

HUMAN RIGHTS IN THE EUROPEAN UNION. CONFLICT BETWEEN THE LUXEMBOURG AND STRASBOURG COURTS REGARDING INTERPRETATION OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

LORENA RINCÓN - EIZAGA**

ABSTRACT

This paper aims to analyze the scope of overlapping jurisdiction and divergent interpretations between the European Court of Justice (ECJ or Luxembourg Court) and the European Court of Human Rights (ECtHR or Strasbourg Court) on the right to respect for private and family life as enshrined in Article 8 of the European Convention on Human Rights. First, this research focuses on the origins of the ECJ's fundamental rights case

*Fecha de recepción: 8 de febrero de 2008
Fecha de aceptación: 2 de abril de 2008*

* Este artículo es un avance del Proyecto de Investigación “La protección de los derechos humanos en la Unión Europea”, registrado ante el Consejo de Desarrollo Científico y Humanístico de la Universidad del Zulia (CONDES), del cual la autora es Investigadora Responsable. El mencionado Proyecto se enmarca en la Línea de investigación desarrollada por la autora denominada “Derechos humanos en los procesos de integración”, adscrita a la Sección de Integración Latinoamericana del Instituto de Filosofía del Derecho de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia (Maracaibo, Venezuela).

** Profesora de Derecho Internacional Público y Jefa de la Sección de Integración Latinoamericana. Abogada (Summa Cum Laude), Magister Scientiarum en Derecho Público y Doctora en Derecho egresada de la Universidad del Zulia. Michigan Grotius Fellow y Master of Laws (LL.M.) de la Universidad de Michigan (Ann Arbor, Estados Unidos). Miembro del Programa de Promoción al Investigador del Ministerio de Ciencia y Tecnología de Venezuela. Dirección postal: Avenida Guajira. Núcleo Humanístico. Instituto de Filosofía del Derecho de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia (Maracaibo, Venezuela). Contacto: Irinconeg@gmail.com

law and the further developments introduced by the Maastricht and Amsterdam treaties. Then, this paper studies the conflicts between the Luxembourg and Strasbourg Courts case law regarding the interpretation of the right to private and family life as applicable to business premises and legal persons. Finally, this research analyzes whether the potentially binding effect of the Charter of Fundamental Rights and the future European Union's accession to the ECHR, would contribute to achieve the necessary coherence between the European Convention and Community law. It is concluded that accession to the ECHR is necessary for achieving that goal, since it would contribute to avoid different interpretations of the European Convention's rights by the ECJ and to enlarge its jurisdiction in every case where those rights are affected by Community measures.

Key words author: Human rights; European Court of Human Rights; European Court of Justice; Article 8 of the European Convention on Human Rights.

Key words plus: Civil Rights; International Courts; Sanctions (International Law).

DERECHOS HUMANOS EN LA UNIÓN
EUROPEA. CONFLICTO ENTRE LAS CORTES
DE LUXEMBURGO Y ESTRASBURGO EN LA
INTERPRETACIÓN DEL ARTÍCULO 8
DE LA CONVENCIÓN EUROPEA
SOBRE DERECHOS HUMANOS

RESUMEN

Este trabajo pretende analizar las interpretaciones divergentes de la Corte Europea de Derechos Humanos (o Corte de Estrasburgo) y la Corte Europea de Justicia (o Corte de Luxemburgo) en torno al derecho a la vida privada y familiar consagrado en el Artículo 8

de la Convención Europea sobre Derechos Humanos. En primer lugar, esta investigación aborda los orígenes de la jurisprudencia de la Corte Europea de Justicia en materia de derechos fundamentales, y los posteriores desarrollos introducidos por los Tratados de Maastricht y de Ámsterdam. Seguidamente, el trabajo estudia los conflictos entre la jurisprudencia de Corte de Luxemburgo y la de Estrasburgo en materia de interpretación del derecho a la vida privada y familiar y su aplicación a los locales de las empresas y a personas jurídicas. Finalmente, la investigación analiza si la posible fuerza vinculante de la Carta de Derechos Fundamentales y la futura adhesión de la Unión Europea a la Convención Europea sobre Derechos Humanos, contribuirá a alcanzar la necesaria coherencia entre la Convención Europea y el Derecho Comunitario. Se concluye que la mencionada adhesión es necesaria para alcanzar dicha meta, dado que contribuiría a evitar diferentes interpretaciones de los derechos consagrados en la Convención Europea por parte de la Corte Europea de Justicia y a ampliar su jurisdicción en todos los casos en que esos derechos sean afectados por medidas comunitarias.

Palabras clave autor: *Derechos humanos; Corte Europea de Derechos Humanos; Corte Europea de Justicia; Artículo 8 de la Convención Europea sobre Derechos Humanos.*

Palabras clave descriptores: *Derechos humanos; tribunales internacionales; sanciones (derecho internacional).*

Summary: I. Introduction.- II. The Fundamental Rights Case Law of the EJC and further developments by the Maastricht and Amsterdam Treaties.- A. The ECJ: Developing its Fundamental Rights Jurisprudence.- B. The changes introduced by the Maastricht and Amsterdam Treaties.- III. Divergent interpretation of Article 8 of the ECHR by the ECJ and the ECtHR.- A. Is Article 8 of the ECHR applicable to business premises against searches and seizures by public authorities?.- B. Is Article 8 of the ECHR

applicable to legal persons?.- IV. The Charter of Fundamental Rights of the European Union.- A. The Relationship between the Charter and the ECHR.- Concluding remarks.- Bibliography.

I. INTRODUCTION

This paper aims to analyze the scope of overlapping jurisdiction and divergent interpretations between the European Court of Justice (ECJ or Luxembourg Court) and the European Court of Human Rights (ECtHR or Strasbourg Court) on the right to respect for private and family life as enshrined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹. After providing a brief introduction on the origins of the fundamental rights jurisprudence of the ECJ, and the provisions of the Maastricht and Amsterdam Treaties, which provide that the EU shall respect fundamental rights as guaranteed by the European Convention, this research will focus on the conflicts between the Luxembourg and Strasbourg Courts case law regarding the interpretation of the right to private and family life as applicable to business premises and legal persons.

Indeed, despite the relevance of the ECHR as a significant source of Community's fundamental rights, there have been divergent interpretations of the European Convention's rights between the ECJ and the ECtHR. These conflicts might lead to difficult situations because Member States would be forced to derogate from its obligations under the ECHR if they want to fulfill their obligations under Community law, which is also binding on them by virtue of the supremacy principle. Finally, this research analyzes whether the potentially binding effect of the Charter of Fundamental Rights and the future European Union's accession to the ECHR²,

1 European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter the European Convention or ECHR], adopted by the Council of Europe at Rome on November 4, 1950 (entry into force: September 9, 1953), 213 UNTS 221.

2 Charter of Fundamental Rights of the European Union, proclaimed by the European Parliament, the Council and the Commission at Nice on December 7, 2000. O.J. 2000/

would contribute to achieve the necessary coherence between the European Convention and Community law.

II. THE FUNDAMENTAL RIGHTS CASE LAW OF THE EJC AND FURTHER DEVELOPMENTS BY THE MAASTRICHT AND AMSTERDAM TREATIES

The drafters of the Treaty establishing the European Community³ did not include any comprehensive or entrenched statement of fundamental rights, perhaps because Community law was expected to be implemented in the main by Member States, who were themselves subject to national and international human rights norms⁴. Fundamental rights started to be incorporated into Community law by the ECJ's case law in order to ensure its supremacy against the allegations of inadequate protection of human rights coming from Member States' courts. This means that the ECJ's commitment to human rights within the Community legal order came as an attempt to protect the concept of supremacy⁵.

Direct effect and supremacy of Community law are the pillars that define the relationship between Community and Member States law, which were developed by the ECJ's jurisprudence in order to

C 364/01. An adapted version of the Charter was proclaimed at Strasbourg on December 12, 2007. As explained in Part III of this paper, the Charter was first incorporated in Part II of the Treaty establishing a Constitution for Europe, which was signed in October 2004, but failed to be ratified after referendum defeats in France and The Netherlands. On December 13, 2007, the Treaty of Lisbon (also known as the Draft Reform Treaty) was signed at a Conference in Brussels by Representatives of Member States in order to amend the Treaty establishing the European Community and the Treaty establishing the European Union. The Draft Reform Treaty, once entered into force, provides that the Charter shall have the same legal value as the European Union Treaties and that the Union shall accede to the ECHR, *available at*: <http://consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf> at 15.

3 Treaty establishing the European Community [hereinafter the EC Treaty], Rome, 25 March 1957. Consolidated version incorporating the amendments made by the Treaty of Nice, signed on 26 February 2001. O.J. 2002/C 325/33.

4 See George Bermann et al., *Cases and Materials on European Union Law*, 203 (2nd Edition, 2002).

5 See Joseph Weiler, *Methods of Protection: Towards a Second and Third Generation of Protection*, in Antonio Cassese et al., Eds., *Human Rights and the European Community: Methods of Protection* V. 2, 555, 581 (1991).

ensure the effective and uniform application of Community law in the national legal orders. Consequently, when the discourse on fundamental rights emerged in the context of the European Community (EC) in the late 1960s, the protection of fundamental rights through the general principles of Community law was presented as necessary to limit the risks entailed for human rights by the affirmation of the supremacy of Community Law on the national law of the Member States and the recognition of its direct effect within the national legal orders⁶.

The direct effect doctrine was first established by the ECJ in its landmark decision in *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963)⁷. In this case, the Court held that the object of the task assigned to it in Article 234 (ex 177) of the EC Treaty⁸ is to secure uniform interpretation of the Treaty by national courts, which means that Member States have acknowledged that Community law can be invoked by their nationals before their courts⁹. Then, the Court ruled that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights,

6 See Olivier de Schutter, *The Implementation of EU Charter of Fundamental Rights through the Open Method of Coordination*, Jean Monnet Working Paper No. 7/04, <http://www.jeanmonnetprogram.org/papers/04/040701.pdf> at 5.

7 See European Court of Justice, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1, in Bermann et al., *supra* note 4, 239-242.

8 Article 234 (ex 177) of the EC Treaty provides: “The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

“(a) the interpretation of this Treaty;

“(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

“(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

“Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice”..

9 European Court of Justice, *Van Gend en Loos*, *supra* note 7, at 240.

albeit within limited fields, and the subject of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage¹⁰.

The ECJ thus made clear that Community law was intended to produce direct effect in national legal orders when the EC Treaty imposes “in a clearly defined way” rights and obligations upon individuals, Member States, and Community institutions. To ensure the value of the direct effect doctrine in the enforcement of Community law, the EC developed the principle of supremacy¹¹, though the EC Treaty did not itself provide a firm textual foundation for the supremacy of Community law¹². Therefore, the question whether and to what extent Community law prevails over conflicting Member State law was left to the ECJ and to the process of reception of the Court’s jurisprudence by national courts¹³.

In its judgment in *Costa v. Ente Nazionale per l’Energia Elettrica (ENEL)*¹⁴, the ECJ made clear that the “new legal order” created by Member States through the EC Treaty, as it recognized one year before in its *Van Gend en Loos* decision, should be accorded precedence because of “its special and original nature”. Consequently, the Court held that the law stemming from the EC

10 Ibid., at 240-241.

11 See Joseph R. Wetzel, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion between the Luxembourg and Strasbourg Courts*, 71 *Fordham L. Rev.* 2823, 2831 (2003).

12 Bermann et al., *supra* note 4, at 269. The authors note that the closest approximation is Article 10 (ex 5) of the EC Treaty, “which imposes on the Member States a general obligation of loyalty to Community law”. Article 10 of the EC Treaty provides: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. “They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty”.

13 Ibid.

14 See European Court of Justice, *Costa v. Ente Nazionale per l’Energia Elettrica (ENEL)*, Case 6/64, [1964] ECR 585, in Bermann et al., *supra* note 4, 269-271.

Treaty could not “be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The 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”¹⁵.

The direct effect and supremacy doctrines developed by the ECJ were met with resistance by Member States in the area of fundamental rights. Indeed, if Community acts were to prevail over national legislation, including national constitutional law, then judicial review of those Community acts could only be based on Community law itself¹⁶, which offered inadequate human rights protection. While the EC treaty contained very limited human rights provisions, particularly related to worker’s rights, the constitutions of the Member States did contain human rights guarantees modeled on universal and regional human rights instruments. It was thus unacceptable to some Member States to implement community legislation without scrutinizing it through the lens of their own constitutional fundamental rights regimes¹⁷.

Facing the challenges of Member States courts, particularly the German Constitutional Court and, to a lesser extent, the Italian Constitutional Court, which questioned the ECJ’s legitimacy and its supremacy doctrine because of the lack of a coherent Community’s approach to fundamental rights, the ECJ “decided to fill a threatening gap in the legal protection of individuals by formulating its own doctrine of the protection of fundamental rights as an unwritten part of

15 Ibid., at 271.

16 See Bruno De Witte, *The Past and the Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston, Ed., *The European Union and Human Rights*, 859, 863 (1999).

17 See Elizabeth Dedeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the ECtHR*, 19 *Dick. J. Int’l L.* 301, 309 (2001).

the Community legal order¹⁸. Subsequently, the ECJ started to develop a rich fundamental rights case law, which deserves immense credit for pioneering the protection of human rights within the Community when the EC Treaty was silent on this matter and in the absence of a written Community “bill of rights” or formal accession to the ECHR¹⁹.

A. THE ECJ: DEVELOPING ITS FUNDAMENTAL RIGHTS JURISPRUDENCE

The Luxembourg Court first established that fundamental human rights are enshrined in the general principles of Community law and, therefore, should be protected by the Court in *Stauder v. City of Ulm* (1969)²⁰. However, the ECJ did not specify the fundamental rights that were protected nor did it provide guidance on the principles of Community law that require the observance of such rights²¹. One year later, the Court provided guidance on these issues in its *Internationale Handelsgesellschaft* judgment (1970)²². The ECJ made clear that protection of fundamental rights under the Community legal order is “inspired by the constitutional traditions common to Member States”, thus their protection must be ensured within the framework of the Community²³.

This means that the ECJ, in shaping its fundamental rights jurisprudence, first drew inspiration from Member States’ common constitutional traditions to ensure respect for fundamental rights within the Community legal order. Shortly thereafter, the Court expanded the scope of this concept in its judgment in *Nold v. Commission* (1974)²⁴. Indeed, the ECJ held that in safeguarding

18 De Witte, *supra* note 16, at 863.

19 See Philip Alston & Joseph Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, Jean Monnet Working Paper No. 1/99, <http://www.jeanmonnetprogram.org/papers/99/990101.rtf> at 46.

20 See European Court of Justice, *Stauder v. City of Ulm, Sozialamt*, Case 29/69, [1969] ECR 419, in Bermann et al., *supra* note 4, 205-206.

21 Defeys, *supra* note 17, at 310.

22 See European Court of Justice, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] ECR 1125, in Bermann et al., *supra* note 4, 171-174.

23 *Ibid.*, at 172.

24 See European Court of Justice, *Nold v. Commission*, Case 4/73, [1974] ECR 491,

fundamental rights, it was bound to draw inspiration not only from the constitutional traditions common to the Member States, but also from international human rights treaties on which Member States have collaborated, or of which they are signatories, since they “can supply guidelines which should be followed within the framework of Community law”²⁵.

Among these human rights treaties, the ECJ was undoubtedly focusing on the ECHR to which all the Member States were signatories. Therefore, the European Convention became a human right standard for determining the legality and legitimacy of the acts of Member States applying Community law. The ECJ made this trend clear in its judgment in *Rutili v. Minister for the Interior* (1975)²⁶, in which it invoked several provisions of the ECHR in order to rule on the limitations placed on the powers of Member States regarding the control of aliens. Therefore, the ECJ used the European Convention as a clear human rights standard to interpret the “public policy” exception to the free movement of workers, justifying Member States to restrict this freedom only to the extent authorized by the ECHR, that is, when it is necessary for the protection of the interests of national security or public safety “in a democratic society”²⁷.

This case illustrates how the ECJ, in the absence of a Community’s “bill of rights”, has progressively shaped its fundamental rights case law inspired mainly by the European Convention and by the constitutional traditions common to Member States²⁸. Subsequently, in *Liselotte Hauer v. Land Rheinland-Pfalz* (1979)²⁹, the Court examined a Community regulation not only against the German

in Bermann et al., *supra* note 4, 206-207.

25 Ibid., at 207.

26 See European Court of Justice, *Rutili v. Minister for the Interior*, Case 36/75, [1975] ECR 1219, in Bermann et al., *supra* note 4, 603-606.

27 Ibid., at 605.

28 Ricardo Alonso García, *The General Provisions of the Charter of Fundamental Rights of the European Union*, Jean Monnet Working Paper No. 4/02, <http://www.jeanmonnetprogram.org/papers/02/020401.pdf> at 27.

29 European Court of Justice, *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] ECR 3727, in Bermann et al., *supra* note 4, 209-210.

Constitution and the constitutions of other Member States, but also against the right of property as enshrined in the ECHR and its public interest exception, though concluding that the regulation did not entail any undue limitation on the right to property³⁰.

Nevertheless, it is worth noting that right after the ECJ began to use the ECHR as an important source for Community fundamental rights, the Court made clear that it had no jurisdiction to examine the compatibility with the ECHR of national legislation which does not fall within the scope of Community law, that is, an area which falls within the jurisdiction of national legislators. On the other hand, the Luxembourg Court has established that in cases where national legislation does fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, the ECJ must provide Member States courts all the criteria of interpretation needed by the national court to determine whether those rules are compatible with fundamental rights, whose observance the Court ensures and which derive in particular from the ECHR³¹.

Throughout the 1970's and 1980's, Community institutions endorsed the protection of fundamental rights within the Community legal order as shaped in the evolving ECJ jurisprudence. In 1977, the European Parliament, the Council, and the Commission issued a Joint Declaration on the ECHR, proclaiming their attachment to "the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention"³². Soon, some scholars and Community institutions, including the Commission and the Parliament,

30 Defeis, *supra* note 17, at 311-312.

31 European Court of Justice, *Cinéthèque S.A. v Fédération Nationale des Cinémas Français*, cases 60 and 61/84, [1985] ECR 2605; *Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, [1987] ECR 3719; *Elliniki Radiophonia Tileorassi - Anonimi Etairia (ERT-AE) v. Dimotiki Etairia Plirofosissis (DEP) and Sotirios Kouvelas*, Case C-260/89, [1991] ECR I-2925; and *Friedrich Kremzow v. Austrian State*, Case C-299/95, [1997] ECR I-2629.

32 Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. April 27, 1977. O.J. 1977/C 103/01, in Bermann et al., *supra* note 4, at 208-209.

proposed the Community accession to the ECHR, in order to render the Convention's catalog of human rights directly binding on Community institutions³³, which would also have resolved the lack of jurisdiction of the European human rights system in cases involving the lawfulness of Community acts³⁴.

Finally, on 26 April 1994, the Council decided to request the opinion of the ECJ on whether the accession of the Community to the ECHR was compatible with the EC Treaty. The Luxembourg Court refused that possibility, arguing that although respect for human rights is a condition of the lawfulness of Community acts, "accession to the Convention would, however, entail 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 institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment"³⁵.

This opinion of the ECJ has been widely criticized by some scholars as unpersuasive. They argue that acceptance of the jurisdiction of the ECtHR, to which the ECJ implicitly objected in its Opinion 2/94, cannot reasonably be considered to be of such great constitutional significance as to require a Treaty amendment when the Court was prepared, for example, to endorse the Community's acceptance of

33 Bermann et al., *supra* note 4, at 211.

34 Wetzel, *supra* note 11, at 2838. This author recalls that after the ECJ's *Nold* judgment, individuals within the Member States attempted to bring cases before the former European Commission on Human Rights (the organ that had been charged of receiving individual complaints within the European human rights system before the entry into force of the Protocol No. 11 of the ECHR) against both the Community institutions and Member States applying Community law. The Commission rejected these cases on the grounds that the ECHR jurisdiction did not extend to the Community because it had not signed the Convention.

35 European Court of Justice, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, [1996] ECR I-1759.

the dispute resolution mechanisms of the World Trade Organization (WTO)³⁶. They also explain that the reluctance of Member States to take action to include the required amendment called for by the ECJ as part of the Treaty of Amsterdam was “equally disappointing”³⁷. Finally, they conclude that “it appears to be highly anomalous, indeed unacceptable, that whilst membership of the Convention system is, appropriately, a prerequisite of accession to the Union, the Union itself – or at least the Community – remains outside that system. The negative symbolism is self-evident”³⁸.

B. THE CHANGES INTRODUCED BY THE MAASTRICHT AND AMSTERDAM TREATIES

Although the Maastricht Treaty³⁹ did not incorporate any provision calling for the Community’s accession to the ECHR, it introduced several provisions concerning the protection of fundamental rights within the Community legal order. It first established in Article 6 (ex Article F) that the “The 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” (emphasis added).

Second, the Maastricht Treaty also made respect for fundamental rights an objective both of the common foreign and security policy (second pillar) in Article 11 (ex Article J.1), and of the provisions on justice and home affairs (third pillar) in Article 29 (ex K.1)⁴⁰. Also, Maastricht required in Article 177 (ex Article 130u) the Community policy in the sphere of development cooperation to “contribute to

36 Alston & Weiler, *supra* note 19, at 25.

37 Ibid.

38 Ibid., at 25-26.

39 Treaty establishing the European Union [hereinafter the EU Treaty], Maastricht, 7 February 1992. Consolidated version incorporating the amendments made by the Treaty of Nice, signed on 26 February 2001. O.J. 2002/C 325/05.

40 Bermann et al., *supra* note 4, at 211.

the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms”. However, the Maastricht Treaty failed to recognize the ECJ’s jurisdiction over protection of fundamental rights as enshrined in the above mentioned Article 6(2), omission that was corrected by the Amsterdam Treaty⁴¹.

The Treaty of Amsterdam (1997) deepened the commitment for fundamental rights protection within the Community, and strengthened the role of the Luxembourg Court on this matter. First, Amsterdam introduced Article 6 (1) of the EU Treaty, which declares that “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” (emphasis added). Second, as mentioned above, the Amsterdam Treaty added Article 6 (2) to the provisions of the EU Treaty that are subject to the powers of the ECJ under Article 46. The main purpose of this amendment of Article 46 was to correct the anomaly created by Maastricht, which had failed to allow the ECJ to use Article 6(2) as a written basis for its fundamental rights case law. Therefore, since Amsterdam, the ECJ was able to refer to the text of the EU Treaty itself, rather than to unwritten general principles, when protecting fundamental rights. The irony, however, is that Article 6 (2) itself states that they are respected “as general principles of Community law”, meaning that, in fact, nothing much would change⁴².

Also, while the ECJ had been excluded from considering any second and third pillar measures, the Treaty of Amsterdam changed this picture by providing that the Court shall have jurisdiction to review and interpret third-pillar measures under Article 35, thus leaving outside of its jurisdiction measures under the second pillar⁴³. Third, the Treaty of Amsterdam amended Article 49 of the EU Treaty to make respect for Article 6(1) a condition for accession to the Community, confirming that “membership requires that the candidate country has

41 Ibid.

42 De Witte, *supra* note 16, at 885.

43 Ibid.

achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”, as Member States had declared at Copenhagen in 1993⁴⁴.

Finally, the Amsterdam Treaty introduced in Article 7 of the EU Treaty a mechanism of sanctions against Member States that present “a clear risk of a serious breach” of the principles enshrined in Article 6(1) of the Treaty. The ECJ does not play any role in either the assessment of the breach or the impositions of sanctions themselves, which is left to the Council, though it seemed to be a wise decision because the ECJ should not be drawn into this highly political and largely subjective power delineated by Article 7⁴⁵.

Despite all these innovations introduced by the Treaty of Amsterdam, it did not provide the Community or the Union with the power to accede to the ECHR, though it was negotiated after the ECJ’s Opinion 2/94. The Treaty did not, either, enact a catalogue of fundamental rights for the Community, it did not create special procedures for the judicial enforcement of existing fundamental rights provisions, and it did not modify the existing standing requirements for individual applications to the ECJ or the Court of First Instance as formulated in Article 230 of the EC Treaty⁴⁶.

Thus, when the ECJ decides cases concerning fundamental rights, in particular those guaranteed by the ECHR, it is inevitable that divergent or inconsistent interpretations between the Luxembourg and Strasbourg Courts exist, especially as the ECJ is not legally obliged to follow the interpretation of the ECtHR.⁴⁷ Indeed, although the ECJ, by its own fundamental rights jurisprudence, has charged itself with the interpretation of the ECHR, which expressly charges the ECtHR with exactly the same task, there is no guarantee of similar interpretations by the two Courts⁴⁸. Therefore, any exercise of

44 Bermann et al., *supra* note 4, at 221.

45 De Witte, *supra* note 16, at 884.

46 *Ibid.*, at 883-884.

47 Dean Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, in Philip Alston, Ed., *The European Union and Human Rights*, 757, 761-762 (1999).

48 Wetzel, *supra* note 11, at 2842.

overlapping jurisdiction by the Luxembourg and Strasbourg Courts could give rise to confusion and conflict⁴⁹.

Conflicts and inconsistencies between both Courts have been frequent and varied. In some cases, the ECJ has decided cases whilst leaving the ECHR dimension aside⁵⁰. In others, there has been a flagrant conflict between the case law of the ECJ and the ECtHR based upon divergent interpretations of the rights enshrined in the European Convention. An example of the latter can be ascertained in the context of cases concerning the interpretation of Article 8 of the ECHR.

III. DIVERGENT INTERPRETATIONS OF ARTICLE 8 OF THE ECHR BY THE ECJ AND THE ECtHR

Article 8 of the ECHR recognizes the right to respect for private and family life, when provides that “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The second paragraph of this provision admits that the right to private and family life is not an absolute right, so that interferences

49 Rick Lawson, *Confusion and Conflict?. Divergent Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, V. 3, 219, 250 (1994).

50 Spielmann, *supra* note 47, at 764-766. This author includes in this group, among others, the following cases: *Administrateur des affaires maritimes à Bayonne & Procureur de la République v. José Dorca Marina et al. (Spanish Fishermen Cases)*. Joined Cases 50-58/82, [1982] ECR 3949, where the ECJ did not meet the argument based on Article 7 of the ECHR; *Konstantinidis v. Stadt Altensteig-Standesamt*, Case C-168/91, [1993] ECR I-1191, where the Court left the human rights dimension of the case undecided (regarding applicant’s right to a name); and *SPUC v. Grogan*, Case C-159-90, [1991] ECR I-4685, where the ECJ left the question open concerning freedom to receive and impart information protected in Article 10 of the ECHR.

by a public authority with the exercise of this right entail a violation of this provision if they do not fall within one of the exceptions provided for in paragraph 2. Therefore, when this right is at stake, the ECtHR has to examine whether the interferences are “in accordance with the law”; whether they have an aim or aims that is or are legitimate under the second paragraph of Article 8; and whether they were “necessary in a democratic society” for the aforesaid aim or aims, namely national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, and protection of the rights and freedoms of others⁵¹.

Article 8 of the ECHR has become increasingly relevant for antitrust law purposes within the Community legal order. Under this provision, for an inspection to be legitimate it should be intended to safeguard one of the legitimate interests enumerated in the second paragraph of Article 8. On the other hand, most cases concerning the legality of the inspections hinge on the question of whether such measures are “necessary in a democratic society”⁵².

The ECtHR has explained its understanding of the phrase “necessary in a democratic society” on various occasions. In the *Silver* case, the Court summarized it in four principles: (a) the adjective “necessary” is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”; (b) the States parties enjoy a certain but not unlimited margin of appreciation in the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the ECHR; (c) the phrase “necessary in a democratic society” means that, to be compatible with the ECHR, the interference must, *inter alia*, correspond to a “pressing social need” and be “proportionate to

51 ECtHR, *The Sunday Times v. The United Kingdom*, Judgment of 26 April 1979, Series A No. 30, at para. 45. However, the Court has held that the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly. See *Klass and Others v. Germany*, Judgment of 6 September 1978, Series A No. 28, at para. 42.

52 An Hertogen, ECJ Case C-94/00, *Roquete Frères*, 22 October 2002, 10 *Colum. J. Eu. L.* 137, 143-144 (2003).

the legitimate aim pursued”; (d) those provisions which provide for an exception to a right guaranteed by the ECHR are to be narrowly interpreted (such as the right to respect for private and family life)⁵³.

A. IS ARTICLE 8 OF THE ECHR APPLICABLE TO BUSINESS PREMISES AGAINST SEARCHES AND SEIZURES BY PUBLIC AUTHORITIES?

In *Hoescht AG v. Commission* (1989), the ECJ held that Article 8 of the ECHR did not apply to business premises. This case concerned the challenge of three Commission decisions that required several undertakings to submit to an investigation for suspecting the existence of agreements or concerted practices concerning the fixing of prices and delivery quotas between certain producers and suppliers of PVC and polyethylene in the Community. Hoechst refused to submit to the investigation on the ground that it constituted an unlawful search⁵⁴.

The ECJ interpreted Article 8 of the ECHR narrowly and reasoned that this provision was only “concerned with the development of man’s personal freedom and may not therefore be extended to business premises”⁵⁵, noting that there was no case law of the ECtHR on that subject. Instead, the Court relied on what it called “a general principle of Community law”, holding that “in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or

53 ECtHR, *Silver and others v. The United Kingdom*, Judgment of 25 March 1983, Series A No. 61, at para. 97 (summarizing the *Handyside* Judgment of 7 December 1976, Series A No. 24, at paras. 48-49).

54 European Court of Justice, *Hoescht AG v. Commission*, Joined Cases 46/87 and 227/88, [1989] ECR 2859, at paras. 2-3.

55 *Ibid.*, at para. 18.

disproportionate intervention. The need for such protection must be recognized as a general principle of Community Law”⁵⁶.

Although the ECJ held in *Hoescht* that there was no case law of the ECtHR regarding the application of Article 8 of the ECHR to business premises, the Strasbourg Court had implicitly accepted that this provision applied to business premises six months earlier in the *Chappell* case⁵⁷, which concerned to the allegedly violation of Article 8 of the ECHR by the investigations on Mr. Chappell’s video-rental business on the grounds of copyright infringement and rental of obscene video material. In this case, the British Government accepted that there had been an interference with the exercise of the applicant’s right to respect for his “private life and home”, and Mr. Chappell conceded that the interference had the legitimate aim of protecting “the rights of others”. Then, the ECtHR expressly admitted to see “no reason to differ on either of these points”, thus accepting that Article 8 indeed applied to the business premises of a private individual⁵⁸.

Three years later, the ECtHR made clear the issue in *Niemietz* (1992). Niemietz was a lawyer who challenged the decision of the Munich District Court to issue a warrant to search his law office premises. In his application before the European Commission, Niemietz alleged that the search had violated his right to respect for his home and correspondence guaranteed in Article 8 of the ECHR, among other provisions of the Convention. The Government of Germany opposed to applicant’s allegations, explaining that Article 8 did not protect against searches of professional offices or premises since the Convention drew a clear distinction between private life and home, on the one hand, and professional life and business premises, on the other⁵⁹.

56 Ibid., at para. 19. The ECJ reaffirmed its position in *Hoescht* in two judgments of 17 October 1989: *Dow Benelux v. Commission*, Case 85/87, [1989] ECR 3137, at paras. 28-30, and *Dow Chemical Ibérica and Others v. Commission*, Joined Cases 97-99/87, [1989] ECR 3165, at paras. 14-16.

57 ECtHR, *Chappell v. The United Kingdom*, Judgment of 30 March 1989, Series A No. 152-A.

58 Ibid., at para. 51.

59 ECtHR, *Niemietz v. Germany*, Judgment of 16 December 1992, Series A No. 251-B, at para. 27.

In this case, the ECtHR gave an extensive interpretation of Article 8 of the ECHR making clear that this provision applied to professional or business premises, thus rejecting the ECJ's ruling in *Hoescht*, which the Strasbourg Court even cited in its decision. Indeed, although the Court did not consider necessary to define "private life", it held that respect for private life must comprise the right to establish relationships with other human beings and, therefore, private life should not be understood as excluding "activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world"⁶⁰.

The ECtHR pointed out that this is particularly true in the case of a person exercising a liberal profession like Niemietz, whose work in that context may form part of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time. Then, the Court emphasized that denying "the protection of Article 8 on the ground that the measure complained of related only to professional activities –as the Government suggested should be done in the present case– could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them"⁶¹. Here, the Court cited its judgment in *Chappell*, stating that in that case even though the search was directed solely against business activities, it did not rely on that fact as a ground for excluding the applicability of Article 8 of the ECHR.

Also, the Strasbourg Court noted that the meaning of the word "home", which appears in the English text of Article 8, has a narrower connotation than the word "domicile" used in the French text, and may therefore encompass a person's professional or

60 Ibid., at para. 29.

61 Ibid.

business premises⁶². Consequently, the Court held that to interpret the words “private life” and “home” as encompassing certain professional or business activities or premises is consonant with the essential object and purpose of Article 8, which is aimed at protecting the individual against arbitrary interference by the public authorities⁶³. Finally, the ECtHR found that the search of the applicant’s office constituted an interference with his rights under Article 8 of the ECHR.

B. IS ARTICLE 8 OF THE ECHR APPLICABLE TO LEGAL PERSONS?

Another point of conflict between the ECJ and the ECtHR regarding the interpretation of Article 8 of the ECHR regards its applicability to legal or juristic persons. The ECtHR had the opportunity to deal with this question in its judgment in the case of *Société Colas Est and others v. France* (2002)⁶⁴. This case concerned the application of three large construction companies supposedly engaged in certain illegal practices in local tendering procedures for roadworks contracts. The companies alleged a violation of “their right to respect for their home” by the French National Investigations Office that had carried out investigations on their premises without judicial authorization in order to obtain and seize numerous documents containing evidence of the unlawful agreements.

The French Government argued during the proceedings that, although the Strasbourg Court had made clear in *Niemietz* that professional or business premises were protected by Article 8, that finding concerned premises where a natural person had carried on an occupation, thus juristic persons could not claim a right to the protection of their professional or business premises with as much force as an individual could in relation to his professional or business address⁶⁵. However, the Government accepted that there had been an interference with the

62 Ibid., at para. 30.

63 Ibid., at para. 31.

64 ECtHR, *Stes Colas Est and others v. France*, Judgment of 16 April 2002, Reports of Judgments and Decisions 2002-III.

65 Ibid., at para. 30.

companies' right to respect for their home within the meaning of Article 8 of the ECHR, but contended that it was in accordance with the law and that it was not disproportionate⁶⁶.

The ECtHR, reiterating its doctrine that the ECHR is to be considered “a living instrument which must be interpreted in the light of present-day conditions”⁶⁷, held that in some circumstances Article 8 may be construed as including the right to respect for a company's registered office, branches or other business premises⁶⁸. Then, the Court found that although the interference was “in accordance with the law”, it constituted an intrusion into the applicant companies' “homes” that was incompatible with Article 8 because it took place without any prior warrant issued by a judicial authority and without a senior police officer being present⁶⁹. Finally, the Strasbourg Court concluded that there has been a violation of Article 8 because the impugned investigations in the competition field could not be regarded as strictly proportionate to the legitimate aims pursued, even in the case that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned⁷⁰.

In its judgment in the *National Panasonic* case (1980)⁷¹, the ECJ left open the question of whether a legal person could rely on Article 8 of the ECHR, applying a very general test to determine if the Commission had respected the right to privacy when it carried out a search on the premises of the undertaking without a search warrant and in the absence of the Panasonic's lawyer. The ECJ merely stated that the interference with the “assumed” private life of Panasonic had a legitimate aim as required by the ECHR, namely, the economic well-being of the country, and left undecided whether the investigation had been “necessary in a

66 Ibid., at paras. 32-33.

67 Ibid., at para. 41 (citing its judgment in *Cossey v. the United Kingdom*, of 27 September 1990, Series A No. 184, at para. 35).

68 Ibid.

69 Ibid., at para. 49.

70 Ibid., at paras. 49-50.

71 European Court of Justice, *National Panasonic*, Case 136/79, [1980] ECR 2057.

democratic society”⁷². The Court held that the investigation powers given to the Commission by Article 14(3) of Regulation No. 17 are to enable it to carry out its duty under the EC Treaty of ensuring that the rules of competition are applied in the common market. In these circumstances, the Court held that it did not appear that Regulation No. 17, by given the Commission the powers to carry out investigations without previous notification, infringed the right invoked by applicant”⁷³.

After *National Panasonic*, the ECJ held that Article 8 is not applicable to business or professional premises in *Hoescht*. Also, in *Limburgse Vinyl Maatschappij NV and Others v. Commission* (1999)⁷⁴, the applicants argued that in the course of its investigations the Commission had infringed the principle of inviolability of the home within the meaning of Article 8 of the ECHR as interpreted in the case law of the ECtHR. The Court of First Instance responded that in so far that these arguments were identical or similar to those put forward in *Hoechst*, the Court saw no reason to depart from the case law of the ECJ on the matter, which is based on the existence of a general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, which are disproportionate or arbitrary⁷⁵. Moreover, the Court of First Instance made clear that the fact that the case law of the ECtHR concerning the applicability of Article 8 of the ECHR to legal persons has evolved since *Hoechst*, *Dow Benelux*, and *Dow Chemical Ibérica v. Commission*, had no direct impact on the merits of the solutions adopted by the ECJ in those cases⁷⁶.

In 2002, the ECJ in *Roquette Frères*⁷⁷ had the opportunity to revisit the issue at the request for a preliminary ruling under Article 234 EC Treaty from the French Cour de Cassation. *Roquette Frères*

72 Lawson, *supra* note 49, at 237-238.

73 Ibid.

74 See European Court of Justice, *Limburgse Vinyl Maatschappij NV and Others v. Commission*, Joined Cases T-305/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94, and T-335/94, [1999] ECR 8375.

75 Ibid., at paras. 417-419.

76 Ibid., at para. 420.

77 European Court of Justice, *Roquette Frères*, Case C-94/00, [2002] ECR I-9011.

was required by the Commission to submit to an investigation concerning its possible participation in agreements or concerted practices in the fields of sodium gluconate and glucono-delta-lactone, which may constitute an infringement of Article 85 of the EC Treaty. The investigation was based again on Article 14(3) of Regulation No. 17, which confers on the Commission investigatory powers to look into possible infringements of the competition rules applying to undertakings.

According to Article 14(6) of Regulation No. 17, the Commission may request Member States' authorities all the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. At the request of the Commission, the French competent administrative authorities submitted an application to the President of the Tribunal de Grande Instance de Lille for authorization to enter the premises of Roquette Frères in order to seize documents. Roquette Frères appealed such authorization, asserting that "it was not open to the President of the Tribunal de Grande Instance de Lille to order entry onto private premises without first satisfying himself, in the light of the documents which the administrative authority was required to provide to him, that there were indeed reasonable grounds for suspecting the existence of anti-competitive practices such as to justify the grant of coercive powers"⁷⁸.

The Cour de Cassation agreed that no information or evidence justifying the presumption of the anti-competitive practices of Roquette Frères was put before the President of the Tribunal de Grande Instance de Lille, making impossible to verify whether or not the application was justified. Then, the French Court recalled that, although the ECJ held in *Hoechst* that there exists no general principle of Community law enshrining, with regard to undertakings, any right to the inviolability of the home, or any case law of the ECtHR inferring the existence of any such principle from Article 8 of the ECHR, the Strasbourg Court in *Niemietz v. Germany*, found that Article 8 of the ECHR may apply to certain

78 Ibid., at para. 16.

professional or business activities or premises. Also, the Cour de Cassation notice that according to Article 6(2) of the EU Treaty, the EU was required to respect as general principles of Community law the fundamental rights guaranteed by the ECHR⁷⁹.

The ECJ admitted that consideration should be given to the case law of the ECtHR subsequent to its judgment in *Hoechst*. According to that case law, said the Court, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (citing here the Strasbourg's judgment in *Société Colas Est and others v. France*); and, second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case (citing here the *Niemietz v. Germany* judgment). Nevertheless, the ECJ maintained its position in *Hoescht*, and continued to rely on a "general principle of Community Law" that recognizes the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities, rather than in Article 8 of the ECHR. This principle, however, applies to any person, whether natural or legal, in the opinion of the Luxembourg Court⁸⁰.

The problem arises when assessing the Strasbourg's interpretation of Article 8 of the ECHR and the scope of this "general principle of Community law" as interpreted by the ECJ. Whereas the ECtHR has made clear since its judgment in the *Chappell* case that both the decision ordering the inspection and the later execution of the inspection must meet the requirements of necessity and proportionality to the legitimate aims pursued by the inspection itself, the ECJ only rules on the necessity of the decision and has rejected the argument of the wrongful execution of the inspection, holding that the latter has no influence on the legality of the decision and thus cannot lead to its annulment⁸¹.

79 Ibid., at paras. 19-20.

80 Ibid., at para. 27.

81 Hertogen, *supra* note 53, at 151.

Therefore, like in *Hoescht*, the level of protection offered by the ECJ is in danger of falling below the requirements of Article 8 of the ECHR⁸². This means that although the ECJ generally follows the jurisprudence of the ECtHR, there have been divergences between the two Courts on the proper interpretation of the right to private and family life under Article 8 of the ECHR, which places Member States in a difficult situation since they might be found to have breached the European Convention when fulfilling their obligations under Community law. This fact prompted scholars and Community officials to raise several proposals in order to strengthen fundamental rights protection within the Community legal order and develop a more comprehensive and integrated system for such protection within Europe⁸³.

C. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

In 1999, the European Council decided that it was necessary to enact a Charter of Fundamental Rights, “in order to make their overriding importance and relevance more visible to the Union’s citizens”⁸⁴. The drafting of the Charter took place during the year 2000 by the “Convention”, the body responsible for preparing the draft Charter, which was composed of representatives of Member States’ governments and parliaments, the Commission and the European Parliament. Finally, Member States proclaimed the Community catalogue of fundamental rights through the Charter of Fundamental Rights of the European Union in December 2000 at Nice.

The Charter, with 54 Articles, incorporates all the rights recognized by the ECHR and some additions that were made as an expression of the modern times and the level of development in Europe that differs from that of the adoption of the ECHR:

82 Lawson, *supra* note 49, at 245.

83 Defeis, *supra* note 17, at 329.

84 Council of the European Union, *Draft Charter of Fundamental Rights of the EU*, cited by Anne-Marieke Widmann, *Article 53: Undermining the Impact of the Charter of Fundamental Rights*, 8 *Colum. J. Eur. L.* 342, 345 (2002).

bioethics (Article 3), the right to good administration (Article 41), and the right of access to documents (Article 42) are some examples⁸⁵. However, the absence of certain rights, like the rights of minorities and of abortion, is significant and reveals a lack of agreement between Europeans⁸⁶. Regarding the right to respect for private and family life, the Charter provides in its Article 7 that: “Everyone has the right to respect for his or her private and family life, home and communications”, and although it did not insert the second paragraph of Article 8 of the ECHR, it did include the home and communications under the scope of protection of this right.

The Charter seeks to provide the Union with a “more evident” (as the European Council of Cologne asked for) framework of fundamental rights protection before the public authorities within the European context, after more than thirty years (since the *Stauder Case*) of full confidence in the leading role played by the jurisprudence of the ECJ⁸⁷. The Charter of Fundamental Rights of the European Union was first incorporated in Part II of the Treaty Establishing a Constitution for Europe⁸⁸, which failed to be ratified after referendum defeats in France and The Netherlands. On December 13, 2007, the Treaty of Lisbon⁸⁹ was signed in order to amend the Treaty establishing the European Community and the Treaty establishing the European Union. Article 6 of the Draft Reform Treaty provides the following:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

85 Jacqueline Dutheil de la Rochère, *The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty*, 41 *CML Rev.* 345, 349 (2004).

86 *Ibid.*

87 García, *supra* note 28, at 4.

88 Treaty Establishing a Constitution for Europe, approved by the Heads of State and Government on 18 June 2004, and formally signed in Rome on 29 October 2004.

89 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (also known as the Draft Reform Treaty), signed in Brussels on 13 December 2007, available at: <http://consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf> at 15.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. 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 Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Although the Charter is not legally binding until the Treaty of Lisbon enters into force, it has been frequently used not only by the ECJ, but also by EU legislative bodies including the European Commission, the European Council and the European Parliament, as an authoritative expression of the fundamental rights recognized by the Union. Indeed, the Charter has been recognized as contributing to the expansion of the Union's legislative action, since legislation's references to this instrument "are overwhelmingly *pro forma* statements that the proposed action respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union"⁹⁰.

However, the Charter has been criticized by others as undermining the role of the ECHR as a constitutional instrument of European public order in the field of human rights, since its approval as the European Union's "bill of rights" and possible future binding force, imply the existence of one more instrument of protection which has to find its own place with regard to the protection afforded by Member States' constitutions and international human rights treaties, particularly the ECHR⁹¹. Consequently, its adoption has

90 Paolo G. Carozza, *The EU Charter of Fundamental Rights and the Member States*, in Steve Peers & Angela Ward, Eds., *The EU Charter of Fundamental Rights: Politics, Law and Policy*, 35-58 (Hart Publishing Co., 2004), available at: <http://ssrn.com/abstract=984745> at 47.

91 García, *supra* note 28, at 4.

been criticized as going against the paramount objective of having a common code of fundamental rights for all Europe⁹².

Indeed, some scholars have argued that even though the intention of the Charter is that those rights which correspond to ECHR rights should be interpreted consistently with the ECHR, the mere existence of two separate texts, with different formulations, will cause confusion, especially if it is forgotten that the Charter binds Member States only where they are implementing EU law⁹³. Accordingly, if Charter becomes legally binding through ratification of the Reform Treaty, “measures should be taken, if possible, to limit the confusion and to ensure harmonious interpretation. The ECHR should remain the bedrock of human rights protection in Europe”⁹⁴.

D. THE RELATIONSHIP BETWEEN THE CHARTER AND THE ECHR

The Charter starts “reaffirming” in its Preamble the fundamental rights of the individuals as they result from the Community and the Union’s Treaties, the constitutional traditions of Member States, the ECHR, the Council of Europe’s Social Charter, and the case-law of the ECJ and of the ECtHR. It is in Chapter VII of the Charter, titled “General Provisions”, where its relationship with the ECHR is defined. Article 52 (3) provides that “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”.

92 A.G. Toth, *The European Union and Human Rights: The Way Forward*, 34 *CML Rev.*, 491, 528 (1997).

93 Francis G. Jacobs, “Accession of the European Union to the European Convention on Human Rights”, Hearing organized by the Committee on Legal Affairs and Human Rights in Paris on 11 September 2007, available at: <http://www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf> at 2.

94 *Ibid.*

It is worth noting that this provision was introduced in the Charter in order to avoid the risk of reduction in the level of protection already guaranteed by the ECHR, and its divergent interpretations by the Luxembourg and Strasbourg Courts⁹⁵. However, there are some inconsistencies that this provision does not seem to resolve. First, it raises the question of which rights are equivalent to those in the ECHR, which is not set out in the Charter but in an explanatory memorandum commissioned by the Presidium of the Convention that drafted the Charter. Some scholars have noted that because this memorandum lacks authoritative status, if the Charter were to be made formally legally enforceable, the list of “corresponding” ECHR/Charter provisions should be given a more authoritative status⁹⁶.

Second, other scholars have expressed concern that this provision does not mention the relationship of the Charter with the jurisprudence of the ECtHR, thus leaving the problem of the two-court system unresolved. Also, some have argued that the Strasbourg Court has already openly shown its readiness to proceed to control Community and Union Law by means of the control exercised over the Member States, which unlike the Community and the Union, are parties to the Convention subject to its jurisdiction⁹⁷. Nevertheless, the Charter failed to address the real possibilities of Strasbourg’s indirect control over the Community legal order.

Finally, Article 53 (entitled “level of protection”) of the Charter has also been subject to criticism. Article 53 provides that “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which

95 García, *supra* note 28, at 8.

96 Christopher McCrudden, *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No. 10/01, <http://www.jeanmonnetprogram.org/papers/01/013001.rtf> at 19.

97 García, *supra* note 28, at 10-11. This author refers to two particular decisions of the ECtHR: *Cantoni v. France* (Judgment of 15 November 1996), and *Matthews v. The United Kingdom* (Judgment of 18 February 1999).

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".

This provision, incorporated in most international human rights treaties included the ECHR in its Article 60, fails to address the substantive and procedural needs of the Community legal order, thus undermining the supremacy of Community law⁹⁸ by opening the door to possible Member States' justifications to set aside Community norms whenever they are deemed to be in conflict with a higher standard of human rights protection under national constitutional orders⁹⁹. Indeed, Article 53 "insofar as it entails the potential displacement of the instrument of which it forms part by others which offer a greater level of protection, poses in the case of the Charter a first complication in its interpretation: unlike the international treaties confined to human rights, which have the clear vocation of complementing the national systems of protection, the Charter is part of a context, the Union context, which is constructed in conceptual terms as an autonomous legal order with an integrating vocation that tends to displace, by means of the principle of supremacy, the disparities between the Member States"¹⁰⁰.

CONCLUDING REMARKS

Although most ECJ's judgments fulfill the standard of protection required by the ECHR, as the same ECtHR has recognized in the *Bosphorus* case¹⁰¹, some conflicts and inconsistencies between both Courts may arise, like in the case of divergent interpretations of Article 8 of the ECHR as applicable to business premises and legal persons. Indeed, despite the ECtHR' finding in *Bosphorus*

98 Widmann, *supra* note 85, at 342.

99 Carozza, *supra* note 88, at 45.

100 García, *supra* note 28, at 22-23.

101 ECtHR, *Bosphorus Hava Yollari Turizm v. Ireland*, Judgment of 30 June 2005, Application No. 45036/98, available at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>

that that the protection of fundamental rights by Community law can be considered to be “equivalent” or “comparable” to that of the European human rights system¹⁰², Judge Ress aptly points out in his Concurring Opinion, that the ECtHR’ analysis of the “equivalence” of the protection was a formal one, which related only to the procedures of protection and not to the jurisprudence of the ECJ in relation to the level and intensity of protection of specific fundamentals rights guaranteed by the ECHR¹⁰³.

He concludes that “one cannot say once and for all that, in relation to all Convention rights, there is already such a presumption of Convention compliance because of the mere formal system of protection by the ECJ. It may be expected that the provisions of the Charter of Fundamental Rights of the European Union, if it comes into force, may enhance and clarify this level of control for the future”.¹⁰⁴ Therefore, he considers that the *Bosphorus* judgment reveals the importance of European Union’s accession to the ECHR in order to make its control mechanism complete within the Community legal order.

The final status of the Charter of Fundamental Rights of the European Union is yet to be determined until the Treaty of Lisbon is ratified by all Member States. If ratified, the Reform Treaty will incorporate the Charter into European Union’s primary law. More importantly, the Treaty of Lisbon, once entered into force, requires the European Union to accede to the ECHR, while providing in Article 6.2 that the Union shall accede to the ECHR without affecting the Union’s competences as defined in the Treaties. Accession to the ECHR is necessary for achieving the necessary coherence between the ECHR and Community law, in order to avoid different interpretations of the European Convention’s rights by the ECJ and to guarantee individual access to the Luxembourg Court, particularly to the Court of First Instance.

102 Ibid., at para. 165.

103 Ibid., Concurring Opinion of Judge Ress, at para. 2.

104 Ibid.

Indeed, as Professor Jacobs has noted, the most evident beneficial effect of European Union's accession to the ECHR is that the ECJ's jurisdiction will be extended to cover all cases in which the European Convention's fundamental rights were affected by Community measures, since the absence of a judicial remedy before the ECJ might itself be a violation of the ECHR. To that end, Jacobs proposes that this enlargement of the ECJ's jurisdiction could be accomplished through a Treaty amendment or in some areas through development of the ECJ's jurisprudence, by enlarging the individual's right of access to it¹⁰⁵.

Finally, accession to the ECHR will guarantee an external control regarding the respect for fundamental rights within the Community legal order, which is highly desirable for its human rights commitment to be credible either at the internal and external level. Indeed, if Member States are obliged to comply with fundamental rights as enshrined in the European Convention, and the Union requires third States to ensure their protection in its external relations, there is no credible reason to support the exclusion of the European Union to the ECHR. This is certainly true at this moment that the Union is seeking to provide itself with a legally binding "Bill of Rights", thus trying to reach further steps of integration founded on the values of democracy, the rule of law, and respect for fundamental rights of the European citizen.

BIBLIOGRAPHY

Alston, Philip & Joseph Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, Jean Monnet Working Paper No. 1/99, <http://www.jeanmonnetprogram.org/papers/99/990101.rtf> at 46.

Bermann, George et al., *Cases and Materials on European Union Law* (2nd Edition, 2002).

Carozza, Paolo G., *The EU Charter of Fundamental Rights and the Member States*, in Steve Peers & Angela Ward, Eds., *The EU Charter of*

105 Jacobs, *supra* note 92, at 1.

- Fundamental Rights: Politics, Law and Policy*, 35-58 (Hart Publishing Co., 2004), available at: <http://ssrn.com/abstract=984745>
- De La Rochère, Jacqueline Dutheil, *The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty*, 41 *CML Rev.* (2004).
- De Schutter, Olivier, *The Implementation of EU Charter of Fundamental Rights through the Open Method of Coordination*, Jean Monnet Working Paper No. 7/04, <http://www.jeanmonnetprogram.org/papers/04/040701.pdf>
- De Wite, Bruno, *The Past and the Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston, Ed., *The European Union and Human Rights* (1999).
- Defeis, Elizabeth, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the ECtHR*, 19 *Dick. J. Int'l L.* (2001).
- European Court of Human Rights, *The Sunday Times v. The United Kingdom*, Judgment of 26 April 1979, Series A No. 30.
- European Court of Human Rights, *Klass and Others v. Germany*, Judgment of 6 September 1978, Series A No. 28.
- European Court of Human Rights, *Silver and others v. The United Kingdom*, Judgment of 25 March 1983, Series A No. 61.
- European Court of Human Rights, *Chappell v. The United Kingdom*, Judgment of 30 March 1989, Series A No. 152-A.
- European Court of Human Rights, *Niemetz v. Germany*, Judgment of 16 December 1992, Series A No. 251-B.
- European Court of Human Rights, *Stes Colas Est and others v. France*, Judgment of 16 April 2002, Reports of Judgments and Decisions 2002-III.
- European court of human rights, *Bosphorus Hava Yollari Turizm v. Ireland*, Judgment of 30 June 2005, Application No. 45036/98, available at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request>
- European Court of Justice, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1.
- European Court of Justice, *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, Case 6/64, [1964] ECR 585.

- European Court of Justice, *Stauder v. City of Ulm, Sozialamt*, Case 29/69, [1969] ECR 419.
- European Court of Justice, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] ECR 1125.
- European Court of Justice, *Nold v. Commission*, Case 4/73, [1974] ECR 491.
- European Court of Justice, *Rutili v. Minister for the Interior*, Case 36/75, [1975] ECR 1219.
- European Court of Justice, *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] ECR 3727.
- European Court of Justice, *Cinéthèque S.A. v Fédération National des Cinémas Français*, Cases 60 and 61/84, [1985] ECR 2605.
- European Court of Justice, *Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, [1987] ECR 3719.
- European Court of Justice, *Elliniki Radiophonia Tileorassi - Anonimi Etairia (ERT-AE) v. Dimotiki Etairia Plirofosissis (DEP) and Sotirios Kouvelas*, Case C-260/89, [1991] ECR I-2925
- European Court of Justice, *Friedrich Kremzow v. Austrian State*, Case C-299/95, [1997] ECR I-2629.
- European Court of Justice, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, [1996] ECR I-1759.
- European Court of Justice, *Hoescht AG v. Commission*, Joined Cases 46/87 and 227/88, [1989] ECR 2859.
- European Court of Justice, *Dow Benelux v. Commission*, Case 85/87, [1989] ECR 3137.
- European Court of Justice, *Dow Chemical Ibérica and Others v. Commission*, Joined Cases 97-99/87, [1989] ECR 3165.
- European Court of Justice, *National Panasonic*, Case 136/79, [1980] ECR 2057.
- European Court of Justice, *Limburgse Vinyl Maatschappij NV and others v. Commission*, Joined Cases T-305/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94, and T-335/94, [1999] ECR 8375.

- European Court of Justice, *Roquette Frères*, Case C-94/00, [2002] ECR I-9011.
- García, Ricardo, *The General Provisions of the Charter of Fundamental Rights of the European Union*, Jean Monnet Working Paper No. 4/02, <http://www.jeanmonnetprogram.org/papers/02/020401.pdf>
- Hertogen, an, *ECJ Case C-94/00, Roquete Frères, 22 October 2002*, 10 *Colum. J. Eu. L.* 137 (2003).
- Jacobs, Francis G., "Accession of the European Union to the European Convention on Human Rights", Hearing organized by the Committee on Legal Affairs and Human Rights in Paris on 11 September 2007, available at: <http://www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf>
- Lawson, Rick, *Confusion and Conflict?. Divergent Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, V. 3 (1994).
- McCrudden, Christopher, *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No. 10/01, <http://www.jeanmonnetprogram.org/papers/01/013001.rtf>
- Spielmann, Dean, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, in Philip Alston, Ed., *The European Union and Human Rights* (1999).
- Toht, A.G., *The European Union and Human Rights: The Way Forward*, 34 *CML Rev.* (1997).
- Weiler, Joseph, *Methods of Protection: Towards a Second and Third Generation of Protection*, in Antonio Cassese et al., Eds., *Human Rights and the European Community: Methods of Protection*, V. 2 (1991).
- Wetzel, Joseph R., *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion between the Luxembourg and Strasbourg Courts*, 71 *Fordham L. Rev.* (2003).
- , *Article 53: Undermining the Impact of the Charter of Fundamental Rights*, 8 *Colum. J. Eur. L.* (2002).