe on the human rights protection in the nations.[79] However, for many Member States the human rights protection being left out was a large defect. The ECJ did not take any consideration to this. In some early case the Court was given the question whether or not the Community's actions in any way could breach the rights secured under the Member States Constitutions. In *Stork*[80] a German company petitioned for an annulment of a decision, by the Commission[81], in a competition case. The Company believed that the Commission had violated fundamental rights enshrined in the German Constitution. The ECJ clearly stated that the Commission was only entitled to apply Community law. It was not to rule on national law. [82] In *Geitling*[83] the Court once again held that the internal law of a Member State was not within the jurisdiction of the Court. This applied even to the constitutions of the Member States. [84] A statement that show the then reluctant approach to human rights can be seen in the following declaration by the Court: *"Moreover Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenances of vested rights."*[85]

Together with the *Costa v ENEL* case, giving supremacy to Community law, the approach to fundamental rights by the ECJ received a frosty welcome in a number of Member States. The Community had come to affect the interest of the individual in many areas of the private life. Especially concerned were the economic rights, which may be confirmed by the fact that many of the first human rights violations claimed before the ECJ concerned exactly those rights.[86]

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[78] Betten & Grief, p. 53. When a new treaty on a European Political Community was drafted in 1953 one of the aims was the protection of human rights. However the treaty was not enforced since France did not ratify it, Craig & de Búrca, *EU Law- Text, Cases and Materials*, 2003, p. 318.

[79] de Witte, *The past and Future Role of the European Court of Justice in the Protection of Human Rights,* 1999, p. 863.

[80] Case 1/58 Friedrich Stork & Cie v High Authority of the European Coal and Steel Community.
[81] Then named High Authority.

[82] Case 1/58, para. 26.

[83] Joined Cases 36-38 and 40/59 Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community.
[84] Ibid., at p. 438.

[85] Joined Cases 36-38 and 40/59 at. p. 439.

[86] Craig & de Búrca, p. 319.

Germany, who had (and has) a strong constitutional protection of fundamental freedoms, was particularly reluctant to the Community approach. German lawyers even went as far as to say that Community law would not apply if it was in breach of the human rights protection under the German Constitution (*Grundgesetz*).[87] After this criticism, the ECJ seemed to change its position, as shown in the case *Stauder v Ulm.*[88]

4.2 Stauder v Ulm

The case concerned a German national, Mr Stauder, who according to an EC Decision[89] was entitled to welfare benefits in form of cheap butter. To receive this benefit Mr Stauder had to identify himself. The provision of the Decision stating this had been differently interpreted in different language versions. The German version demanded the recipient to give his or her name. Mr Stauder claimed this to be humiliating and a violation of fundamental rights given to him in the *Grundgestz*.[90] The Court first said that when interpreting a Community act, which has different language version holding different meaning, the most liberal interpretation of the text must be used. This is true when the objective of the decision is still maintained.[91] When interpreting the Decision in such a way it did not demand that the recipient had to identify himself by name. So Mr Stauder had not been denied of any of the claimed rights. However, the Court then made a statement that showed a new approach to the human rights question. It observed that " *the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the court.'*[92]

In distinction to the previous case law of the ECJ, this statement show that the Court from here on recognized fundamental rights as general principles of Community law. These principles are part of Community law and must be conformed to when interpreting and applying that law, as stated in Article 220 EC.[93] The provision does not explicitly mention general principles, but the word "law" are seen as referring to other sources then the Treaty. The general principles are developed through the case law of the ECJ. The Court based them on the Community Treaties, the legal systems of the Member States and general principles of international law.[94]

The ECJ did however not make clear which these fundamental human rights were, or how this category of rights were to be parted from other general principles such as the principle of proportionality. As stated before, (see 2.1) human right are often explained as rights protecting the individual from state interference. Other general principles are more of a binding code for the States or authorities to follow. [95] The distinction may be small, and for

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[87] Hartley, 2003, pp. 135-136.

[88] Case 29/69 Erich Stauder v City of Ulm - Sozialamt.
[89] Decision No 69/71/EEC.

[90] Hartley, 2003, p. 136.

[91]Case 29/69, paras 3-4.
[92] Ibid., at paras 6-7.

[93] Betten & Grief, p. 56. Article 220 EC was as previously mentioned also used to justify the making of the principle of supremacy- see chapter 3.2.3.

[94] Hartley, 2004, pp. 298-299, and Hartley, 2003, p. 133.

[95] Betten & Grief, 1998, p. 57.

some even non-existing, but the legal status of the fundamental human rights has shown to be of great importance for the European Community and especially for the Member States. [96] Ward even claims that a definition is of more importance in Community law than in other legal systems. In the Community the focus is more on economic and social rights than the usual international concentration on civil and political rights. He considers it a danger to place for instance the right to fish on equal level with the more respected right to life.[97]

The doctrine of general principles was criticised much in the same manner as the principle of supremacy. The Member States, academics and judges did not agree with the ECJ's teleological interpretation of the EC Treaty. The Court based its doctrine on Article 220 EC. It made this evident in a later case, *Internationale Handelsgesellschaft*[98], where they affirmed that Article 220 EC (then Article 164) gives the Court permission to interpret and apply Community law and to do so in the light of the general principles of Community law.[99]

4.3 Internationale Handelsgesellschaft

The *Stauder* case may have recognized fundamental rights within the Union but not sufficiently clear for many Member States. This was proven by the *Internationale Handelsgesellschaft* case. This case illustrates the conflict between the human rights protection in the Members States and the principle of supremacy.[100]

Internationale Handelsgesellschaft concerned two Community Regulations[101] that set up a system that required exporters to apply for a certain licence. The exporter also had to deposit an amount of money that was not to be returned if he or she failed to export during a certain time limit. The exporter claimed this to be a violation of the German Constitution and its principle of proportionality.[102] The ECJ rejected any obligation to consider national laws. To do so would threaten the "*uniformity and efficiency of Community law*".[103] Community meas-

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[96] See further chapter 4.7.

[97] Ward, *A critical Introduction to European Law*, 2003, pp. 88-89. This criticism also applies to the more recent human rights policy of the European Union. For example the rights within the Charter of Fundamental Rights for the European Union (see chapter 7) have been criticised in the same manner for putting certain not so fundamental rights on the equal level as more historical human rights.

[98]Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

[99] It also became more evident in later cases from the ECJ. See Joined Cases C- 46& 48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others ECR 1-1029 para. 27. "*Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States".*

[100] de Witte, *The past and Future Role of the European Court of Justice in the Protection of Human Rights*, 1999, p.863.

[101] Commission Regulation no 473/67/EEC on import and export licences for cereals and processed cereal products, rice, broken rice and processed rice products and Regulation no 120/67/EEC on the common organization of the market in cereals.

[102] Case 11/70, para 2.
[103] Case 11/70 para 3.

ures can only be judged according to Community law. The fact that the measure here was allegedly breaching the German Constitution could not weaken the supreme nature of Community law.[104]

However, the Court affirmed once again its doctrine of fundamental rights stating that: *"an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."*[105] This meant that the ECJ found itself obliged to examine if the Community measure had violated any fundamental right guaranteed under Community law.[106] But, the Court did not find anything in this case to support a violation of any rights protected under EC law.[107]

The above quotation can be seen not only as a confirmation of the *Stauder* case but, also as expanding the human rights concept within the Community. The Court here makes reference to "constitutional traditions" of the Member States being an inspiration to the general principles.[108] This is not to be mistaken as admittance by the Court to follow the constitutional traditions. It is only to be seen as a way for the Court to explain the background of its general principles. The Court was weighing Community law with the principles in international law that are part of many national constitutions. [109]

The reference to the Member States constitutions are not all that clear and leaves many questions unanswered. Does the specific fundamental right have to be protected under each of the Member States constitutions? If not, in how many of them does it have to be found?[110]The Court failed to answer these questions but went further three years later in the case *Nold*[111] where they developed another source of inspiration.

4.4 Nold

This case dealt with a Community Decision[112] which said that Nold, in his capacity as a wholesaler of coal, was not allowed to buy from the supplier unless he bought a certain magnitude of coal.[113] Nold, who could not fulfil that condition, argued that the system was

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[104] Case 11/70 para 3.

[105] Case 11/70, para 4.

[106] Ibid.

[107] Case 11/70, para 20.

[108] Hartley, 2003, p. 137.

[109] Steiner, Woods & Twigg- Flesner, p. 156.

[110] Hellner, *Skyddet av grundläggande fri- och rättigheter i framtidens EU* (The protection of fundamental rights and freedoms in the future EU), pp 27-28.

[111] Case 4/73 Nold v Commission of the European Communities.

[112] Comission Decision of 21 December 1972 authorizing new terms of business for Ruhrkohle AG.

[113] Hartley, 2004, p. 301.

in breach of his right to property and his right to a free business activity under the German Constitution.[114] The ECJ started by expressing its commitment to uphold the human rights protection, which is part of the Community's general principles.[115] It then followed its judgment in *Internationale Handelsgesellschaft* giving the constitutions of the Member States recognition as an inspiration to the human rights doctrine and added that, "*[S]imilarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.*"[116]

The ECJ then examined the facts and came to the conclusion that the Decision was in fact not contrary to the Community's general principles. The Court maintained that the principles of Community law are not absolute and that they are "*subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched*"[117] The restriction on Nold's economic and property right was not a result of the Decision but instead a consequence of economic change and thus not within the scope of the general principles.[118]

This case did not only expand the sources of inspiration to include additionally international treaties but, also made it evident that a Community act that violates fundamental rights will be annulled.[119] This has also become more visible since the inclusion of Article 46(d) EU. The Article gives the ECJ (and the CFI) the right to, under certain circumstances, annul Community acts that are incompatible with human rights.

When expanding the sources of inspiration the Court did not clearly mention the ECHR, even though the applicant had referred to it when claiming a breach of his fundamental rights.[120] However the Court decided to do so in later cases.

4.5 Reference to the ECHR

Rutili[121] was the first case in which the ECJ made an explicit reference to the ECHR. The case concerned Rutili, an Italian citizen employed in France. He was ordered to move out of his apartment. The reason for this was his participation in certain activities of a trade union which was allegedly threatening public policy.[122] When interpreting the public policy justification the ECJ referred to particular articles in the ECHR.[123]

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[114] Case 4/73 para. 12.

[115] Ibid., para. 13.

[116] Ibid.

[117] Ibid., para 14.

[118] Ibid.

[119] Hartley, 2003, p 138.

[120] Case 4/73 para 12.

[121] Case 36/75 Roland Rutili v Ministre de l'intérieur.

[122] Ibid., paras. 1-6.

[123] Case 36/75 para. 32.

In *Hauer*[124] the ECJ made a more detailed description of specific provision of the ECHR. The court first made reference to its judgments in both *Internationale Handelsgesellschaft* and *Nold,* describing the protection of human rights within the legal order of the Community.[125] Subsequently it used provisions in the ECHR, relating to the right of property[126], to illustrate the common constitutional principles of the Member States that are manifested in the Convention.[127]The Court also made references to the Constitutions of some Member States, (Germany, Italy and Ireland), in order to examine the general interest justification common among the Member States.[128]

The Court has followed its line of reasoning in these cases and has in several cases afterwards explained that the ECHR is of special importance. In the case *P/S Cornwall* the Court made a reference to the case law of the ECtHR for the first time.[129]

4.6 Human Rights Binding the Member States

In *Rutili* the ECJ referred to Directive 64/211[130], which set restriction on how Member States could invoke the grounds for justifications of restrictions to the free movements, as a confirmation of the Community's general rules on human rights. The ECJ found the Directive to reflect the justifications for human rights breaches found in the ECHR.[131] In another case, *Johnston*[132], the ECJ referred to another directive[133] as forming part of the general principles recognised by law enshrined in the Constitutions of the Member States.[134] These cases showed that the ECJ considered the directives concerned to be expressions of the general principles of law, which form part of both the Member States Constitutions, the ECHR as well as Community law, and that the Member States have an obligation to be consistent with those principles. [135] So the ECJ has the right to review national laws so that they reflect the general principles recognized by the Community.[136] This means that the

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[124] Case 44/79 Liselotte Hauer v Land Rheinland-Pfalz.

[125] Ibid., paras. 14-15.

[126] Specially Article 1 of the 1st protocol to the Convention.

[127] Case 44/79 para. 17.

[128] Ibid., para 20.

[129] Case C- 13/94 P v S and Cornwall County Council, para. 16.

[130] Directive no 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

[131] Case 36/75 paras. 26-32.

[132] Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary.

[133]Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion , and working conditions.

[134] Case 222/84 para 18.

[135] Craig & de Búrca, pp. 338-339.

[136] Ibid., p. 341.

Member States are obliged to protect fundamental rights when they apply Community legislation that are made to protect a specific fundamental right.[137]

In the case *Wachauf*[138] the ECJ expressly stated that the Member States are bound by rights recognized by the Community also when implementing Community law (even when the specific Community legislation is not aimed at protecting fundamental rights). The ECJ having judged certain criteria in a German law, which was based of Community legislation, to be incompatible with the protection of fundamental right in the Community subsequently stated; "*Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements."*[139] This case show that the Member States also are obligated to respect fundamental rights when they implement Community law in the role of agents of the Community.[140]

In *Cinéthègue*[141] the ECJ was asked to rule on whether a French law, derogating from the free movement of goods but justified by a mandatory requirement of public interest should also be in line with fundamental rights as enshrined in the ECHR. The ECJ responded by declaring that even though the protection of fundamental rights is of importance for the Community, the Court is not able to examine if measures that fall outside the scope of Community law are in line with the ECHR.[142] In a later case, *Demirel*[143], the ECJ followed the reasoning in *Cinéthègue.* It declared that when the national law falls outside the scope of Community law the ECJ do not have power to examine the national law's compatibility with the ECHR.[144]

The two judgments above seem to show a readiness to examine national law if they were inside the scope of the Community. Although, exactly how to understand the judgments of the ECJ is not clear.[145] In *ERT*[146], which concerned several justifications for the breach of the free movement of services and their compatibility with the freedom of expression protected by the ECHR, [147] the Court seems to offer a clarification. Here the ECJ held that restrictive measures within the scope of Community law had to comply with fundamental

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[137] Young, *The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by the Community Law?,* 2005, p. 221.

[138] Case 5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft.

[139] Ibid., para 19.

[140] Young, p. 221.

[141] Case 60 & 61/84 Cinéthèque SA and others v Fédération nationale des cinémas français.

[142] Ibid., paras. 25-26.

[143] Case 12/86 Meryem Demirel v Stadt Schwäbisch Gmünd .

[144] Ibid.,para 28.

[145] Craig and de Burca, p. 343.

[146] Case C- 260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (usually referred to as ERT).

[147] Article 10 ECHR.

rights for the Member States to be able to rely on them.[148] In *Familiapress*[149] the ECJ ruled on a restriction on the free movement of goods. A German newspaper company had arranged a lottery in their magazine, which was distributed in Austria, an activity in breach of Austrian competition legislation. The ECJ held that the Austrian law restricted the rights to free movement of goods. However the restriction was non- discriminatory and the Austrian authorities claimed it to be justified by mandatory requirements. They claimed that the prohibition helped smaller newspapers and for that reason promoted press diversity.[150] The ECJ acknowledged that the promotion of press diversity was a part of the freedom of expression protected by the ECHR (article 10). The Court then ruled that the non- discriminatory restrictions had to be interpreted in the light of fundamental rights.[151] The case can be seen as an enlargement of situations where fundamental rights are applicable. In *Cinéthègue* it seemed like the ECJ only felt obligated to acknowledge the rights in discriminatory situations whereas the *Familiapress* case seemed to put an obligation on the Member States to take fundamental rights into consideration even in non-discriminatory cases. So when reading the later case it seemed like fundamental rights would be a hindrance to justification of both discriminatory and non discriminatory restriction.[152]

Other later cases from the ECJ have showed situations which the Court believes fall outside the scope of Community law. In *Kremzov*[153], which concerned a possible breach of the right to free movement of persons, the ECJ held the situation to fall outside the scope of EC law. The case concerned a man sentenced for murder in Austria. The ECtHR had judged a violation of Article 6 ECHR (the right to a fair trial), and the man now claimed that his right to free movement had been violated since the sentence in Austria had been illegal.[154] The ECJ held that since the man in fact did not try to exercise his right to free movement the situation could not fall inside Community law. A theoretical movement was not enough.[155]

As seen the margins of the fundamental rights principles' influence on the Member States are not clear. The case law of the ECJ does not given an absolute and settled picture. The picture is maybe even more distorted by the Charter of Fundamental Rights' provisions on its applicability in the Member States. This question will be discussed more in chapter 7.

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[148] Case C- 260/89 paras. 42-45.

[149] Case C- 368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v.Heinrich Bauer Verlag.

[150] Case C- 368/95 paras. 8-13.

[151] Ibid., paras 24-26.

[152] Craig & de Búrca, p. 344-345.

[153] Case C-299/95 Friedrich Kremzow v Republik Österreich.

[154] Ibid., paras. 1-12.

[155] Case C-299/95 para. 16.

4.7 Human Rights v. Fundamental Freedoms

4.7.1 Community, Fundamental and Citizenship Rights

As previously stated (chapters 2.1 and 4.2) the terms fundamental freedoms and human rights are often used interchangeably. But that is not always the case.

It has been suggested that rights within the Community can be divided into Community rights, fundamental rights and citizenship rights.[156] The first category of rights is those that can be find in the treaties or legislation of the Community. Fundamental rights on the other hand are those rights that the ECJ developed through its case law on general principles. The last category, citizenship rights, are those found in articles 17 to 22 EC, including the right to move freely (art. 18) and the right to vote in elections to the European Parliament (art. 19).[157] But the distinction between the categories is not always clear. For example certain Community rights, such as the four free movement rights, have been described by the ECJ as fundamental. [158]

4.7.2 Balance Between the Human Rights and Community Freedoms

In some recent cases the ECJ seem to have tried to balance fundamental freedoms and human rights, which would be an evidence of distinction. The case *Schmidberger*[159] concerned a claim by a transport company that the Austrian government had unlawfully restricted the company's right to free movement of goods. An important highway in Austria had been blocked due to a demonstration by an association to protect the environment in the Alpine. The association had made a prior notice to the authorities, which had allowed for the demonstration to take place. The company Schmidberger who was affected by the highway being blocked claimed that the authorities had committed a breach of EC law, in particular the right to free movement of goods (articles 28-30 EC).[160] An Austrian court referred the question(s) to the ECJ for a preliminary ruling.[161]

The ECJ first cited previous case law stating that the Member State does not only have to refrain from creating obstacles to the free movement itself but also prevent obstacles that are caused by other parties. The obstacles created by an individual, in this case the demonstrating association, might as easily affect intra- Community trade. [162] The Court found that owing to the fact that the Austrian authorities did not ban the demonstration a "*measure of*

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[156] Hilson, *What's a right? The relationship between Community, fundamental and citizenship rights in EU law,* 2004.

[157] Ibid., pp. 637-639.

[158] Hilson, p. 641.

[159] Case C- 112/00 Eugen Schmidberger, Internationale Transporte und Planzüge and Republik Österreich.

[160] Ibid., paras. 10-16.

[161] Case C-112/00, para. 25.

[162] Ibid., paras. 51-63. The Court in particular refers to Case 8/74 Procureur du Roi v Benoît and Gustave Dassonville and Case C-265/95 Commission of the European Communities v Frech Republic.

equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations (...) unless that failure to ban can be objectively justified" arose.[163]

In the Court's further reasoning on justification grounds it examined the considerations of the Austrian authorities when deciding not to ban the demonstration. The main reasoning was to protect the fundamental rights to freedom of expression and freedom of association. The question was whether those rights also falls within the scope of the fundamental freedoms, in this case the free movement of goods, or if the latter prevails. The Court acknowledged the recognition in both the Austrian Constitution and the ECHR of the freedom of expression and association.[164] It once again referred to its fundamental rights doctrine where it has established that fundamental rights are a part of Community law and have to be respected.[165] And "*since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."* [166]

The Court then evaluated the scope of the conflicting rights and recognized the fact that neither right are absolute. The fundamental freedoms, such as the free movement of goods, have both treaty-based restrictions and restrictions for overriding requirements in connection with public interest. The freedom of expression and association both have restrictions, which can be seen in articles 10 and 11 ECHR. By reason of the conditionality of the conflicting rights the different interests at hand had to be balanced. [167] The ECJ acknowledged the fact that the demonstration had been legally authorised, that it had been of limited time and scale and that the event was previously made public. Therefore the Court decided that the authorities were right when deciding that a ban would be a too hard interference on the right of expression and association and that no less restrictive measure on intra- community trade was available. [168]

In another case, *Omega*[169] the ECJ received a question for preliminary ruling whether or not the fundamental human rights protected by the Community could restrict the fundamental freedoms, in the case the freedom to provide services and goods. The company Omega which had started a 'laserdome' received a prohibition order by reason of public policy. The German authorities found that the game's objectives was 'playing at killing people', an offence to the constitutional principle of human dignity.[170] The question put before the

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[163] Case C-112/00, para.64.

[164] Ibid., paras. 65-70.

[165] Case C- 112/00, paras. 71-73

[166] Case C-112/00 para. 74.

[167] Case C-112/00 paras. 78-81.

[168] Ibid., paras. 83-93.

[169] Case C- 36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn.

[170] Ibid., para 3-16.

ECJ was if the principle could be used to restrict the company's and its supplier's free movement rights. [171]

The ECJ first held that the prohibition order did in fact restrict the free movement. It also held that a restriction such as that of public policy must be interpreted strictly so that only true and serious threat to the public will be resorted to. Although, since the reasons for public policy varies in the different Member States the authorities enjoy a vide margin of discretion.[172] The German authorities and courts all agreed that the game in question could be seen as a threat to human dignity, a fundamental right protected by the German Constitution. The ECJ once again recognized the Community's commitment to uphold the fundamental rights enshrined in its general principles and inspired by the Member States constitutions. The respect for human dignity is a part of those general principles. [173] The Court found that the fundamental rights in fact could be a justification to restrict Community rights such as the free movements. But in order to rely on a public policy ground the restriction in question must be necessary for the policy protected and only used unless less restrictive measures were unavailable. The Court also explained that a fundamental right, such as human dignity, did not have to uphold the same level of protection in each Member State to be relied on. [174] The Court came to the conclusion that the German justification did not go beyond what was necessary and was a justified restriction to the freedom to provide services and goods. The ECJ held that "*Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.*" [175]

The *Schmidberger* and *Omega* cases are both cases where the fundamental human rights and the fundamental freedoms of Community law have come to clash. Neither case expressly state that fundamental human rights should prevail over fundamental freedoms but the *Omega* case have been argued to establish a hierarchy of rights which give preference to the fundamental (human) rights. According to an interview at the ECJ the Court have discussed an alteration of its case law after its judgment in *Omega.* The alteration would mean that measures in the Member States that restricts fundamental freedoms for the purpose of protecting human rights would be consistent with EC law.[176] Some say that these cases merely establishes fundamental rights as a 'mandatory requirement'. Others view it as a new and third justification category equivalent to mandatory requirements and treaty-based justifications.[177] Brown points on the fact that the ECJ in *Scmidberger* does not refer to justified derogations either in the Treaty or the mandatory requirements. In his opinion the Court might have produced a new 'floating' justification. "*The obligation to ensure the protection of fun-*

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[171] Case C-36/02, para. 17.

[172] Ibid.,para 28-30.

[173] Case C- 36/02 para 32-34.

[174] Ibid., para 36-38.

[175] Case C-36/02, para. 35-41

[176] Scheeck L., *Solving Europé's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance*, 2005, p. 18-19.

[177] Morjin J., *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, 2006, p. 38.

damental rights is all-encompassing. It applies whenever Community law is applied or invoked. It cuts (horizontally) across the whole of Community law: even Treaty articles must be applied and interpreted in a fundamental rights-compliant manner".[178]

Brown also believes that the judgment and the Courts approach towards the Member States are influenced by the fear that the Member States objections to the principle of supremacy will surface once more.[179] He also raises objections to classifying the fundamental rights in the case as a restriction in the first place. That would mean that the protection of such a right would in fact be improper, but justified in the specific circumstance. In his opinion the Court seems unwilling to once and for all decide on the boundaries of the Community's protection and instead continues to decide one case at a time. [180]

4.7.3 The Charter of Fundamental Rights

One thing that complicates the distinction, between human rights and fundamental freedoms, is the Charter of Fundamental Rights of the European Union. The Charter will be discussed further below (chapter 7) but one interesting matter in this discussion is the fact that the Charter seems to include more than only fundamental rights. It does not only codify previous fundamental rights developed by the ECJ moreover it includes several citizenship rights.[181] Another thing is said to separate the fundamental rights in the Charter in distinction to the classical definition of human rights found for example in the ECHR. The ECHR applies to all persons, unlike the Charter which can be seen as only protecting EU citizens. The fundamental rights in the Charter seem to lack the universality criteria often ascribed to human rights. [182]

4.8 Concluding Remarks

The development of the human rights doctrine of the ECJ progressed from a reluctant acknowledgement of such rights to one who has come to reflect much of the objectives of the Member States. But it has been argued that the development relied less on the notion to protect fundamental rights than it did on the threat to the principle of supremacy coming from the constitutional courts.[183] Some have also criticised the development for being more of an expansion of the common market goals that a true concern of human rights.[184]

The Court does not explicitly bind itself to hold the constitutions of the Member States as legal sources. Instead they used the constitutions and international treaties, including the

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[178] Brown, *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzuge v. Austria. Judgment of 12 June 2003, Full Court,* 2003, p. 1504.

[179] Ibid., p. 1506.

[180] Ibid., pp. 1508 and 1510.

[181] Hilson, p. 638.

[182] Scheek, p. 15. The Charter do not explicitly explains to whom the rights/principles are directed. In the Preamble it refers to the 'peoples of europe' and in some of its articles it refers to 'those protected by the law of the union' The chapter on citizen rights refers to 'the citizen of the union' while some of the other articles of the Charter are directed to 'everyone'.

[183] Craig & de Búrca, p. 320.

[184] Ibid., pp. 363-364 where the authors refer to some of those arguments.

ECHR, to exemplify the Community general principles.[185] To do otherwise would jeopardize the principle of supremacy. The principle of supremacy's link with the human rights doctrine has much to do with the response the principle received in the Member States. As described before (chapter 2.4) the human rights doctrine has on many occasions been used by the Court to legitimise the principle of supremacy among the Member States. The ECJ had to take steps to approach the Member States and to strengthen the principle's acceptance. The Court did so by recognizing fundamental rights as a part of the Community's general principles in *Internationale Handelsgesellschaft.*

The recognition of the Member States constitutions, in *Internationale Handelsgesellschaft*, left some question unanswered. Would a right have to be common in the constitutions of all Member States? If not in all, how common did it have to be to be part of the general principles? The question has not received a complete answer yet. Some argue that the Court use a 'universal maximum standard', while other claim that a 'common denominator standard' is used. The prior method would mean that the ECJ acknowledge any fundamental freedom protected by a Member State to be part of the general principles. The latter method would only take rights common to the Member States into account.[186] Craig and de Búrca do not believe that the 'universal maximum standard' is the one favoured by the Court. Such a method, which would take into account numerous principles of the constitutional laws of the Member States, would clearly threaten the supremacy of Community law.[187] Hartley believes that even if a right is protected under the constitutions of almost all the Member States, it does not definitely make it a part of the general principles.[188]

The Court's case law has determined that the Member States have to respect fundamental rights as a part of Community law and to do so when implementing that law.[189] The scope of the fundamental rights also extends to the Community institutions drafting and applying legislation. The respect for human rights also applies in situations when the institutions of the Community act as employers.[190]

If the Court thought that its judgment in *Internationale Handelsgesellschaft* would calm the disapproval in the Member States, the response from both the German and Italian Constitutional Courts showed another picture.

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[185] For example the ECJ also made reference to the European Social Charter in Case 149/77 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena para. 28.

[186] Craig & de Búrca pp. 327-328 and Steiner, Woods & Twigg-Flesner, pp. 156.

[187] Craig & de Búrca p. 328.

[188] Hartley, 2003, p. 138-138.

[189] See for example Case 5/88 and Case C-260/89.

[190] Betten & Grief, pp. 62-63. See Joined Cases C-193 and 194/87 Henri Maurissen and European Public Service Union v Court of Auditors of the European Communities, paras. 13-14 and Case C-404/92 X v Commission of the European Communities paras. 17-18.

5 Responses in the Courts of the Member States

5.1 Germany

When the judgment by the ECJ in *Internationale Handelsgesellschaft* was forwarded to the German national court it chose to refer it to the Constitutional Court (the Bundesverfassungsgericht). The Bundesverfassungsgericht was asked whether or not the Community legislation in question was contrary to the German Constitution[191]. The court examined the provisions in the German constitution allowing for a transfer of power to international organisations. It found that an international law that violates the aim and structure of the constitution is null. Since the respect for fundamental rights is a vital part of the constitution it cannot be overruled by legislation that fail take those rights into account.[192] It then made a hypothetical statement what would happen if the Community failed to provide a sufficiently high standard of protection. The court found no such failure in the present case.[193] Nevertheless it declared itself competent to rule on the Community's level of protecting in the future. The Constitutional Court declared that the EC required a catalogue of fundamental rights and that it lacked a directly elected parliament. So long as (the judgment is usually referred to as Solange I) those requirements were not upheld the Bundesverfassungsgericht had the right to test EC law against the fundamental rights standards of its own constitution. [194]

The case made the ECJ expand its position and it did so in *Nold* (see above chapter 4.4). Following in time the Parliament, the Council and the Commission made a declaration on the institutions respect for fundamental rights.[195] The ECJ's expansion of its doctrine to also include the ECHR in the list of inspirational sources may have been an additional reason why the Bundesverfassungsgericht came to change its position in a judgment in 1986.[196] The Court then explained in the so called Solange II verdict that the EC had reached a level of protection of fundamental rights that was sufficient. Hence the Bundesverfassungsgericht was no longer compelled to control and review EC law.[197] The case would seem to put an end to the conflict between the ECJ and the German Constitutional court and so also the threat to the supremacy of EC law. However the German Court did not change its position. It still viewed the German Constitution as prevailing over Com-

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[191] Hartley, 2004, p. 308

[192] Case 2 BvL 52/71 Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 37 BverfGe 271 paras. 22-23. For an English translation of (almost the entire) case see Oppenheimer A.*, The Relationship between European Community Law and National Law: The Cases,* vol 1, 2003, pp. 419- 460.

[193] Ibid., para 28.

[194] Case 2 BvL 52/71 Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel , 37 BverfGe 271 para. 35.

[195] Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights, of 5 April 1977.

[196] Re the Application of Wünsche Handelsgesellschaft, BVerfGE 73, 339 (1986). For an English version of the case see Oppenheimer A., *The Relationship between European Community Law and National Law: The Cases, vol 1,* 2003, pp. 461- 496.

[197] Betten & Grief, p. 66.

munity law. But it left for the ECJ to make sure that Community law is compatible with fundamental rights.[198] Moreover the German court still viewed itself capable of taking back those powers. The Court expressed this in the case *Brunner*[199] and in the *Bananas* case[200].

In the *Brunner* case the German Court expressed their view on Community supremacy by declaring that application of Community secondary legislation in Germany was dependent on the cooperation between the ECJ and the Bundesverfassungsgericht. This meant that the German court still found itself competent to rule on the validity of EC law.[201] This case both show the reluctance to fully accept the supremacy principle and an opposition to the Community itself ruling on its competences.[202]

In the *Bananas* case the German Constitutional Court responded to a previous case from the ECJ. The background to the case was a Regulation concerning the banana market in the Union.[203] The regulation provided certain benefits for farmers, in African Caribbean and Pacific States, in close connection with importers in France, Portugal and Spain. On the other hand the Regulation made imports from other countries unfavourable. Germany was one country in which many importers were unfavourably affected due to the fact that many German importers had gained tariff-free imports from Central American countries.[204] The German importers and their government both filed complaints against the Regulation in the ECJ. The Court declared the complaint by the importers inadmissible. In the case of the German government's complaint the Court found the Regulation justified on reasons of general interest. The Court could not find any evidence of disproportionate measures. [205]

Following the ECJ's judgment some German importers took the case to different German courts. A lower administrative court dismissed the claim but the Constitutional Court demanded that the first court would re- examine its ruling. After having considered the case once more the administrative court found in favour of the applicant. Although the applicant, who was not completely satisfied with the somewhat limited approval, continued by taking the case to the Constitutional Court. The Court declined the case for reasons of procedure but additionally expressed the rights for the national courts to suspend the EC Regulation under certain circumstances. Additionally the Bundesfinanzhof, the highest German financial court, declared that the Regulation might be inapplicable due to the fact that the Community had exceeded their competence. [206]

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198 Hartley, 2004, p. 312.

199 2 BvR 2134/92 and 2153/92 Manfred Brunner and others v the European Union Treaty.

200 2 BvL 1/97 Banana Market Organization Constitutionality Case. See Oppenheimer A., *The Relationship between European Community Law and National Law: The Cases, vol 2*, 2003, pp. 270- 285.

201Reich, *Judge-made'Europa à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation,* 1996, p. 105.

202 Betten & Grief, pp. 67-68.

203 Regulation 404/93 on the common organization of the market in bananas.

204 Reich, p. 106.

205 Case C-280/93 Federal Republic of Germany v Council of the European Communities

206 Betten & Grief, p. 67.

The judgments by the German Court(s) were not the only national court hesitant to the supremacy principle and its effect on the constitutions of the Member States. The following section illustrates the resistant approach taken by the Italian Constitutional Court.

5.2 Italy

As previously mentioned, in regard to the *Costa* v *ENEL* case, the Italian Constitutional Court early on rejected the principle of supremacy. Precisely as in Germany the rejection was tied to the high regard of the fundamental rights protection in the country's constitution. In another case the Court declared that EC law may conflict with ordinary sections of the constitutional law, but it was not to be contradictory with the fundamental rights protection enshrined in the Constitution.[207] After this first reluctant approach the Court somewhat changed its position. It declared that those Community rules that did not become supreme due to *lex posterior derogat priori*, i.e. was later in time, was to be judged in comparison with the Italian Constitution. If previous Community act was found constitutional it would prevail over later national law, and only then.[208] The ECJ rejected these sorts of arguments in the *Simmenthal* case, declaring national courts obliged to judge national laws which are contrary to Community law inapplicable, even if later in time.[209] However the Italian Court did not entirely abandon its position, something that can best be illustrated by the case *Fragd*.[210] Here the Court further declared that it was competent to rule on individual EC rules and their consistency with the fundamental rights protection in the Constitution.[211]

5.3 Concluding Remarks

The rejection of Community law being absolutely supreme to national law did not only exist in German and Italian courts. Also other countries were reluctant to enact Community rules that differed from national rules in the constitutions, but the Italian and German conflicts with the ECJ was more evident. However, some judgments in France and Denmark in the 1990s were also strongly opposed to the supreme role of the ECJ.[212] A recent judgment by the Polish Constitutional Court shows a similar opinion. The Court then explained that the Member States have a right to judge if the Community legislation adheres to principles such as proportionality and subsidiarity.[213]

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[207] Case 183/73 Frontini v Ministerio delle Finanze, Italian Constitutional Court para. 22. See Oppenheimer A., *The Relationship between European Community Law and National Law: The Cases, vol 1,* 2003, pp. 629-642.

[208] Cartabia, *The Italian Constitutional Court and the Relationship between the Italian legal system and the European Union* p. 136.

[209] See above n. 44.

[210] Case 232/ 89 Fragd v Amministrazione delle Finanze dello Stato. See Oppenheimer A., *The Relationship between European Community Law and National Law: The Cases, vol1,* 2003, pp. 653- 662.

[211] Steiner, Woods & Twigg-Flesner, p. 158 and de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order* p. 202.

[212]Alter, pp. 23 and 31 referring to the Brunner case (see above note. 199)

[213] Kwiecien, *The Primacy of European Union Law Over National Law Under the Constitutional Treaty,* 2005, who refers to case K 18/04 The Accession Treaty case. The case is summarized in English on page http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm 2006-05-18

The decision of the national courts declaring themselves competent to interpret the equality of Community legislation might be a threat to the principle of supremacy. Although the German Court has never ruled a Community act to violate its Constitutions.[214] The national courts' reasoning is based on the idea that the Community only has received its powers from the Constitutions of the Member States. The ECJ's claim of the Community being *a new legal order* was not shared by the Constitutional Courts of Germany and Italy.[215]

However to limit the principle of supremacy in the way that the national courts have done is a threat to the principle, which is one of the foundations of the Community. Different applications of EC legislation in the Member States is another unfavourable consequence.[216]

The approach by the Constitutional Courts of Germany and Italy are to a large extent brought on by those countries respect and protection of fundamental rights. Even though the threat from those countries has never been direct it has never the less come to affect the behaviour of the ECJ. The decision of the ECJ to acknowledge fundamental rights within the sphere of EC law was obviously done to make the Member States accept the principle of supremacy. The drafting of the Charter, which will be described in chapter seven, may also have been a response to the request by the German Constitutional Court to produce a catalogue which would have equivalent fundamental rights protection to that of the German Constitution. Even though the ECJ never expressly has amended its principle of supremacy it has come to change other parts of Community law due to the response in the Member States.

As previously mentioned the relationship between the European Union/Community and the ECHR has been a greatly disputed area in European law. The Union itself is not a Member to the European Convention but all its Member States are. In most of the Members States the Convention now even forms a part of the Constitutions. This means that the ECHR can be exercised in a national court case. Even if the Convention is not incorporated it is still binding on the Member States. If an individual feel that his/her rights have been violated, and have used all national legal measure, he/ she can file a complaint at the ECtHR.[217]

In an earlier chapter (4.5) it was described that the ECJ has chosen to use the ECHR as one of the sources of inspiration to its doctrine on human rights. The Court has even referred to specific cases from the ECtHR when determining the scope of certain rights. The ECJ apparently holds the ECHR in high regard.

But what happens if a Member State of the EU, who at the same time is a signatory to the ECHR, implements a Community act that violates the ECHR? The Member State has to adhere to the Community Act and is at the same time bound to follow its duties according to the ECHR. This problem and its implications on the principle of supremacy will be discussed in the next chapter.

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[214] Hartley, 2004 p. 311.

[215] Alter, p. 59.

[216] Steiner, Woods & Twigg- Flesner, p. 159.

[217] Ibid., p.160.

6 ECHR and the European Union

6.1 Conflicting Treaties

As before mentioned (chapter 1.1) the possible accession by the European Community, to the ECHR, has been deliberated on many occasions and by many different groups. The question of a conflict between ECHR and the Community treaties was and is a hot subject. In international law the problem is usually solved by relying on the Vienna Convention on the Law of Treaties. But all the original treaties of the Community were concluded before the Vienna Convention and therefore the Convention does not apply. However some regard the Vienna Convention to form part of customary international law and for that reason be relevant.[218]

The Vienna Convention declares in its article 30 that if one of two conflicting treaties says that the other prevails that should be followed. Otherwise the latter prevails if all the parties in the treaties are identical. If not, the second treaty nonetheless prevails if all parties in the first treaty also are bound by the second one. When merely a number of the parties to the former treaty are parties to the second, the latter only prevails between States bound by both.[219]

The EC Treaty contains two articles which cover the conflict between treaties, articles 305 and 307. However the former only refer to the conflict between the EC Treaty and the ECSC and Euratom treaties. Article 307 on the other hand concerns treaties concluded before 1958 or before accession to the EU.

Even though a subsequent treaty would prevail over the EC Treaty according to international law and Article 30 of the Vienna Convention a breach of EC law would probably be the consequence. It follows from the first paragraph of article 307 EC that the Community will not prevent its Member States from performing its duties in accordance with a previous treaty.[220] This does not mean that the Community is responsible for any breaches of the other treaty. According to Hartley, Article 307 EC only means that treaties that are adopted before the EC Treaty entered into force should be respected by the Member States.[221]

In a number of cases the ECJ has considered the question of conflicting treaties in which the EC itself do not take over any of the Member States duties. *Commission v Italy* [222]concerned the GATT (The General Agreement on Tariffs and Trade) treaty and the fact that Italy in accordance with it placed custom duties on specific goods. Since the GATT agreement was concluded before the EC Treaty Italy argued that according to article 307 EC (then 234) the prior agreement would prevail even in situations between the EC Member States. ECJ instead followed the argument of the Commission; that Italy, in accordance with principles of international law, by signing the EC Treaty had given up its rights and

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[218] Hartley, 2004, p. 332.

[219] Vienna Convention on the law of treaties, 1969, article 30.

[220] Hartley, 2004, p. 335.

[221] Ibid., p. 336-336.

[222] Case 10/61 Commission of the European Economic Community v Italian Republic.

duties under the former agreement.[223] The judgment meant that in situations between EC Member States the EC treaty applied, whereas the GATT nevertheless was valid in situations involving trade with non-member states.[224] Therefore the non- member states are not affected if their contracting party subsequently makes another agreement.[225]

In the *Levy*[226] case the question involved the collision between an ILO (International Labour Organization) agreement,[227] prohibiting night work of women in certain industries, and a Community equal treatment directive[228]. The ECJ had in a previous case, *Stoeckel,* interpreted the directive as giving women equal right to work at night.[229] Mr Levy, who had employed women to do night work, was accused of violating French law based on the ILO Convention. In his justification Mr Levy relied on the EC Directive. The French court referring the case to the ECJ asked whether or not it made any difference that the French law, evidently in breach of Community law, was based on the ILO Convention.[230]

After having referred to its previous judgment in *Commission v Italy* and *Stoeckel* the ECJ examined the second paragraph of Article 307 EC.[231] The paragraph states that even if the EC Treaty do not affect previous agreements binding the Member States (first paragraph of the same article), the Member States "*shall take all appropriate steps to eliminate the incompatibilities established"* between the Treaty and the other agreement. The Commission argued that the obligation to take ' appropriate steps' put a duty on France to change its law so that also women had the right to work on the same conditions as men. They also pointed on the fact that the ILO had since the conclusion of the convention in question, concluded several other agreements which were opposing the earlier one. According to 59 (1) (b) of the Vienna Convention this would make the first convention non- binding. [232]

ECJ rejected the arguments of the Commission. The Court did not find itself competent to rule on duties that an earlier agreement puts on a Member State or to determine their field of application. The result was that ECJ found no obligation on France to change its national legislation.[233]

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[223] Case 10/61.

[224] Hartley, 2004, p. 337.

[225] Hartley, 2003, p.182.

[226] Case C- 158/91 Criminal proceedings against Jean-Claude Levy.

[227] ILO Convention No 89 on night work for women in industry.

[228]Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[229] Case C- 345/89 Criminal proceedings against Alfred Stoeckel.

[230] Case C- 158/91 paras. 2-3 and 5-6.

[231] Ibid., para 11.

[232] Case C- 158/91 paras 14, 18 and 20.

[233] Ibid., para. 21.

The obligation to uphold the rights and duties of the former agreement do not concern situations between two Member States. The ECJ held in *Deserbais*[234] that Member States are not able to fall back on Article 307 in a situation merely among Member States.[235]

In two cases from 2000 the ECJ was asked to rule in a situation of treaties conflicting with the EC Treaty.[236] The cases concerned Portugal and a shipping agreement it had concluded before accession to the EC Treaty. The Commission had brought an action against Portugal claiming that the country had violated EC law by not denouncing the prior agreement as requested by a Community Regulation[237] to ensure the freedom to provide sea transport.[238] Portugal used article 307 EC to justify the alleged breach. The Commission argued that the rule in the first paragraph of article 307 EC should be restrictively interpreted since it could be seen as an exception to the principle of supremacy.[239] The Commission thought that the third paragraph of the article could be seen as a confirmation of that. The paragraph states that the Member States "*shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States*" when they applying the prior agreements. The Commission claimed that Member States had the duty to ensure the supremacy of Community law and when doing so they might have to dissolve the prior agreement. [240]

The Advocate General (A.G.) denied the Commission's interpretation in his opinion. He believed that the first paragraph only express the international principle of *pacta sunt servanda*. The A.G. declared that the principle of supremacy is a Community principle and that it cannot be seen to affect the treatment of principles of international law. [241] As explained by Hillion the two principles live in symbiosis and the principle of supremacy cannot 'qualify the other' principle.[242] The Advocate General declared that the Member State keep on having rights and duties of the prior agreement even if not congruent with Community law.[243] But the A.G. also affirmed that denunciation could be one way to ensure that the agreement was compatible with Community law.[244] The ECJ believed that a denunciation

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234 Case C- 286/86 Ministère public v Gèrard Deserbais.

235 Ibid., para. 18.

236 Case C- 62/98 Commission v. Portugal and C- 84/98 Commission v. Portugal.

237 Regulation Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378 p. 1.

238 Case C- 62/98, para. 1 and Case C- 84/98, para. 1.

239 Manzini, *The Priority of Pre-Existing Treaties of EC Member States within th Framework of international Law*, p. 789.

240 Joined Opinion of Advocate General Mischo Cases C- 62/98 and C- 84/98 paras. 28-38.

241 Ibid., para 56.57.

242 Hillion, Case C-62/98 *Commission of the European Communities v. Portugal, and Case C-84/98 Commission of the European Communities v. Portugal, judgments of the Full Court of 4 July 2000*, p. 1272.

243 Ibid.

244 Joined Opinion of Advocate General Mischo Cases C- 62/98 and C- 84/98 paras. 60-61.

of the prior agreement 'cannot be excluded' if any other adjustments are out of the question.[245] The ECJ, unlike the A.G., interpret the article as putting an obligation on the Member State to reach the result demanded by the article. [246] Hillion points on the cautious wording of the 'cannot be excluded' approach and believe that "*the Court is keen to prevent the threat of heterogeneity generated by the widening and deepening of the integration process. In other words, the Court aims at maintaining a high level of uniformity of Community law.*"[247]

6.2 Opinion 2/94

The question whether or not the EC should accede to the ECHR was put on the agenda already in 1979 when the Commission made an assenting proposal.[248] The Commission did not believe that the human rights protection within the EC was insufficient. However, there was a problem of legal certainty when the individual could not be sure of which rights were protected in the Community. The Commission proposed a written catalogue of rights. That would be best solved with an accession to the ECHR.[249]It made another attempt in 1990, when it published a new report. The Commission expressed the fear of legal uncertainty, in view of the fact that the Community itself was not subject to any human rights assessment while the Member States was examined by the ECtHR. Even though the ECJ acknowledged and even used the ECHR as a source of inspiration the protection of rights enshrined in the Convention might be violated. The risk of different interpretations in the ECJ and the ECtHR was another problem the Commission found disturbing.[250]

As a response to the Commission's report the European Council requested an opinion from the ECJ. The Court was asked whether or not it was possible for the Community to accede to the ECHR under the existing Treaty. The Council's own opinion as well as the opinions of the Commission, the Parliament and the Member States was also put forward. All of them agreed on the fact that only the Community had an opportunity to accede. An accession by the EU was impossible since the Union, unlike the Community, did not posses legal personality. In addition eight of the Member States[251]together with the Community institutions agreed that article 308 (then 235) EC made it possible for the Community to accede. Five other Member States[252] held the opposite opinion, article 308 EC could not be relied on.[253] Hence an accession was impossible.[254]

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245 Case C- 62/98, para 49. and Case C- 84/98, para.58.

246 Hillion, p. 1280.

247 Hillion, p. 1283.

248 EC Bulletin Supplement 2/79- Accession of the Communities to the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms.

249 Betten & Grief, pp. 68-69.

250 Hartley, 2003, p. 143.

251 Austria, Belgium, Denmark, Finland, Germany, Greece, Italy and Sweden.

252 France, Spain, Portugal, Ireland and the United Kingdom.

253Betten & Grief do not refer to the opinions of the two other Member States of the Union- Luxembourg and the Netherlands. The authors refer to the 'Raport for the Hearing' before the court. Since I have not been able to find that document it is impossible to know if the source I have used missed or disregarded the countries view, or if those countries abstained from giving a view on article 308 EC.

Article 308 EC states that "*if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."* The Members States who were opposed to the Article being used, denied that human rights could be seen as one of the EC objectives. The opposite side held human rights protection to be of necessity to the Community and that it was of importance for the individuals in the Community to have an outside judicial control. In line with its previous reasoning, seen in the above mentioned cases from the Italian Supreme Court (chapter 5.2), Italy believed that the transfer of powers from the Member States to the ECJ only could be followed by a sufficient protection of human rights. [255]

The ECJ stated in its opinion that it was incapable of giving an opinion on the compatibility with the Treaty. This since it had not received enough information on how a possible accession would deal with the legal control from the Convention institutions.[256]The Court viewed an accession impossible under the existing treaty since article 308 EC could not be interpreted to give such a wide scope.[257] The ECJ held it to be '*a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international instrument system as well as integration of all the provisions of the Convention into the Community legal order (…) Such a modification… would be of constitutional significance and (…) could be brought about only by way of Treaty amendment.'*[258]

The Opinion yet confirmed the principal importance of the Community human rights protection. Respect for human rights continues to be a prerequisite for the legitimacy of any Community act.[259]

Craig & de Búrca do not believe that the Opinion excluded the possibility that article 308 EC could be used to adopt other human rights legislations within the Community. The difficulty in this situation was that an accession to the ECHR would to a large extent change the structure, organisation and institutions of the Community and for that reason it demanded a transformation of the Treaty. [260] The Article was actually used as a base for the development of a later Council Regulation in the area of fundamental rights.[261]

The ECJ failed to acknowledge or decide on the possible effect on the principle of supremacy if an accession took place. The Court then would be under the scrutiny of another

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[254] Betten & Grief, pp. 111-112.

[255] Borrows, *Question of Community Accession to the European Convention Determined,* 1997, p. 60.

[256] Betten & Grief pp. 112-113.

[257] Hellner, p 35.

[258] Opinion 2/94 Accession of the Community to the European Convention for the Protection of Human rights and Fundamental Freedoms, paras 34-35. Text taken from Polakiewicz, *The Relationship between the European Convention on Human Rights and the EU Charter of Fundamental Rights- Some proposals for a coherent system of human rights protection in Europe,* 2001,p. 82.

[259] Betten & Grief, p. 113.

[260] Craig & de Búrca, p. 353.

[261] Ibid., p. 354. The regulation referred to are Council Regulation 976/1999.

organisation. Some believe the danger to be exaggerated and point on the fact that the ECJ on several occasion have referred to the case law of the ECtHR. The fact that the latter court could not change EC law even if the Community was legally bound to the ECHR is said to point in the same direction.[262]

Eeckhout believes that the ECJ's reluctance to give effect to international agreements such as the ECHR, and also WTO law, is due to the fact that that would make it to some extent bound to comply with other judiciaries and their case law.[263] He also criticises the Court's reasoning in the Opinion. He believes that when they in one sentence rejects a general power of the Community to bring about human rights regulations or conventions and, in another confirm that the respect for human rights is a requisite for Community legislations legality are inaccurate in their reasoning. Since the Court itself refers to the ECHR in its case law it appear as if they see themselves somewhat bound to the human rights norms and principles enshrined therein.[264]

Even after the Opinion the question on whether or not the EC was bound or could be bound by the ECHR arose. The institutions of the ECHR were on several occasions required to judge on the relationship between the Union/Community and the ECHR.

6.3 The Position Taken by the ECtHR

The question if the ECtHR is willing to hold the Member States responsible for acts committed when implementing EC law has occurred in a number of cases before the Court. In 1978 the Human Rights Commission (the former "court of first instance" to the ECtHR, hereafter referred to as ECommHR) made a judgment in the case *CFDT*[265] that seemed to reject any such responsibility. The case concerned a French labour union, CFDT, who over and over again was left outside the nomination process to the advising committee in the European Commission. The union, which was the second largest in France, felt that the French government had violated the rights of the organisation and made an application to the ECtHR. The organisation based its application on the fact that several other, smaller groups were nominated. The reason, according to the union was the political opinions of the union members- they were communists.[266]

The labour union had addressed the suit against three entities: the European Community, the Member States collectively and the Member States individually. In the case of the Community itself the ECommHR declared that the fact that the EC where not a Party to the Convention made the question outside the jurisdiction of the Commission. The ECommHR went on to the question of the Member States collectively. The ECommHR, who found it hard to understand what the applicant meant by 'collectively', interpreted it as being directed against the European Commission. Also in this situation it was outside the jurisdiction of the ECommHR. It then argued that neither Member State could be seen as

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[262] Betten & Grief, pp. 114-115.

[263] Eeckhout, *External Relations of the European Union- Legal and Constitutional Foundations*, p. 344.

[264]Ibid., pp. 85-86.

[265] ECommHR Application No. 8030/77 Confédération française démocratique de travail v. European Communities; Alternatively, their Member States, Jointly and Severally.

[266] Hartley, 2004, p. 340.

having exercised their jurisdiction, a condition for the appliance of the Convention.[267] Hence the actions of the Community could not fall within the Convention.[268]

In another case, *Dufay,*[269] the ECommHR followed its reasoning in the *CFDT* case and explained that the case was outside the jurisdiction of the Commission.[270] Although these judgments did not give the problem its final solution, since ECommHR seemed to have had another opinion in two other judgments. In *Tête*[271] the Commission was faced with a question relating to the French law on European Parliament elections. The same question came up in the *Fournier* [272] case. In both cases the Commission ruled the cases to be inadmissible.[273] However the Commission declared that, "*if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty.*"[274] The ECommHR also referred to the rights under the ECHR as being part of "the public order of Europe". Harmsen believes that the Commission even view the rights enshrined in the ECHR as being "peremptory" to Community law.[275]

The mentioned cases do not make the status of the Union Member States within the Convention system very clear. *Tête* and *Fournier* showed a possibility for EC Member States to be held responsible for enforcing Community legislation in breach of the ECHR. Yet according to *Dufay* and *CFDT* that would be impossible.

In 1990 the Commission was once again asked to judge on the compatibility of national acts implementing Community legislation with the ECHR. The case *M & Co. v Germany*[276] concerned the German Governments execution of an ECJ competition decision. The company who's appeal, of a European Commission decision, had been denied where claiming that the case before the ECJ was not in accordance with article 6 ECHR (the right to fair trial).[277] The ECommHR cited all of the previous judgments mentioned above, and added a form of equivalent test (similar to the Solange doctrine of the German Constitutional Court).[278] The Commission again referred to the 'peremptory character' of the Convention rights and the necessity for those rights to be applied effectively. The transfer of

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267 Article 1 of the ECHR.

268 Hartley, 2004, p. 340-341 and Harmsen, *National Responsibility for European Community Acts Under the European Convention on Human Rights: Recasting the Accession Debate,* 2001, p. 629.

269ECommHR Application No. 13539/88 Christiane Dufay v. European Communities; Secondarily, the Collectivity of their Member States and their Member States Taken Individually.

270 Harmsen, p. 630.

271 ECommHR Application No. 11123/84 Etienne Tête v. France.

272 ECommHR Application No. 11406/85 Marcel Fournier v. France.

273 Harmsen, p. 630.

274 ECommHR Application No. 11123/84.

275 Harmsen, p. 630.

276 ECommHR Application No. 13258/87 M. & Co. V. Federal Republic of Germany.

277 Harmsen, p. 631.

278 Ibid.

powers to another organisation is acceptable as long as the other organisation has an equivalent protection of human rights. The Commission then, among other things, mentions the doctrine of the ECJ as support of satisfactory protection within the Community. The ECommHR therefore rejected the application.[279]

The case showed that the Member States were free from responsibility if the organisation, to which they had transferred some of their powers, had equal protection o human rights as that of the ECHR. This could be interpreted to mean that even if a specific case was in fact in breach of the Convention the Member States would go free since the overall protection was good enough.[280]

The ECtHR initially made similar restrictive judgments concerning the responsibility of the Member States for implementing Community acts.[281] However in *Cantoni*[282] the Court seemed to have changed direction. The case which concerned a possible breach of article 7 ECHR (no punishment without law), was judged to the disadvantage of the applicant. However the court found that even if the French law was based on, and almost identical to, an EC Directive it did not fall outside the scope of article 7.[283]

Following the *Cantoni* judgment the ECtHR made another interesting judgment in the *Matthews*[284] case. Matthews was a woman living in Gibraltar who lodged a complaint on the fact that the citizens of Gibraltar was unable to vote in the election to the European Parliament. As a result of an EC Act, which has treaty status, the voting rights were limited to the nationals of the United Kingdom. However according to a UK law the citizens of Gibraltar should be seen as nationals of the former country, when the term national are used under the EC treaty. [285] The Applicant claimed that the exception of Gibraltar from the voting-rights was a breach of the ECHR. Article 3 of Protocol number 1 ECHR states that, "[*T]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."* [286] The British government argued that it was not responsible for any Community acts.[287]

Before reaching the Court the ECommHR had ruled against the application, finding the term 'legislature', in the article referred to, not to apply to the European Parliament.[288] The ECtHR instead looked at the situation after the Maastricht Treaty and recognized the evolved legislative role of the Parliament. The Court believed the actions of the Parliament to affect also the citizens of Gibraltar and consequently they had a right to vote under the

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[279] ECommHR Application No. 13258/87.

[280] Lawson, *Human Rights: The Best is Yet to Come,* 2005, p. 32.

[281] Ibid.

[282] ECtHR Application No. 17862/91 Cantoni v. France.

[283] Ibid., para. 30.

[284] ECtHR Application No. 24833/94 Matthews v. United Kingdom.

[285] Ibid., para 14.

[286] ECtHR Application No. 24833/94 Matthews v. United Kingdom para 24.

[287] Ibid., para. 26.

[288] ECommHR Application No. 24833/94 Matthews v. United Kingdom.

ECHR. The Parliament was involved in the democratic control of the Community and therefore a legislature in accordance with article 3 of protocol number 1.[289] According to the Court the United Kingdom could not get away from responsibility by claming to hold no control over Community acts. The government was responsible for the acts of the Community after having entered into the Maastricht Treaty.[290]

The decision in *Matthews* can be seen as amending the decision on collective responsibility rejected in the *CFDT* case. In *Matthews* the ECtHR instead held"*United Kingdom, together with all the other parties to the Maastricht Treaty,* (…) *responsible* (…) *for the consequences of that Treaty".*[291] The decision has also been viewed as a response to the ECJ broadening its competence as regards human rights and the Union's development of its own human rights catalogue.[292] One other interesting statement is the Court declaring itself competent to judge on the Treaty of Maastricht, something which falls outside the scope of the ECJ.[293]

The ECtHR has afterwards received a number of cases on responsibility of the EC Member States of the acts of the Community institutions. Many of these are directed at the Member States collectively.[294] However the Court has not ruled a Member State responsible in any of those cases. The cases have either been found inadmissible since no breach of the ECHR took place, or because they were outside the Convention's field of application.[295]

The avoidance of the Court to once again rule on Community law may be a result of the confidence in the European Union proposed accession to the ECHR. And as long as the Union itself seem to have the desire to accede the Convention the ECtHR will probably avoid any conflict. [296] In one of its later cases *Emesa Sugar*, [297]which the Court found inadmissible, it did not make any reference to the applicability of the Convention, in situations where Member States implement Community law, in a potential breach.[298] This is contrary to the *Cantoni* judgment where the Court, after declaring the case inadmissible, however made clear that the situation could be judged under the applicable article (article 7). Perhaps the decision in *Matthews* was only applicable under that particular case and all other should be judged according to *M & Co*? For example in *Bosphorus Airways*[299] the Court referred to the *M& Co* judgment and its 'equivalent protection' test and added that even

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289 ECtHR Application No. 24833/94 Matthews v. United Kingdom paras. 50-54 and 60-65.

290 Ibid., para 35.

291 ECtHR Application No. 24833/94 Matthews v. United Kingdom para. 33.

292 Garpelin, *Europadomstolens framtid som försvarare av mänskliga rättigheter i Europa* (The European Court's future as a defender of human rights in Europe), 2006, p. 28.

293 Ibid.

294 Scheek, p. 27-28.

295 Scheek, p. 28.

296 Garpelin, p. 31.

297 ECtHR Application 62023/00 Emesa Sugar N.V v. The Netherlands

298 Scheek, p. 29.

299 ECtHR Application No. 45036/98 Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland.

though the Court had found the Union to posses such equivalent protection, it still had the power to review the Union once more.[300]

The decision in *Bosphorus Airways* is viewed as differing from that in *Matthews* not only because they had different outcomes. Whereas the latter case concerned Community primary law the *Bosphorus Airways* concerned secondary law. The ECtHR seem to apply the 'equivalent protection' test different in those situations. When the case concern a question where the country is implementing Community law the court examines if the country has any freedom of choice. If that is the case, the country is responsible for the breach of the ECHR which occurs when they implement Community law. The reason for the ECtHR to examine primary law is according to them the fact that no such possibility exists under Community law, and the Community then cannot provide protection which is corresponding with that of the ECHR.[301] Costello argues that there in fact exists a hierarchy between the ECtHR and the ECJ, in favour of the first Court, but that the ECtHR disguised it in the *Bosphorus Airways* case.[302] She believes that the equivalent protection test is evidence of such a hierarchy. One interesting point is that the European Commission in their written observation to the ECtHR expressed the view that if the ECtHR were to judge on situations were the EC Member States where implementing Community law it *"would pose an incalculable threat to the very foundations of the European Community"*.[303]

6.4 Response in the EC

The above mentioned cases show that the ECtHR in some way or another interprets Community law. The ECJ, who thinks of itself as the only interpreter of EC law, was of course not entirely enthusiastic to the development in the ECtHR. The Court showed its reluctance already in its Opinion 2/94.[304] The opinion might also have been responsible for the ECtHR changing its view towards the Community in the *Matthews* case.[305]

The Maastricht Treaty, which inserted an article in the Union Treaty declaring the Unions protection of human rights, neglected the question of Convention accession. The then article Article F.2 declared the Unions respect for fundamental rights. The Amsterdam Treaty changed the article, and renamed it article 6 EU, and its first two sections now states:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. [T] he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

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[300] Ibid., paras. 155- 156.

[301] Hinarejos Parga, *Bosphorus v Ireland and the protection of fundamental rights in Europe*, 2006.

[302] Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 2006 at note 86-87.

[303] Ibid., at note 88 where she refers to the Written Observations of European Commission.

[304] Scheek, pp. 31-32.

[305] Hartley, 2004, p. 350.

The Amsterdam Treaty too included an Article 7 in the EU Treaty. The Article provides a possibility to prevent and take action if the Member States gravely violates any of the principles mentioned in article 6.1.

The ECJ also developed its own catalogue of rights, the Charter of Fundamental Rights, which existence may have caused some of the judgment by the ECtHR. The Charter will be discussed in the next chapter.

6.5 Constitutional Change

The Treaty establishing a Constitution for Europe includes an article that makes it possible for the Union to accede the ECHR. Article I-9 section 2 states that, "*[T]he The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.*" The proposed Union accession is possible after an amendment in the new article I-7 giving the Union legal personality.

The Council of Europe has also made an accession possible by making changes in the ECHR permitting the European Union to join the Convention.[306] However other adjustment has to be made before the EU can accede. The contracting parties to the Convention all have to ratify the changed Convention once more.[307]

6.6 Concluding Remarks

The former reluctance of the EU to join the European Convention system and thus being under the review of the ECtHR seem to have change with the drafting of the new Constitution. Perhaps the reality that the ECtHR did in fact review the Union even without a formal accession made the EU turn around. Such an examination of the Community's legal order by another institution affects the principle of supremacy in that the final word is some cases no longer is placed at the ECJ. The threat previously came from the Member States claiming that their constitution was the ultimate arbitrator on the legality of Community legislation. Although the ECtHR in reality cannot make the Community's legislation void, it can have an effect on the Member States' implementation and execution of that law.

The reason for the change is not obvious, an accession would still make the Union under the scrutiny of another institution; the fact that the Member States hold the protection under the ECHR of great importance might also have affected the turnabout. The Member States that seem to oppose mostly to the Community's/Union's own human rights protection, claiming it to be insufficient, will perhaps stop doing so once the Union has acceded. Then again an accession brings on other, or the same, questions. What kind of hierarchy will exist between the two courts? What will happen if the ECtHR then find a Community act to be contrary to the ECHR? Do the Community then have to terminate the act or does the final word still rest with the ECJ? The questions arising with the change in the new Constitution will be discussed more in the next chapter.

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[306] Article 17 of Protocol No. 14, amending article 59 of the Convention.

[307] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention- Explanatory Report, pp. 17-18.

The advantage of having its own representative in the ECtHR and being able to defend itself before the Court as a contracting party may also have affected the change. The ECJ has also for many years referred to the ECHR in its judgments and seem to consider its principles of extra importance. The ECJ has even on some occasion referred to the judgments of the other court (see chapter 4.5). Perhaps an accession was the only possible outcome of the ECJ's human rights development.

The new Constitution also brings about other changes in the human rights area. The Constitution incorporates the previously non binding Charter of Fundamental Rights, making it legally binding. The questions caused by those alterations will be discussed in the next chapter.

7 Charter of Fundamental Rights and the Changes in the Constitution for Europe

7.1 Drafting the Charter

The history of the Charter of Fundamental Rights of the European Union began at the European Council meeting in Cologne in June 1999. There a decision was made to strengthen the human rights protection within the Union. At a later meeting, of the same body, in Tampere (Finland) in October 1999 a decision was made to establish a Convention with the task of drafting a Charter. [308] The Convention was made up of representatives of the EU Member States, the President of the European Commission and of the European Parliament. Representatives from the Council of Europe were also invited to observe the proceedings. The Convention has been commended for its high effort to make all documents and hearings public and to have consulted all concerned and interested.[309]

The outcome of the Convention's work were a draft Charter adopted by the Convention in October 2000. Following the approval of the European Parliament and Commission the Charter was finally proclaimed in December 2000 in Nice.[310]

Even though the drafting of the Charter was completed in its given time limit, a year, the process had not been without obstacles. The non binding character of it can be seen as a way to compromise all the different and conflicting intentions of those involved. The question of the legal character of the Charter was a highly disputed one. Additionally, the relationship between the Charter and the ECHR was given much consideration. In the words of de Búrca, the Charter "*represented a difficult and delicate compromise between very different political and constitutional interests and visions.*[311] The Charter was finally made to be non- binding. However, already in the first meeting of the Convention it was declared that the body should take into account that the Charter would become of binding character.[312] Goldsmith, who was one of the members of the drafting group, does not believe that that was done. In his opinion the document was not precise enough to be incorporated in the EC Treaty.[313]

Some also argue that the Charter in some parts is a codification of the ECJ's case law and for that reason already is binding.[314] The claim may be confirmed by the Advocate General

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[308] Liisberg, *Does the EU Charter of fundamental Rights Treaten the Supremacy of Community law- Article 53 of the Charter: a fountain of law or just an inkblot?,* 2001, pp. 5-6.

[309] Ibid., and Weatherill, p 75.

[310]Charter of Fundamental Rights of the European Union: Home page, available on http://www.europarl.europa.eu/charter/default_en.htm 2006-05-22

[311] de Búrca, Human Rights: *The Charter and Beyond*, 2001,p. 4

[312] Groussot, *A Third Step in the Process of EU Constitutionalization: A Binding Charter of Fundamental Rights?*, 2003, p. 539.

[313] Lord Goldsmith, *A Charter of Rights, Freedoms and Principles*, 2001, p. 1215.

[314] Ibid., who refers to some of those in favour of such an interpretation.

Tizzano's Opinion in the *Broadcasting* case[315]. The Advocate General used the Charter to confirm that a claimed right in fact was fundamental.[316] On the other hand the ECJ itself never seem to have based a judgment explicitly on the Charter.[317] However the ECtHR has used the Charter as a reference in some of its decisions.[318]

The directive given to the Convention when drafting the Charter was to "*make the overriding importance and relevance* [of fundamental rights] *more visible to the Union's citizens."*[319] The Charter was to include the fundamental rights safeguarded in the general principles of the Community as well as the rights and freedoms protected by the ECHR. Also social and economical rights equal to those protected in the European Social Charter[320]should be taken into consideration. [321] The Charter would make the rights of the individual more visible and clear for those protected. Another purpose was to ensure that the rights were taken properly into consideration by administrative, governmental and legislative authorities.[322]

The draft Charter contained 54 articles divided in to seven chapters. The rights was placed and separated in the first six chapters named; dignity, freedoms, equality, solidarity, citizen's rights and justice. The last chapter contained general provisions.

The general provision in the last chapter, usually referred to as the horizontal articles, explain the scope of the Charter and its relation to the ECHR.[323] Article 51 para. 1 relates to the scope of the Charter and declares that" *the provisions of this Charter are addressed to the institutions and bodies of the Union (…) and to the Member States only when they are implementing Union law."* The explanation declares that the Charter is mainly addressed to the institutions of the Union. As regards the Member States, the explanations argue that the case law of the ECJ shows that the Member States are bound to take the rights into consideration when implementing Community law.[324] The cases cited, *Wachauf* and *ERT* (see chapter 4.6), have however also been seen as extending the scope to situations outside those of Member States implementing Community law. [325] Exactly what the Member States' obligations are is not

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[315] Opinion of Advocate General Tizzano 8 February 2001Case C- 173/99 Broadcasting Entertainment Cinematographic and Theatre Union v. Secretary of State for Trade and Industry para. 26.

[316] See *The Charter in the European context -A point of reference for the courts* available on http://www.europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html 2006-04-18.

[317] Morjin, p. 19.

[318] Scheek, p. 37.

[319] Cologne European Council- Presidency Conclusions Annex IV- Decision on the Drawing up of a Charter of Fundamental Right of the European Union.

[320] European Social Charter 1961 and Revised European Social Charter 1996.

[321] Cologne European Council- Presidency Conclusions Annex IV- Decision on the Drawing up of a Charter of Fundamental Right of the European Union.

[322] Lord Goldsmith 2001, p. 1204.

[323] Ibid., p. 1214.

[324] Draft Charter of Fundamental Rights of the European Union- Text of the explanations relating to the complete text of the Charter, article 51 Explanation.

[325] Vranes, *The Final Clauses of the Charter of Fundamental Rights- Stumbling Blocks for the First and Second Convention*, 2003, at note 10-14.

entirely clear and there are many different interpretations. The perception that the Member States in fact are bound also when derogating from Community freedoms, are seen as ensuring that the treaties are interpreted in the light of the fundamental rights. Those against such an interpretation fear that the competence of the ECJ would extend too far in the field of human rights. [326]

The question on the relationship with the ECHR received many different suggestions and opinions during the draft but an agreement was finally reached and presented in an article 52.3. The article declares that, "*[I]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."* The question is then which rights in the Charter actually correspond to those in the ECHR? The explanations to the article try to answer that question. The explanations first emphasize that the referral to rights in the ECHR also includes the interpretation of those rights made by the ECtHR. Then a list of rights included in the Charter which corresponds to those in the ECHR is given.[327]

7.2 Inclusion in the Constitution and the Relationship with the ECHR

As previously mentioned (chapter 1.1) the new Constitution for Europe implements the Charter in its second part. The Intergovernmental Conference in 2004 was given the task of deciding whether or not such an inclusion of the Charter should take place. The Conference agreed to do so and explained that the rights of the Charter *"will be legally binding not only on the Union, its institutions, agencies and organs, but also on the Member States as regards the implementation of Union law."* [328] The language of the above quote does not seem to give explanation on the situation of derogations from fundamental freedoms.[329]

The inclusion of the Charter has also brought on the question on the relationship between the Charter and the ECHR. Since the proposed Constitution for Europe also includes an article I-9 (2) which says that the ECJ shall accede the ECHR the question is of further importance. In a protocol[330] annexed to the new constitution the accession process is explained. The Protocol's first two articles states the following:

Article 1

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for

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[326] Vranes, at note 16.

[327] Draft Charter of Fundamental Rights of the European Union- Text of the explanations relating to the complete text of the Charter, article.

[328]Outcome of the European Convention- the fundamental rights available at http://europa.eu.int/scadplus/european_convention/objectives_en.htm#RIGHTS 2006- 04- 18.

[329] Vranes, at note 21-24.

[330] Protocol 32 relating to Article I-9(2) of the Constitution on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

in Article I-9(2) of the Constitution shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

The Charter, which was first probably made as an option to ECHR accession, is as previously mentioned incorporated in the new Constitution. In a declaration 'Concerning Provision of the Constitution' annexed to the Constitution the explanations of the Charter are repeated.[331] The preamble of the explanations states that they are updated by the Praesidium of the European Convention and taking the changes of the Charter, in article 51 and 52, into account. It also explains that even though the explanations *"do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.*"

The relationship between the Charter and the ECHR and the former article 52.3 are phrased the same as before and its explanations seem to make no more detailed explanation. The explanations once again provide a list of rights which corresponds to those in the ECHR.

7.3 Rights and Principles

Article II-111 of the Constitution (article 51 of the Charter) states that the Member States and institutions of the Union shall *"respect the rights,* [*and*] *observe the principles"* listed in the Charter. This implies that there is a difference between the rights and principles as protected by the Charter. The Preamble also seems to make a distinction given that it refers to rights, freedoms and principles. Also article II-112 para 5 (article 52(5)) makes a distinction. They article states that provisions "*which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."* This would imply that the principles provided for in the Charter are of less legal value. However, the Charter and its explanations are not entirely clear on which provisions in the Charter are rights and which are only principles. The explanations give some example of what are to be seen as

[331] Declarations Concerning provisions of the Constitution, point 12- Declaration concerning the explanations relating to the Charter of Fundamental Rights.

principles. It explains that the rights of the elderly (article II-85) and the provisions referring to integration of persons with disabilities (article II-86) and environmental protection (article II-97) is some of the principles. Since article II- 112 para 5 explains that the principles are only to be binding in situations on interpretation and ruling on legality of Community acts by the institutions and the Member States, a more transparent explanation would be helpful. Lawson points on a specific problem for the ECJ when determining a case involving provisions of the Charter. He wonders what will happen if the Court are asked to rule on a provision which contains principles. Is the Court then not to decide on the right in that provision?[332]

Goldsmith points to the fact that the principles enshrined in the Charter are often those rights referred to as social rights. Those rights, as previously mentioned in chapter 2.1, are often only justiciable collectively. They also vary much in different legal systems and Member states add different value to their importance and target different resources to them. The Community itself does not have competence in the area and to include those rights would illustrate something else.[333] The Charter has also been criticized for including rights which not are entirely 'fundamental'. Kirkhope believes that the Charter's inclusion of social rights, in distinction to the non inclusion of those rights in the ECHR, is wrongly inserted in the document.[334]

7.4 Supremacy Threat

The inclusion of the Charter and the accession to the ECHR both give rise to questions concerning the supremacy of Community law. The purpose of those changes is clearly to give the fundamental rights protection within the Union a more obvious and noticeable place. However, some claim that the changes unfortunately can be viewed to accept setting aside Community law in favour of national law. On the contrary others see the changes as strengthening, or at least preserving the previous status of, the principle of supremacy

7.4.1 Inclusion of the Principle of Supremacy

As previously mentioned (chapter 3.2.3) the new Constitution also for the first time put the principle of supremacy in writing, in article I-6, and the explanations to that article show that it should reflect the case law of the ECJ. The inclusion of the principle was most likely made to make the principle more visible and could be seen as a confirmation that all Member States now tolerate and accept it[335]. However some claim that the conditional approach in some of the Member States to the principle even now will take place.

Those who fear a continuing conditional approach by the Member Sates claim that the article does not settle the way the Kompetenz- Kompetenz question should be solved (whether or not the ECJ itself should rule on its competence). Neither does the reference to 'law' in the new article settle the conflict between EC law and the national constitutions.

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[332] Lawson, p. 30.

[333] Goldsmith, p. 1212.

[334] Kirkhope, *Charter of Fundamental Rights, the Enhancement of Human and the Curtailment of Human Rights?,* p. 42.

[335] Kumm and Ferreres Comella, *The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty,* pp. 8-9.

Another complication is the new article I- 5. The Article states that the Union shall respect the national identity of the Member States of which the fundamental constitutional structure are part of.[336]

However, Kumm and Ferreres Comella argue that even if the supremacy article may be seen as a way to set EC law aside on behalf of national constitutional law, it cannot be seen as a breach of Community supremacy since such a situation would in fact be based on Community law.[337]

Kumm and Ferreres Commella also points to the reference to 'the law of the Member Sates' in the same article. Such a wording could be used as a basis for arguing that the constitutions of the Member States still can control the legislation of the Community.[338] However they believe that the Union after the adoption of the Constitution will have a sufficiently high level of protection towards human rights making the national courts hindered from using an argument based on the contrary.[339]

7.4.2 The Inclusion of the Charter

Also the inclusion of the Charter, or its language and form, has been accused to affect the supremacy of Community law. Those who express such a fear view the Charter to be unclear. Some have even argued that it would affect the legal order of the Community. Liisberg has in an article explored whether or not the Charter's article 53 (now article II-113) could pose a threat to the principle of supremacy.[340] Article 53 states that; "*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.*"

The article was made to explain that the document only would be seen as a minimum standard of protection and not limiting higher protection provided by other sources.[341] During the draft of the Charter some of the involved expressed a fear that the reference to national law in fact could be a threat to the principle of supremacy.[342] But the fear of such a threat was not openly expressed by any of the Community institutions involved in the drafting. Liisberg calls it, at least in relation to the Commission who is the guardian of the treaty, reasoned by a hope to 'let sleeping dogs lie'.[343]

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[336] Kumm and Ferreres Comella, pp. 10-11.

[337] Ibid., p. 11.

[338] Ibid., p. 12.

[339] Ibid., p. 20.

[340] Liisberg, Does the Charter of Fundamental Rights Threaten the Supremacy of Comunity Law? - Article 53 of the Charter: a fountain of law or just an inkblot?

[341] Ibid., p. 1.

[342] Ibid., p. 10.

[343] Liisberg, p. 19.

However Liisberg does not believe that the article gives the ECJ any obligation, or right, to use the constitutions of the Member States to judge Community legislation invalid. Though he believes that the phrase 'in their respective fields of application' might make the article unclear. Since the field of competence of the Member States, as well as the Community, in the area is imprecisely expressed in the case law of the ECJ the phrase does not make it easier.[344] Liisberg argues that the intention of the Charter and the legal order of the Community do not confirm any restriction of the supreme nature of Community law. In his words; "*[T]he whole purpose of strengthened human rights protection at the Community level is precisely to ensure that the supremacy principle is not obstructed by constitutional sensitivities in the Member States.*"[345] He further stresses that even if the constitutional courts of some Member States seem to challenge the principle that is not changed with the Charter. Liisberg did not believe when writing his article, in 2001, that a codification of the supremacy principle would ever take place. The opposing Member States as well as the Community itself was satisfied with the agreement and no real conflict had really taken place. [346]

Duff seems to be of the same opinion as Liisberg regarding the Charter's possible threat to the principle. He states that the recognition of the constitutions in article 53 does not weaken "*the important general principle of European Community law concerning uniformity in application".*[347]

Of the opposite opinion, to that of Liisberg and Duff, is Ortega. He believes that the article's reference to Member States constitution, a reference part also of the new Constitution, may make the ECJ forced to balance the Community rules against the level of protection in the Member States.[348]

7.4.3 Accession to the ECHR

One feared consequence of the accession to the ECHR is that it would affect the principle of supremacy. The accession would make the Union somewhat under the jurisdiction of another court. This would give a new dimension of the threat to the principle supremacy. Because instead of being an issue between the Member States and the Community an additional element is introduced by the institutions of the ECHR.

Scheek believes that the ECJ fear a judgment by the ECtHR that rejects a previous decision by the first court. Such a judgment would imply that the Community does not have a protection of the standards of the Member States and would hence give the Member States foundation in such a claim.[349]

The situation between the Member States, the ECHR and the EU/EC on the question of human rights protection are triangular. The Member States are under international law

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[344] Liisberg, pp. 38-39.

[345] Ibid., p. 40.

[346] Liisberg, p. 42.

[347] Duff, *Towards a European Federal Society*, 2000, p. 21.

[348] Ortega, *Fundamental Rights in the European Constitution*, 2005, p. 372.

[349] Scheek, p. 16.

obliged to follow the rules in the ECHR. However they have the same responsibility towards the Union/Community.[350] This is one possible unfortunate consequence that would still exist after an accession to the ECHR. In the words of Harmsen the Member States"*run the risk of becoming trapped (…) between conflicting obligations under the two bodies of law*"[351]

Sheek does instead point on possible positive outcomes of an accession. He has found evidence of the ECtHR endorsing the principle of supremacy in its case law. The ECtHR has pushed the Member States to make preliminary references to the other European court and has even referred to the Member States obligation to uphold the supremacy of Community law.[352]

Other positive outcomes of an accession are described by Polakiewicz who believes that an accession to the ECHR would, in addition to providing clarity in European human rights protection, make the possibility of different interpretations between the ECJ and the ECtHR less likely. He further argues that the Community is not entirely against being under the scrutiny of another court, and that there actually will not exist any hierarchy between the courts after an accession. The courts will act on the same level and the ECJ will remain the last judge on EC law. [353]

7.5 Concluding Remarks

The Charter of Fundamental Rights of the European Union began its existence as a non binding political proclamation, mostly an incorporation of the existing rights of the Community. The reason for the making of the Charter was, just as the making European Constitution would make the treaties more understandable, to make the rights easier and more visible to the EU citizens. However, some parts and provisions of the Charter was (and is) problematic. The question of the application of the Charter when it comes to the Member States is one. The Charter is not clear whether or not Member States obligations are extended to when they make derogations from the fundamental freedoms.

Changes in the new Constitution such as the incorporation of the principle of supremacy and the accession of the Union to the ECHR are also causing some confusion. Does the incorporation of the principle of supremacy once and for all stop the conditional approach taken by some Member States? Most suggest that the problem for the Community will continue even after a possible ratified Constitution. The accession to the ECHR brings on several questions. The relationship between the ECJ and the ECtHR is not clear and neither is the relationship between the Charter and the ECHR.

It would have been valuable if the supremacy article had once and for all put down in black and white the relationship between the national constitutional law and Community law. In absence of such a firm clarification the article does not seem to change much of the previous problems. The Member States can now probably base their non acceptance on a vague expression in the new Constitution. The fact that the relationship between the Union/ Community and the ECHR even after an accession remains unclear is another disappoint-

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[350] Vranes, p. 10.

[351] Harmsen, p. 642.

[352] Scheek, p. 36.

[353] Polakiewicz, pp. 80 and 83-84.

ing outcome of the Constitution. The effect is that the Member States in a conflicting situation even now remain uncertain. In addition the inclusion of the ECHR in many of the Member States constitutions gives the Member States another foundation for arguing a hierarchy favouring the constitutions rather than Community law. Whereas the previous threat, direct or not, mainly relied on the interpretation of the Member States constitutions, the new concern for the principle's acceptance and assurance are unclearness in the law of the Community.

The accession to the ECHR makes the Union under the jurisdiction of the ECtHR. The ECtHR has before showed its willingness to review Community law and will probably do so even after an accession. Even if the court has no legal possibility to change Community law their position will clearly be affecting it. However, one change might be that after the accession the once hold responsible for a breach of the ECHR are the institutions of the Community, and not the Member States.

The mentioning of the law of the Member States in the new supremacy article may be another confirmation to the conditional approach. The Member States might argue that the wording of the article gives the constitutions a higher legal value than the simple law of the Member States.

The referendum held in France and the Netherlands on the possible ratification of the Constitution for Europe had a negative outcome. The reasons for the outcome in the countries, both founders of the Union, probably do not have only one explanation. Many have argued reasons such as Turkey's possible accession to the Union, a fear of immigration or simply brought on by a dislike of those politicians in favour. Other argues that the voters were uninformed. de Búrca does not agree with any of the above reasons. She believes that the result of the referendum instead should be taken under sincere reflection. The voters shall not be described as ignorant. The Union should instead attract more attention to its democratic deficits since those probably are some of the motivations for the No voters. The citizens of the Union also need to play a part in the future of the Union.[354]

The European Council decided in June 2005 to put the question on ice. A 'period of reflection', lasting a year, was fixed. This since all the Member States of the Union need to ratify the new Constitution for it to enter into force. [355] However, the Constitution has been ratified in fifteen of the Member States, the latest of them Estonia who's parliament ratified the constitution on the 9th of May 2006.[356] Among the Member States yet to ratify the Constitution Finland is proposed to be the next one to take the step. The country, which is next in line for presidency of the Council, will probably do so after the summer.[357]

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[354] de Búrca, *After the Referenda,* 2006, pp. 6-8.

[355] A Constitution for Europe web page. Citizens ask- EUROPE DIRECT answers at, http://www.europa.eu.int/constitution/citizens_ask_en.htm#q9 2006-04-26. The Member States that have ratified the Constitution are: Austria, Belgium, Cyprus, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia and Spain.

[356] BBC News. *EU constitution: Where member states stand*, available at http://news.bbc.co.uk/1/hi/world/europe/3954327.stm 2006-05-15.

[357] Euobserver.com , *Finnish parliament starts EU Constitution ratification process,* available at http://euobserver.com/18/21586 2006-05-15.

The Commission also started a strategy named 'PLAN D' in 2005. The plan is to bring about debate among the citizens in the Member States about the future and challenges of the Union.[358] The current Austrian presidency of the Council are said to take up the debate once more.[359] On the 10th of May this year the Commission adopted an agenda for the citizens. The agenda, among other things, would like the citizens to have access to their rights and better knowledge of them. The Commission would like the leaders of the Union to make a declaration by the end of next year and further continue the process in 2008 or 2009. [360]

In an interview on the 14th of May 2006 made by the BBC, the president of the Commission, Manuel Barroso, explained his opinion on the process. "*Well when the leaders of Europe will meet next month my advice to them will be don't go for the penalties, penalties can be very cruel, give yourself some extra time. Because, the fact is, that there is not yet a consensus (…) So the reasonable thing to do now is not to try to get it in June, but on the contrary to move forward with an agenda of resolve and showing concretely what we can do. How can we deliver some things that are important for the European citizens and change the context, and afterwards come back to the text. One thing is sure to me, we need some reforms of institutions because we need a European Union that works more efficiently (…).*" [361]

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[358] *European Commission launches PLAN D for Democracy, Dialogue and Debate*, available at http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1272&format=HTML&aged=0&language=EN&guiLanguage=en 2006-04-26

[359] Austria will have the presidency until the end of June 2006, when it will be handed over to Finland. Austria 2006- Presidency of the European Union. *The Council presidency*. http://www.eu2006.at/en/The_Council_Presidency/index.html 2006-05-15

[360] *Delivering results for Europe: Commission calls for a citizens' agenda,* available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/595&format=HTML&aged=0&language=EN&guiLanguage=en 2006-05-15

[361] BBC Sunday AM. *EU Constitution.* available at *http://news.bbc.co.uk/1/hi/programmes/how_euro_are_you/4769987.stm 2006- 05-15*

8 Conclusions

8.1 The Human Rights Policy

The European Community has been accused of not having the respect of fundamental rights as the true intention behind their fundamental rights policy. The protection of those rights are seen as a way to develop and advance the economic aims of the internal market. I believe that the accusation to some degree was true and the fact that many of the cases before the ECJ in the beginning were related with economic freedoms seems to confirm that view. I also believe that the strong denial of the ECJ in the *Geitling* case show that the Court made a complete turnabout when declaring fundamental rights as one of their general principles in *Stauder*. For me the change indicates that when they so clearly refused any protection of the rights in the *Geitling* case, the Community had no intention of establishing any such safeguard in the beginning of their existence. The fact that they latter on did, was only a response to the opinion of the Member States on the supremacy principle.

On the other hand the later cases from the ECJ in my opinion show that the Community made the respect for human rights one of their priorities. The *Omega* and *Scmidberger* cases show that the ECJ can make the fundamental freedoms subject to the respect for human rights. In *Scmidberger* the Court found the freedom of expression and association to be a legitimate interest worth protecting and a possible justification to restrictions of the free movement of goods. In *Omega* the ECJ decided that human dignity could be a justified reason to a breach of the fundamental freedoms. None of these cases expressly declare that the protection of fundamental rights is of higher value than the maintenance of the free movements. The fact that they seem to classify the rights as restrictions in the first place would mean that they do not fully hold human rights to be of peremptory character in the way many of the Member States, as well as the ECtHR, do.

However the cases show that the Court now clearly holds the protection of fundamental rights to be one of the Community's objectives. I also find the inclusion of an article (46(d)) in the EC Treaty, giving the ECJ the right to annul Community acts in breach of human rights, another proof of the Community's respect and true defense of those rights. The proposed accession to the ECHR is for me another confirmation that the Union/Community now clearly holds the protection of fundamental rights of high ranking. I believe that the ECJ now feel required to take the protection into account in most Community situations. The position in many Member States and a possible pressure from the ECtHR did probably affect the Court's somewhat new approach. How far the Court is willing to go when balancing the human rights protection against the economic aims of the Union is yet to be seen in the future.

Nonetheless the development of the protection of human rights was as said to some extent forced on the Community. It was brought on by a threat coming from the Member States. The threat against the principle of supremacy, an essential part of the Community structure, made the ECJ reconsider the issue of human rights protection. So after an initial reluctance the Court, which prior expressed human rights to fall outside the ('expressed or otherwise') scope of the Treaty, in *Stauder* had a complete change of heart.

The subsequent case law of the ECJ described and formulated the fundamental rights protection as a part of the Community's general principles. Those rights were according to the Court inspired by the constitutional traditions of the Member States. Even though this approach recognized various rights enshrined in the constitutions of the Member States the

Court remained unclear how common the rights had to be. That question have not received a confirm answer in any of the ECJ's rulings. Some argue for a maximum method where the Court accepts every fundamental right protected under the constitutional legislations in the Member States. The opposite side believes that the Court only should acknowledge rights common in most constitutions. It is hard to see how the Court has reasoned in this question but a maximum protection method does not seem to be the one preferred. I believe that such a method would be too risky and would certainly affect the principle of supremacy. The Court then has to take all rights understood as fundamental in the constitutions of the Member States into account. If an alleged principle only is protected in one of the Member States constitutions, it would be illogical to make such a principle part of the general principles of Community law. Additionally, even if a principle exists in many of the legal systems of the Member States that principle may have different meaning or interpretations. One benefit of the Unions accession to the ECHR is that the rights protected under the Convention now can be relied on by the ECJ. It will be a helpful way to see what rights is commonly respected by the Member States; rights which the Community also will be acknowledging through an accession.

8.2 The Threat from the Member States

The conditional approach in the Member States towards the principle of supremacy has surely affected the Community's protection of the fundamental rights. But has it been an actual threat or only a hypothetical one? I believe that the Community itself took the threat serious enough to make changes in one of its most essential cornerstones. Even though the ECJ never will acknowledge itself bound by the any parts of the Member States constitutions they to some extent are. The Member States will disapprove if their respected fundamental rights are being left out or not taken under consideration in the Community's actions.

Whether or not the position and reaction in the Member States posed a real threat to the principle of supremacy the Community has also chosen to approach the Member States by declaring their respect for the constitutional traditions of the Member States. I believe that this may be a way to silence the conditional approach. However, the method might backfire. One example is the reference to 'the constitutional traditions of the Member States' included in the Charter. I believe that the Member States might argue that such a respect would include placing the rights in the constitutions before the legislation of the Community. The former arguments against the ECJ's competence to themselves decide on their competence may also occur. The recent judgment from the Polish Constitutional Court show that some Member States still do not agree with the Community's opinion about the ECJ being the only one to judge on Community law. The Member States' belief to be the masters and guardians of the legality of the Community probably still exists in some situations.

The accession to the ECHR would make the Union under the jurisdiction of the ECtHR. The ECtHR has been willing to judge on Community law and will probably do so also after the accession. The *Bosphorus Airways* showed that the court still found themselves able to review EC law. Although the ECtHR has no legal way to alter the law of the Community the judgments of that court affects the way the Member States implement Community law.

8.3 The Charter

Perhaps the making of the Charter of Fundamental Rights was another way to silence some of the disapproval. The function and purpose of drafting and making the Charter was to make the rights available and protected in the Union more visible. I do not believe that purpose was achieved. First of all, for the citizens to really rely on any of the rights the Charter had to be binding. Moreover the Charter does not clearly explain in which situations it is addressed to the Member States. I believe that the Charter may have been a good thought but it seems to produce too many questions to be of any considerable use. Perhaps the political aim behind the Charter was achieved but for the citizens it is of little help. For who if not the citizens is the fundamental rights presumed to protect?

Moreover the Charter produces problems for the EU/EC itself. The wording of the Charter does also produce possible negative effects on the principle of supremacy. The reference to the constitutions of the Member States creates once more the question of the constitution's relationship to Community law. The drafters of the Charter left the question unanswered even if it was brought up by some of the involved. Since the affect on the principle of supremacy was rather apparent I agree with Liisberg's argument that the Community institutions wanted to avoid arguments and problems arising with the question.

8.4 Accession to the ECHR

The question of a possible accession to the ECHR has come to an end with the Constitution for Europe. The accession was probably a big factor for some of the Member States acceptance of the protection of the fundamental rights in the Community to be of sufficient standard. I believe that the Charter was not a satisfactory catalogue of rights for many of the Member States. Precisely as the ECtHR some of the Member States hold the human rights to be of peremptory character, which mean than no Community law could ever be justified to breach a fundamental right. The non binding Charter was not support enough for those rights and the accession was the only possible outcome.

I also believe that the case law of the ECtHR had an effect on the proposed accession to the ECHR. The judgment in *Matthews* showed that the ECtHR was not afraid to rule on and interpret Community law. However I also believe that the drafters of the new Constitution of Europe have made a regretful blunder when not clearly once and for all making clear the exact relationship between the EU/EC and the ECtHR. A possible and tragic outcome of the accession to the ECHR would be that in addition to the conditional approach coming from the Member States, an approach which have been evident for many years, another concern might come up. The new article I-9 and explanatory protocol only says that the accession not shall affect the Unions competences and the competences of its institutions. However I believe that the important question instead is what competences the ECtHR will have in the sphere of Community law. The ECtHR could now have the competence of reviewing Union and Community law and hold the Union and in its institutions responsible for human rights violations. I am of the opinion that the consequence of leaving out an explanation of the relationship between the two bodies is that there now exist a risk of another threat to the supremacy of Community law. Even if the ECtHR cannot alter or make Community legislation invalid their possible interpretation affects the implementation in the Member States. The opinion of Kumm and Ferreres that such a situation would in fact be based on Community may be correct. However a consequence would still be that the analogous interpretation of Community law would be in danger. I also do not

believe that the drafters of the Constitution intended that the article was to have such a meaning.

The relationship between the Union and the ECHR may proceed without any major difficulties even after an accession. However, I believe that if the ECtHR were to rule on Community law and find it in breach of the ECHR the superiority of Community might have to be reinterpreted. Similar to the way the ECJ changed their interpretation of the Community's general principles in order to respond to the Member States disapproval of the lack of fundamental rights protection, they may have to alter Community law to correspond with the ECHR. Some may not see it as a real threat to the principle of supremacy; nevertheless I believe that the accession may produce exceptions to the principle. This will take place when a specific Community act does not correspond with the ECHR. I believe that the threat to the supremacy which then arise are similar to the one based on the Member States constitutional approach. Community law will not always be the highest legal source in the Member States. Community law now may have to surrender to the judgments of the ECtHR.

On the other hand one may see the accession to the ECHR as making the Convention a part of Community law. Hence no breach of Community law would ever take place. But one problem still exists; who would be the arbitrator of that law; the ECJ or the ECtHR. As it stands now I interpret it as both courts are to judge on issues regarding the ECHR. What will then happen if two differing judgments on the same question are made? The relationship between the courts is in my opinion not made clear by the new Constitution. Such a relationship has to be determined and it would have been good if it was explained in the Constitution. Perhaps the fact that such a provision is lacking in the Constitution is that the procedure still demands some adjustment by the contracting parties to the ECHR. Perhaps the relationship between the EU and the ECHR, and their institutions, will be explained under those arrangements. The result of such an arrangement may be that the hierarchy between the courts, or lack of it, is explained. Although, I believe it will be difficult to construct a situation where none of the courts are the final arbitrator. And if that arbitrator becomes the ECtHR, some of the Community's superiority will be lost (even though in this case not to the Member States, which was were the conflict existed before). I would have preferred that the Union on their part had explained the relationship better in the Constitution.

8.5 The Constitution and the Future

The new article that for the first time introduce the principle of supremacy in the new Constitution for Europe could have made the question of the relationship between the Union/Community and the Member States unambiguous. However the wording of the article creates possible interpretations relied on by the Member States to claim a subordination of Community law in favour of the constitutions of the Member States. Even though the declaration made by the drafting Conference say that the article reflect the former case law of the ECJ, the Member States have previously chosen to ignore the Court's interpretation of the principle. Even if the implementation of the principle into the Constitution could be seen as an evidence of an acceptance in the Member States there are no other indications of the Member States giving in to complete superiority of Community law.

Precisely as the aim of drafting the Charter was to make the rights of the citizens more visible, the aim of producing a new Constitution for the EU was to make the Union more transparent for the citizens. Nonetheless many problems seem to remain even in the new

document. The principle of supremacy being one of the important foundations of Union/ Community law is not unaffected. Even though the principle surely has been accepted in most Member States the conditional approach have not entirely disappeared. The principle's connection with the human rights protection in the Member States and the Union continue to exist. The accession to the ECHR gives the problem furthermore another angle. I believe that the ' period of reflection' brought on by the negative referenda in France and the Netherlands gives the Union an excellent time to go over the difficulties arising around the principle once more. I believe that the accession to the ECHR is a good thing for the Union/Community but the relationship and effects needs to be clearly explained and understood.

In my opinion, the fact that the ECJ has not chosen to rely on the Charter of Fundamental rights in any of its judgments makes it of less value. Since the Court instead choose to use the rights in the ECHR the Charter becomes useless after an accession to the Convention. It may have been a good political statement of the Unions respect for fundamental rights but I believe that its existence no longer is of use. If the Union now instead is bound by another catalogue of rights that would surely be enough testimony of such respect. Additionally, the duplication of human rights documents only creates confusion. Therefore the Charter of Fundamental should be disposed of in the new Constitution for Europe

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