FUNDAMENTAL RIGHTS, THE EUROPEAN COURT OF JUSTICE, AND THE CONSTITUTIONALIZATION OF EUROPE

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In Europe rights are protected through a variety of systems—national, international, and supranational. This paper is about the role of the ECJ in this multi-level system. Part one focuses on the emergence of a rights jurisprudence in the ECJ’s case law and explains how this development was essential in securing the acceptance of the doctrine of supremacy, one of the Community’s central legal principles. Part two describes the expansion of the rights jurisprudence after 1989 and examines the questions of judicial capacity that this development raises. After examining the problems with judicial capacity, namely those related to the challenge of handling conflicts with the national courts, the difficulty in determining the proper standard used to give expression to the protected right, and the general uncertainty about the definition and scope of rights in EU law recognized on a case-by-case basis, the analysis shifts to consideration of reform. Part three examines the Charter of Fundamental Rights and asks how this proposed reform might affect both the work of the ECJ and Europe’s multi-level system for protecting fundamental rights.

Introduction

Under the law of the United Kingdom, the retirement age for men and women is 65 and 60 years, respectively. In February 2002, Sarah Margaret Richards applied to the Secretary of State for Work and Pensions for a retirement pension to be paid from February 28, 2002, the date on which she turned 60. In March 2002, the application was refused on the ground that her birth certificate registered her as male and the retirement age for men in the United Kingdom is 65. Ms. Richards brought an appeal to the Social Security Appeal Tribunal, arguing that in 2001 she underwent gender reassignment surgery and, therefore, was eligible for a retirement pension at age 60. When the Appeal Tribunal dismissed her case, Ms. Richards appealed to the Social Security Commissioner. She claimed that the refusal to pay her a retirement pension at the age of 60 violated Article 8 of the European Convention on Human Rights and Directive 79/7 which
implemented the Community law principle of equal treatment for men and women in matters of social security. In September 2004, the Social Security Commissioner referred the following question to the European Court of Justice (herein ECJ) for a preliminary ruling under Article 234 EC: “Does Directive 79/7 prohibit the refusal of a retirement pension to a male-to-female transsexual until she reaches the age of 65 and who would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law?”

In April 2006 the ECJ ruled that “the right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure.” The Court went on to explain that “Article 4(1) of Directive 79/7 must be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.”

The ECJ’s ruling in Sarah Margaret Richards v. Secretary of State for Work and Pensions (2006)\(^1\) raises many questions about the protection of rights in Europe. The most obvious question concerns the legitimacy of the ECJ’s rights jurisdiction. On what authority may the ECJ recognize fundamental rights and use them to strike down national laws or policies to the contrary? The Treaty Establishing the European Economic Community (1957) (herein Treaty of Rome) lacked an express bill of rights and in 1959 the ECJ ruled that the protection of fundamental rights was not part of its jurisdiction.\(^2\) Over the course of nearly a half century, the ECJ has recognized a fairly substantial list of fundamental rights, including most recently the right of transsexuals to obtain pensions free from discrimination.\(^3\) Two commentators have called it “the progressive construction of a charter of rights for the Community.”\(^4\) Since fundamental rights as such were not matters originally within the Court’s competence, questions about the legitimacy of this development, engineered by the ECJ, naturally arise.

Another question concerns the capacity of the ECJ to develop a coherent and effective system of rights protection for all of Europe. The European Union (herein EU)
today is a diverse, supranational polity of 25 Member States and over 457 million people. Despite the EU’s motto, *in varietate concordia*, there are still questions whether the ECJ can possibly succeed in finding a common standard of fundamental rights when the political and legal systems and the cultural traditions of the Member States differ as much as they do. Rights are often closely related to cultural values. The rights recognized and enforced by the ECJ may not always reflect the values of citizens in all parts of Europe. The potential for a clash of values has increased dramatically since 2004 when ten countries from Central and Eastern Europe joined the EU. Clearly the challenges of an expanded EU are not simply economic, such as the tension between fast-growth, low-wage, low-tax, low-unemployment economies and slow-growth, high-wage, high-tax, and high-unemployment economies. There is also the challenge of declaring and ultimately enforcing rights, such as equal rights for transsexuals, against the objections of the sovereign institutions and actors of Member States.

The third question that this paper addresses is the likely effect the Charter of Fundamental Rights (herein Charter) will have if and when the proposed Treaty Establishing a Constitution for Europe (herein Constitution) is ratified. Will the Charter, included as Part II of the proposed Constitution, rectify the problems of the ECJ’s capacity to protect fundamental rights in the European Union? To answer this question the nature and function of Europe’s unique multi-level constitutionalism, which produces parallel and sometimes overlapping systems of rights protection, will need to be explored. To what degree will the new Constitution and the Charter alter the division of powers and competences between the national and supranational levels? Is the proposed Constitution an integral step toward a European super-state or merely the codification of the trends toward greater political integration since the Treaty on European Union (1994)?

**Part I. Emergence of a Rights Jurisprudence**

The development of fundamental rights in the law of the European Community/European Union has progressed through four distinct stages. The first, spanning from the founding in 1957\(^5\) to 1969, was a time when the ECJ ruled consistently that fundamental rights were not part of its jurisdiction. The second stage began in 1969 with the first recognition in ECJ case law that fundamental rights could not be easily separated from the economic freedoms at the core of the Treaty of Rome. In a series of cases during the 1970s and 1980s the ECJ ruled that fundamental rights were an integral part of Community law and could be used in the review of Community measures, such as Commission decisions, regulations and directives. The third stage came in 1989 when the ECJ ruled for the first time that these newly recognize rights extended to the acts of Member States to the extent that their acts came within the field of Community law. Featured in the third stage were the expansion of the rights recognized and applied as general principles of EC, and later, EU law, and the tension this

\(^5\) The Treaty Establishing the European Economic Community (EEC) was signed in Rome on March 25, 1957.
development caused between courts at the national and supranational levels. The fourth stage is thought to have begun in 1999, the year the EU committed to drafting a Charter of Fundamental Rights. Featured in this latest stage in the development of fundamental rights in the law of the EU are the questions about the Charter’s legal status and its potential effect on the ECJ’s jurisdiction if, and when, it is ratified.

The Treaty of Rome lacked what might be called a traditional bill of rights. Nevertheless, it contained several fundamental rights, such as the right to equal pay for men and women (Article 141) and the right to be free from discrimination based on nationality (Article 12). In 1957, at the time of the founding of the Community, rights in Europe were protected at the national level by the Member States’ constitutions, bills of rights, and court systems, and at the international level by membership in the Council of Europe and acceptance of the mechanism set up by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (herein ECHR). These arrangements were believed to be sufficient. Later, it became clear that the ECJ’s responsibility in making sure that Community law was interpreted and implemented in conformity with the founding treaties of the European Community could not be carried out by ignoring fundamental rights.

The ECJ at first denied, but later came to recognized fundamental rights as “general principles of Community law.” In Freidrich Stork v. High Authority of the European Coal and Steel Community (1959) the ECJ decided that it could not rule on the compatibility of Community measures with fundamental rights. Stork, a Germany citizen, argued for annulment of a decision of the High Authority, an institution established by the EEC Treaty, on the grounds that the decision violated the fundamental right to economic freedom protected by Articles 2 and 12 of the German Basic Law. In rejecting that argument, the ECJ explained: “Under Article 8 of the Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States.” Ten years later, in Stauder v. City of Ulm, Sozialamt (1969), the ECJ made its first, albeit vague, reference to fundamental rights in Community law. The question was whether the Commission’s measure to stimulate the sale of surplus butter by authorizing Member States to make butter available to the needy at reduced prices violated the right to privacy. Strauder alleged his right to privacy, protected by the German Basic Law, was breach by the requirement that he had to disclose his name on the coupons needed to purchase the butter at reduced rates from retailers. In ruling that the challenged measure in this case could and should have been interpreted so as not to require an action that might compromise fundamental rights, the ECJ indicated its willingness to review Community measures for compatibility with fundamental rights:

It follows that the provision in question must be interpreted as not requiring—although it does not prohibit—the identification of beneficiaries by name… Interpreted in this way 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.

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6 Case 1/58 [1959] ECR 17.
7 Case 29/69 [1969] ECR 419.
The following year the ECJ in Internationale Handelsgesellschaft Mbh v. Einfuhr- und Vorratsstelle Fur Getreide und Futtermittel (1970)\(^8\) referred less obliquely to its role in judging the validity of Community measures on rights grounds:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by the rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore, the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

However, 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.

Several years later, the Community measure requiring national coal producers to sell only to large wholesalers was challenged on fundamental rights grounds by a small wholesaler named Nold. The measure was adopted in a time of economic recession with the aim of achieving greater efficiency in the production and distribution of coal. Though the measure was upheld against Nold’s claims that its fundamental rights to property and freedom to engage in economic activity were being denied, the ECJ explained more fully the sources of the rights now understood to be part of the general principles of Community law:

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, 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.\(^9\)

The sources for the fundamental rights comprising the “general principles of Community law” were the constitutional traditions of Member States and the ECHR. The first reference to the ECHR in the database of the ECJ’s case law appeared in Nold (1974). Once the ECHR was recognized as a source for fundamental rights in Community law, references to the European human rights treaty and the ECtHR’s case law became more frequent. Figure 1 (See Appendices) shows the number of ECJ cases

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with explicit references to the ECHR over time. The ECHR was cited by the ECJ nearly twice as many times in the past 10 years (1996-2005) than it had been in the first 22 years (1974-1995). Thus, the ECJ has come to rely increasingly on the ECHR when giving expression to fundamental rights in Community law.

The previous discussion described when and how the ECJ began to develop its fundamental rights jurisprudence. The question why is subject of some academic debate, dividing those scholars who favor the “strategic power” explanation and those who favor its rival, the “neo-functionalist” explanation. Coppel and O’Neill\textsuperscript{10} argue that the ECJ extended its jurisdiction to include rights in order to expand the reach of the Community over more and more activities of the Member States. Weiler,\textsuperscript{11} Stone Sweet,\textsuperscript{12} and the authors of this paper take the position that the ECJ’s new rights jurisdiction was but the natural extension of the doctrine of supremacy, the fundamental organizing principle of Community and later EU law.

That is why we believe that the view expressed in Stork (1959) (the ECJ was not competent to consider the traditions of fundamental rights of Member States when applying Community law) had to be changed. After the Court’s decision in Costa v. Ente Nazionale per l’Energia Elettrica (ENEL) (1964),\textsuperscript{13} national courts began to see the danger posed by EC supremacy without fundamental rights. To allay these concerns, the ECJ had to develop this new competence.

In Costa v. ENEL (1964), the ECJ established the doctrine of supremacy of Community law over conflicting laws of Member States:

\begin{quote}
The precedence of Community law is confirmed by Article 189 [now 249], whereby a regulation “shall be binding” and “directly applicable in all Member States.” This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.
\end{quote}

Constitutional courts in Italy and Germany were the first to question the supremacy of Community law over deeply entrenched rights in their national constitutions.\textsuperscript{14} In getting the ECJ to reconcile this problem, the constitutional courts in these Member States forced the ECJ to develop a rights jurisprudence. If the doctrine of supremacy was going to endure, then Community law had to safeguard the fundamental rights traditions of the Member States. In the words of one commentator, “Without supremacy, the ECJ had decided, the common market was doomed. And without a judicially enforceable charter of rights, national courts had decided, the supremacy doctrine was doomed.”\textsuperscript{15}

\textsuperscript{12} Alec Stone Sweet, \textit{The Judicial Construction of Europe} (Oxford 2004).
\textsuperscript{13} Case 6/64 [1964] ECR 585.
\textsuperscript{14} \textit{Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel (Solang e I) 37 BVergFGE 271 (1974); Frontini v. Ministero delle Finanze, Case 183, [1974] Il Foro It. 314.}
In Solange I (1974), the German Constitutional Court ruled that “as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights...of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution,” it would decide for itself whether Community law would be supreme. The ECJ’s newfound respect for fundamental rights in the 1970s—Nold v. Commission (1974)\(^\text{16}\) and Hauer v. Land Rheinland-Pfalz (1979)\(^\text{17}\)—is, therefore, best understood as a response to this challenge. Its concerns allayed, the German Constitutional Court in Solange II (1986)\(^\text{18}\) accepted the supremacy of Community law “so long as the EC, and in particular the ECJ, generally ensures an effective protection of fundamental rights.” By responding to the concerns of Member States, the ECJ transformed the Community from its beginnings as essentially an economic unit, committed to advancing the four trade-related freedoms (free movement of goods, free movement of workers, free movement of capital, and freedom to provide services) into a more integrated political unit committed to principles of liberty, democracy, and respect for fundamental rights.

In the 1970s and 1980s, the ECJ was careful to restrict its emerging fundamental rights principles to review of Community measures. Though it was restrained in this respect, the ECJ had moved aggressively to enforce the fundamental right to equality and equal treatment. The ECJ’s rulings on equal pay and gender equality\(^\text{19}\) stand out as notable legal developments during this early stage when the ECJ was just beginning to recognize fundamental rights as general principles of Community law.

This court-engineered development was approved in 1977 in a Joint Declaration by the European Parliament, the Council, and the Commission. What is interesting from a comparative constitutional law perspective is that there was not much controversy over the introduction of ECJ review of Community measures for compliance with fundamental rights principles. In the United States, for example, judicial review of the acts of the coordinate branches of the national government (horizontal review) still manages to excite considerable controversy.\(^\text{20}\) As will be explained in the next part, the introduction of vertical review in Community law, that is, ECJ review of Member State measures implementing Community law for compliance with principles of fundamental rights, has caused much more controversy in Europe than has the introduction of vertical review in

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\(^\text{17}\) Case 44/79 [1979] ECR 3727.

\(^\text{18}\) In re Application Wunsche Handelsgesellschaft (Solange II), 73 BVerfGE 339 (1986).

\(^\text{19}\) See, for example, Deffrene v. Sabena, Case 43/75 [1976] 1 ECR 455 (equal pay for women and men/comparable worth standard); Commission v. United Kingdom, Case 61/81 [1982] ECR 2601 (need for an authority within Member States to decide whether work has same value as other work); and Bilka-Kaufhaus GmbH v. Von Hartz, Case 170/84 [1986] ECR 1607 (shifts burden of proof to employers in cases of indirect discrimination against women in employment). See also Ingeborg Heide, “Supranational Action Against Sex Discrimination: Equal Pay and Equal Treatment in the European Union,” 138 International Labour Review 381 (1999).

\(^\text{20}\) See, for example, Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford 2004). Kramer casts doubt on the idea that courts have a monopoly on constitutional interpretation, arguing that over the years judicial review supplanted the founding generation’s idea that the “people” would play a vital role.
American law. With its ruling in Martin v. Hunter’s Lessee (1816), the U.S. Supreme Court asserted its authority to review state law matters that presented federal constitutional questions and the power has been widely accepted. The difference cannot be explained solely on the basis of the U.S. Constitution’s supremacy clause. The doctrine of supremacy, as explained supra, is also recognized in European law. The fact that the issue of vertical review still manages to rankle in Europe suggests that center-periphery relations in Europe are different. In comparison with the United States, the European legal system is much less hierarchical or, in the words of one commentator, a kind of “inverse hierarchy”:

The Member States remain sovereign, in the international law sense of the term, and they ultimately are free to leave the Union for any reason. The Union, for its part, does not have the competence to decide freely on its own competences (Kompetenz-Kompetenz) and thus is denied sovereignty…. Thus, the political authority of the Union is best described as a union of States, where sovereignty and thus the ultimate responsibility for the Union’s course of action rests with the constituent Member States.

Part II. Developing a More Expansive Rights Jurisprudence

The ECJ introduced fundamental rights to Community law gradually, first by applying fundamental rights norms horizontally to Community law measures that would have direct effect in Member States and then by extending fundamental rights norms vertically to review Member State action within the sphere of Community law. The critical year for this development was 1989. In Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft (1989) the ECJ declared for the first time that actions of Member States would be reviewed for conformity with fundamental rights.

Wachauf was a tenant dairy farmer in Germany who brought suit against the Federal Office for Food and Forestry (herein Federal Office) in the Verwaltungsgericht Frankfurt am Main. When his landlord decided not to renew his lease, Wachauf decided he would exercise his rights to compensation which an EC regulation provided to dairy farmers who ceased the production of milk. The Federal Office responsible for implementing this regulation denied Wachauf’s claim because he had not obtained the written consent of the landowner. The law in Germany, passed pursuant to this EC regulation, specified that if the individual requesting compensation under this scheme is a

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22 14 U.S. 304 (1816).
23 “This Constitution, and the Laws of the United States which be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,…” U.S. Constitution (1789), Article VI, section 2.
tenant farmer, the application must provide evidence of the landlord’s written consent. Because the landlord had withdrawn his consent, the Federal Office denied Wachauf’s claim. The Verwaltungsgericht stayed the proceedings, and referred two questions to the ECJ for a preliminary ruling. In its ruling the ECJ expanded its protection of fundamental rights in Community law to include review of Member State action within the scope of EC law:

The Court has consistently held, in particular in its judgment...in...Hauer v. Land Rheinland Pfalz (1979), that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court....

Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. 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.

Instead of overruling the German rule requiring the landlord’s consent in these cases, the ECJ instructed the Verwaltungsgericht to read the act so as not to offend Wachauf’s fundamental rights to the “fruits of his labour and of his investments in the tenanted holding.” The Verwaltungsgericht complied, and awarded Wachauf compensation and costs.

The ECJ expanded the scope of its decision in Wachauf to include review of Member State measures which are only indirectly related to Community law. Elliniki Radiophonia Tileorassi (ERT), the radio and television broadcasting company that had received from the Greek government the exclusive right to broadcast television programs, sued Dimotike Etairia Plirofissississ (DEP) and the Mayor of Thessaloniki for setting up a rival television station. Realizing that the case raised many questions of Community law, the national court stayed the proceedings and sought a preliminary ruling from the ECJ. In Elliniki Radiophonia Tileorassi v. Dimotike Etairia Plirofissississ (1991), the ECJ ruled that “Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest.” The ruling directed the national court to focus on “the manner in which the monopoly was organized” and on the actions taken to justify the exclusive right. The ECJ reasoned that where a Member State seeks to derogate from the freedom to provide services, in this case denying a rival television station’s right to broadcast, its justifications for doing so must be compatible with Community-based principles of fundamental rights the same way actions directly related to Community law must be:

[W]here a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights.

26 Case C-260/89 [1991].
By 2000, the ECJ had extended its review on fundamental rights grounds of the following measures: Community measures, including Commission decisions, regulations, and directives; national measures taken in pursuance of EU law or in implementing a directive; and the national measures, as in the ERT case, that are only indirectly related to Community law. In extending its reach, the ECJ was careful not to displace the fundamental rights jurisprudence of Member States or the ECtHR. The Community’s fundamental rights system co-exists alongside the national and international systems when Member States are not acting within the sphere of Community law. But when Member States are acting within the sphere of Community law, the three systems overlap and sometimes there is tension between the national and supranational levels. The ECJ has tried to manage this conflict by adopting a cooperative or dialogic approach. In the words of two commentators, the interplay between the ECJ and the national courts over this issue of fundamental rights had the positive effect of deepening legal integration:

> Despite being conflictual in origin, the dialogue on fundamental rights has served to deepen legal integration, to widen the scope of EC constitutional politics, and to strengthen the supranational aspects of the Community.  

The expansion of the ECJ’s rights jurisprudence to include review of Member State action soon raised some questions of judicial capacity. The first, and perhaps most urgent, issue involved the challenge of handling conflicts with the national courts. After Wachauf and ERT, it was not clear which level—national constitutional court or ECJ—had the final decision in disputes over whose fundamental rights law should apply. The second issue stemmed from the difficulty in determining the proper standard to be used to give expression to a protected right. The parallel and, since Wachauf and ERT, sometimes overlapping systems of rights protection result in more than one standard for the protection of the same fundamental right. It is entirely possible in Europe’s multi-level system to have the same right apply differently because the standard established by the constitutional courts of Member States in applying Community law may be different than the standard established by the ECJ or the ECtHR. The lack of a coherent standard for what is supposed to be a fundamental right is closely related to the third issue—the general uncertainty about the definition and scope of what are essentially unwritten rights incorporated into EU law at the discretion of the ECJ on a case-by-case basis.

A. Who has the final decision in cases raising conflicts over fundamental rights?

Decisions of the constitutional courts of Germany and Italy suggest that there are still some questions about who will be the final arbiter of rights. In Brunner and Others v. The European Union Treaty (1993),\(^\text{28}\) the Bundesverfassungsgericht may have accepted the primacy of Community law when it upheld the constitutionality of the German law ratifying the Treaty on European Union, but it reserved for itself the competence to ensure that the fundamental rights in the Basic Law would not be


\(^{28}\) (The Maastricht Treaty Case) 89 BverfGE 155 (1993).
diminished. The Bundesverfassungsgericht made clear that EU measures, as applied in Germany, would be scrutinized for compliance with national law standards:

Acts of the particular public power of a supranational organization which is separate from the State power of the member states may also affect those persons protected by the basic rights in Germany. Such acts therefore affect the guarantees provided under the Basic Law, and the duties of the Federal Constitutional Court, which include the protection of basic rights in Germany, and not only in respect of German governmental institutions. However, the Federal Constitutional Court exercises its jurisdiction regarding the applicability of derivative Community law in Germany in a “cooperative relationship” with the ECJ.  

The Italian Constitutional Court came to the same conclusion on the question of who has the final decision on matters of fundamental rights. In both Frontini (1974) and later in Granital (1984), the Corte Costiuzionale conditioned its acceptance of Community law with the following proviso: the protection of fundamental rights guaranteed by the Italian Constitution is ultimately its responsibility. According to one commentator, decisions by national courts showing the same “defiance” can also be found in Denmark, Belgium, and Spain.

B. Which standard applies?

The parallel systems of rights protection sometimes results in more than one standard for the protection of fundamental rights—the standard established by the constitutional courts of Member States in applying Community law, the standard established by the ECtHR, and the standard established by the ECJ. With its divided competences, Europe’s multi-level system of protecting rights creates the potential for a constitutional crisis. What if there is a conflict between the ECJ and the ECtHR over the interpretation and effect to be given a Convention right? There have been instances when an interpretation by the ECJ on the meaning of a right inspired by the ECHR is subsequently contradicted by an interpretation of that same right by the ECtHR. The national constitutional court may be acting contrary to the ECHR if it follows the ECJ’s interpretation and may be acting contrary to Community law if it follows the interpretation of the ECtHR.

The problem with standards can be seen in all the litigation emerging from the Irish “Right to Life” case called Society for the Protection of Unborn Children (SPUC) v. Grogan (1991). The SPUC sought to enjoin Grogan and other student organization officers from distributing information about clinics in countries where abortion is legal, such as the United Kingdom. Grogan and the other defendants argued that the Community law principle of free movement of services protected their right to publish and disseminate literature about the availability of abortion services in the United Kingdom. Once the Community law issue was raised, the Irish High Court asked the ECJ for a preliminary ruling. In the meantime, SPUC appealed to the Irish Supreme Court, arguing that the lower court’s refusal to grant immediate relief was a violation of the provision in the Irish Constitution which protects the right to life (Article 40).

Without waiting for the ECJ’s ruling, the Irish Supreme Court issued the injunction sought by the SPUC based on its previous decision that prohibited physicians and family planning counselors from discussing abortion options with women. In its preliminary ruling, the ECJ decided that abortion was a “service” within the meaning of the Community law principle freedom to provide services and that the conflict between the right to life in Irish law would have to be considered in light of the fundamental rights within the “general principles of Community law” that were implicated in this case. In balancing freedom to provide services with right to life in Irish law, the ECJ came down on the side of the latter:

Although the national court’s questions refer to Community law in general, the Court takes the view that its attention should be focused on the provisions of Article 59 of the EEC Treaty, which deal with the freedom to provide services, and the argument concerning human rights.…. As regards, first, the provisions of Article 59 of the Treaty, which prohibit any restriction on the freedom to supply services, it is apparent from the facts of the case that the link between the activity of the students associations of which Mr Grogan and the other defendants are officers and medical terminations of pregnancies carried out in the clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 of the Treaty.

Although the ECJ had managed to avoid a decision on whether the prohibition in Irish law on the dissemination of information about abortion services violated freedom of expression, the issue soon came before the ECtHR. In Open Door Counseling and Dublin Well Women v. Ireland (1992), the ECtHR ruled that the Irish ban violated Article 10 of the ECHR: “[T]he Court concludes that the restraint imposed on the applicant from receiving or imparting information was disproportionate to the aims pursued.”

The Grogan case resulted in three different interpretations of the right to free expression. At the national level, the Irish Supreme Court ruled that the right to free expression had to give way to competing constitutional value—the right to life. At the
international level, the ECtHR applied its test of proportionality and found that the ban on speech could not be saved by any “pressing social needs.” And at the supranational level, the ECJ ruled that the free speech issue raised by defendants in this case was outside of the scope of Community law: “[T]he information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics in another Member State.”

C. How does the ECJ find and determine the scope of unwritten rights?

Since its decision in Stauder (1969), which recognized that fundamental human rights were enshrined in the general principles of Community law, the ECJ has developed a fairly impressive catalogue of rights (See footnote 3, supra). Though there were some guidelines, such as the ECHR, which the ECJ said had “special status,” and the constitutions of the Member States, which the ECJ declared would be an important source of fundamental rights to be protected, the ECJ has had considerable discretion both in declaring these unwritten rights and in determining the scope of their application. Thus, another problem with this development has been the general uncertainly about the nature and scope of the rights recognized on a case-by-case basis.

The need for clearly understood limits on Community power becomes more pressing as the scope of Community power increases. As it stands now, the ECJ’s power to interpret the scope of EU law determines whether the Community’s fundamental rights will apply. As we explained supra, the ECJ’s decision in the Irish Right to Life case turned on its belief that the defendants’ speech was in context beyond the reach of EU law. If the fundamental rights recognized as general principles of Community law are to be real checks on the exercise of power, then the field of application of Community law cannot be decided on a case-by-case basis.

Part III. Rights Under the Proposed Constitution for Europe

The approach of the new millennium brought with it a realization that the EU lacked a coherent system for the protection of fundamental rights. The desire for greater certainty and clarity led to the call to draft a “charter of rights” for the EU.

In December 2000, the European Council met in Nice and signed the draft Charter of Fundamental Rights for the European Union (herein Charter). The Charter included a catalog of fundamental rights and its purpose was to make clear that these rights were legally binding not only on the institutions, agencies, and bodies of the European Union, but also on the Member States. In October 2004, the heads of state of the 25 Member States and the three candidate countries signed the treaty establishing a Constitution for Europe. This new treaty incorporated the Charter in Part II and, until June 2005, had been going through the formal ratification process. Prior to France’s “no” vote on May 29, 2005, fourteen countries had voted to ratify the new Constitutional Treaty. But after the no votes in France and in the Netherlands (June 1, 2005), the

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37 Opinion 2/94 on the Accession by the Community to the ECHR.
European Council called for a “period of reflection” and suspended the votes that had been scheduled in the remaining countries. Therefore, at the time of writing, this latest step in what has been a gradual process of making fundamental rights an integral part of supranational governance in Europe is now on hold.

None of the treaty ratifications had gone very smoothly. Assuming that the fate of the Treaty Establishing a Constitution for Europe will eventually be the same as the fate, for example, of the Maastricht Treaty, then it is not too early to assess the likely effect the new Treaty will have on both the work of the ECJ and the European systems of rights protection.

In order to understand more fully the effect the Charter will likely have, it is necessary to examine the context of fundamental rights protection in the EU. This context includes the three parallel and sometimes overlapping systems of rights protection discussed previously. One reason for proposing the Charter was to commit “[t]he peoples of Europe” to a set of “common values.” The proposed text does not establish any new rights, but brings together rights that have been proclaimed in a variety of human rights documents and have been recognized judicially by the constitutional courts of Member States, the ECtHR, and the ECJ. This point is even emphasized in the Charter’s preamble:

This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

The Charter is organized into seven separate chapters, each including several articles. The following table lists the rights enumerated in the Charter, leaving out the detailed provisions for each one:

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Chapter 1—Dignity:

Articles 1-5: Human Dignity, Right to Life, Right to the Integrity of the Person, Prohibition of Torture and Inhuman or Degrading Treatment or Punishment; Prohibition of Slavery and Forced Labour

Chapter 2— Freedoms:


Chapter 3— Equality:

Chapter 4—Solidarity:


Chapter 5—Citizen’s Rights:

Articles 39-46: Right to Vote and to Stand as a Candidate at Elections to the European Parliament, Right to Vote and to Stand as a Candidate at Municipal Elections, Right to Good Administration, Right of Access to Documents, Ombudsman, Right to Petition, Freedom of Movement and of Residence, Diplomatic and Consular Protection

Chapter 6—Justice:

Articles 47-50: Right to an Effective Remedy and to a Fair Trial, Presumption of Innocence and Right of Defense, Principles of Legality and Proportionality of Criminal Offences and Penalties, Right not to be Tried or Punished Twice in Criminal Proceedings for the Same Criminal Offence

Chapter 7—General Provisions

Articles 51-54: Scope, Scope of Guaranteed Rights, Level of Protection, Prohibition of Abuse of Rights

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The Charter sets out in one document the fundamental rights binding on the actions of the European Union. Though the legal status of the Charter is at present uncertain (the Council decided not to make it binding), it has already been used to help decide cases involving fundamental rights before the ECJ. The first reference to the Charter was in an Advocate-General’s opinion. The first reference to the Charter in the ECJ was in an Order of the President of the Court in Commission v. Technische Glaswerke Ilmenau GmbH (2002). Over the past five years, there have been 73 references to the Charter. Figure 2 (See Appendices) shows the number of Charter references in the EU Law database over the past five years. Though the Charter will not have full legal effect until it is fully ratified, it already can be seen as influencing the development of EU law.

References to the Charter appeared first in the opinions of the Advocate-General offered to the ECJ, and since 2002 have appeared in the opinions of the Court. It has also begun to affect the European Commission. On April 27, 2005, the Commission issued its policy on the effect of the Charter of Fundamental Rights on matters related to

39 Case C-232/02 (2002).
Community law. “The main aim,” the Commission explained in its document titled Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals,\(^{40}\) “…is to allow Commission services to check all Commission legislative proposals systematically and rigorously to ensure they respect all the fundamental rights concerned in the course of normal decision-making procedures.” The Charter’s reception by the EU legal and political community has generally been positive.

**Evaluation of the Potential Promise and Problems**

The Charter might help to remedy the three problems described at the end of Part II—Developing a More Expansive Rights Jurisprudence. The jurisdictional confusion that has sometimes resulted in conflicting interpretations of fundamental rights is likely to be lessened. A clearer understanding of the rights that would then be explicitly provided for in the text would help to constrain the ECJ’s discretion in determining whether the right may be enforced against EU measures. And, if Article I-7 of the proposed Constitution providing for EU accession to the ECHR is ratified, the uncertainty over whether the ECJ’s or ECtHR’s standard ought to apply will be dramatically reduced.\(^{41}\) But since multi-level constitutionalism will remain the distinctive feature even after the Constitution for Europe is ratified, there will still be the potential for conflicts between the standards used by the constitutional courts of Member States and the ECJ.

The Charter presents considerable promise in terms of enhanced visibility and coherence for the rights to be protected in EU law, but there are two potential problems worth considering. The first concerns the nature of the rights enumerated in the Charter. Though most are the typical, first-generation political and civil rights that one expects to find in a listing of fundamental rights, there are some that are more aspirational and perhaps less amendable to judicial enforcement. Included in this list are a number of socio-economic rights, such as “the Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness,...” (Article 34.1) and “the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources....” (Article 34.3)

The second problem may result from the fact that the principles of subsidiarity and proportionality have been codified in the Charter. By entrenching these two principles in Chapter VII, Articles 51 and 52,\(^{42}\) the ECJ may find it difficult to adopt

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\(^{40}\) Commission of the European Communities, COM (2005) 172 Final (Brussels, April 27, 2005).

\(^{41}\) Article 52.3 of the Charter deals explicitly with this issue: “In 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.”

\(^{42}\) Article 51.1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
alternative approaches to rights protection. The general criticism of proportionality review is not with the first part of the test which requires that limitations on the exercise of Charter rights be provided by law and respect the essence of those rights. The problem is with the second part, which requires the ECJ to balance the public’s interest in the limitation against the individual’s interest in the right. The problem with balancing is that the scales are often tipped in favor of the public’s interest in maintaining the limitation on the right. Embedding the proportionality test in the Charter may have the unintended consequence of preventing the ECJ from trying to enforce rights more robustly.

The Charter is likely to make some improvements in the coherence and effectiveness of the European rights system. It is also likely to expand the rights jurisdiction of the ECJ even further, thereby helping to complete the ECJ’s transformation into Europe’s preeminent constitutional court.

Conclusion

This paper examined the challenges of protecting fundamental rights in a supranational polity. Thirty years after the ECJ first introduced fundamental rights into Community law, there are still many important questions about the nature of rights protection in Europe’s multi-level system of constitutionalism.

One of the first questions this paper asked was whether the emergence of a rights-based jurisprudence in ECJ case law was legitimate. The legitimacy of the ECJ’s development of a fundamental rights jurisprudence rests on two foundations. First, it is clear that European legal integration would have stopped without the subsequent incorporation of fundamental rights principles into Community law. Therefore, the EU’s fundamental rights jurisprudence is legitimate to the extent that without the incorporation of human rights principles into Community law in the 1970s, there would not have been support for deeper economic and political integration in the Single European Act (1987) and the Maastricht Treaty (1993). Second, the case law developments recognizing the place of fundamental rights in EU law and the role of the ECJ in determining the scope and application of these rights had been ratified by the European Parliament, the Council, and the Commission in the 1977 Joint Declaration and later by explicit references in the Treaty on European Union (1994) and the Treaty of Amsterdam (1999). The national referenda processes that put these treaties into effect are perhaps the best evidence of the legitimacy of this development.

As the EC has evolved from an essentially economic Community of six Member States in 1957 into a closer political Union of 25 Member States (and more expected to

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Article 52.1. Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.
Fundamental rights played a key role in the processes of political integration and what has been called the “constitutionalization of Europe.” The first important step in the process of the constitutionalization of Europe was the establishment by the ECJ of the principle of supremacy of Community law (Costa v. ENEL). The next step was when the ECJ developed a fundamental rights jurisprudence in defense of the challenges by Member States to the doctrine of supremacy. After establishing horizontal review of Community law and action based on fundamental right principles (Nold), the ECJ established vertical review of Member State law and action designed to carry out Community law (Wachauf). The drafting of the Charter follows logically from the entrenchment of the idea that the ECJ would review both Community action and Member State action on behalf of Community law for conformity with principles of fundamental rights.

Public support for the proposed Constitution has been widespread and relatively stable since 2001. Survey data by Eurobarometer found support throughout Europe to be on average nearly 64 percent (63.88) each year since 2001. (See Figure 3. Appendices). Despite the results of the French and Dutch referenda in spring 2005, support for the idea of a constitution is still high. In the latest Eurobarometer survey (December 2005), 63 percent of EU citizens reported support for the proposed Constitution. Given this support, we might safely assume that the Constitution will eventually be ratified.

There is good reason to believe that once the Constitution (and with it the Charter) is ratified, it will increase the role of the ECJ and further advance the “constitutionalization of Europe.” We agree with one commentator who has written: “[t]he incrementally developed role of the ECJ in relation to the protection of individual rights could be considerably enhanced by this development…” By continuing to

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43 Alec Stone Sweet and Thomas Brunell define the term in the following way: “The constitutionalization of the EC refers to the process by which the Rome Treaty evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons and entities, public and private, within the EC territory. The phrase thus captures the transformation of an intergovernmental organization governed by international law into a multi-tiered system of governance founded on higher-law constitutionalism.” The Judicial Construction of Europe (Oxford 2004), p. 65.

develop its fundamental rights jurisprudence under the Charter, the ECJ will complete its transformation into Europe’s preeminent constitutional court.

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**APPENDICES**

Figure 1. References to the European Convention on Human Rights in EU Law

Figure 2. References to the Charter of Fundamental Rights in EU Law

Figure 3. Support for the Proposed Treaty Establishing a Constitution for Europe

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