THE EUROPEAN UNION AS A HUMAN RIGHTS ORGANIZATION?

HUMAN RIGHTS AND THE CORE OF THE EUROPEAN UNION

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1. Introduction

It is tempting to understand the progress of European integration as a process of growing centrality of human rights in the European legal order: human rights as being ever more important for the ever closer union. The story has been told many times: although human rights did not figure in the original Treaties, they steadily gained in importance from the late 1960s on.1 This process appears to have accelerated recently. A most prominent piece of evidence is European Council’s decision at its Cologne summit that a human rights charter should be drafted for the European Union because “[P]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy……There appears to be a need … to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens.”2 The group entrusted with the task of developing a charter presented a “Draft Charter of Fundamental Rights of the European Union” on 21 September 2000.3

The solemn declaration of such a charter,4 whatever its provisional or its final legal status, might be part of an ongoing process that has the potential

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to transform substantially the Union and its legal system. The desirability of such a transformation, not the Charter as such, is the topic of this article. The European legal order started as a functional legal order: it was set up in order to integrate the European peoples and States, mainly through an integration of their national economies. European law has been an instrument for political and social transformation of completely new dimensions for democratic societies, not meant to protect, but rather to change them with a view toward a common European future. Human rights were gradually introduced as limits to the discretion of the supranational institutions. They did not, however, alter the aims, focus or activity of the Union’s legal order and institutions. According to Article 2 TEU and Article 2 EC, the Common Market still towers over all other objectives, and the most important scientific journals are the Common Market Law Review for law and the Journal of Common Market Studies for policy. Now, there are important efforts being made to put human rights where the common market has been until today. If these endeavours succeed, human rights would determine rather than simply limit the European legal system and would move to the forefront of its institutions’ activity. Human rights as the core of the supranational order is a tantalizing prospect. They might provide a strong, visible, incontestable raison d’être, something the Union is longing for, given the technicality of the Common Market and its policies. As this article shall argue, however, there is good reason to be sceptical about such a development. Rather, a more nuanced evolution is more appropriate.

The investigation addresses three challenges to the established ways of dealing with human rights in the European Union. The first challenge regards legal policies and the demand that human rights become a core policy of the European Union. The second addresses the administration of justice, requiring the European courts to tighten their analysis and deepen their scrutiny when fundamental rights are at stake. The third demands a reconstruction of the system of European law in light of fundamental rights, and therefore primarily targets legal scholarship as its audience. Different as they are, they all aim to make human rights much more central in the policies and the legal system of the European Union than they are today. The discussion of these challenges simultaneously allows one to evaluate some aspects of the proposed human rights Charter.

5. For a compilation of the case law cf. Sudre, Quellien, Rambion, Salviejo, Droit communautaire des droits fondamentaux (Bruylant, 1999).
2. Human rights as a core policy?

At present, there is only a rudimentary EU human rights policy, for example in some aspects of its foreign relations or in the problematic reaction with respect to the participation of the Freiheitliche Partei Österreichs in the Austrian Government. Although the proposed Charter does not explicitly demand an explicit human rights policy, it might push the Union further in this direction. For example, given the broad scope of most provisions, the Charter could easily become the yardstick for EU surveillance mechanisms of the general human rights record of Member States under Article 7 TEU, or for determining the readiness of a third country for accession. Only in the light of such a reading of certain provisions of the Charter, such as the prohibition of the death penalty in Article 2(2) Charter, do they gain any actual meaning. The power for setting up such mechanisms is inherent in the tasks and competences under Article 7 EU. Moreover, the Charter does not simply prohibit infringement of fundamental rights, but requires their protection through appropriate action and even envisages broad social services (e.g. Arts. 1, 8, 24, 25, 26, 28 to 37 Charter). The possibility of it pushing the Union to develop a comprehensive human rights policy is not excluded by Article 50(2) Charter, according to which it “does not establish any new power or task”: the actual competences of the Union under the diverse Treaties already provide a basis for action on many human rights issues.


8. Tomuschat (supra note 4). The other possible explanation is that the Charter simply contains some elements “on stock” for the advent of a European superstate. However, on close examination, very few provisions appear completely outside the current scope of the Union’s powers.

9. For example, the persistence of homelessness, such as in Frankfurt-am-Main, could – on the basis of Art. 33(3) Charter – lead to an increased surveillance of Germany’s social security system. The public authorities’ response to racist aggression is another obvious issue.

10. See e.g. Art. 7 TEU, Arts. 12(2), 13, 18, 63, 136, 137, 141(2), 177(2), 179 EC; for a more forward-looking view see Weiler and Fries, “A human rights policy for the European Community and Union: The question of competences”, in Alston, supra note 6, p. 147, 154; “General principle of human rights competences”.

2.1. *The Union in a leadership role on human rights policy?*

The demand to develop a specific human rights policy has been voiced repeatedly. In particular the Commission’s DG V (Employment and Social Affairs) and the European Parliament have been working for a much more crucial role for a human rights policy. At the scientific level, a most forceful appeal to move in the direction of a EU human rights policy comes from the introductory contribution by Philip Alston and Joseph Weiler to the book on “The EU and Human Rights” recently edited by Alston. They argue that the Union should take international leadership in human rights by providing an outstanding example of a coherent, forceful and forward-looking human rights policy. The implications of such a policy will be studied through a discussion of their contribution.

Alston and Weiler’s thesis is above all a challenge to the scholarly community because it implies that they have worked with a far too narrow method and focus for the last 25 years. The main scholarly interest has been to accompany the ECJ in its development of human rights, mainly through comparative studies and a critical analysis of the Court’s judgments in light of the national constitutional experience. Orientation towards text and the Court have been at the heart of the scholarly effort. Alston and Weiler dedicate just two and a half of their 63 pages to the protection of human rights through courts, since they consider that focus insufficient. This has important methodological implications: legal scholarship moves away from a hermeneutic, text-based science towards political and administrative sciences and social engineering with the broad focus of policy-formation and implementation.

Given the insufficiency of protection by the courts, Alston and Weiler ask the legal community to broaden its view and become more engaged with other means of implementation. A human rights policy requires the pertinent political and administrative institutions and not just the judiciary. They turn their attention to other institutions, such as the Commission and the Council, proposing major organizational and procedural changes, for example

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11. See the impressive list of documents in Alston, *supra* note 6, p. 939–940.
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a separate Commissioner with a Directorate General for Human Rights or a specialized agency of the Union monitoring the human rights behaviour of EU institutions, Member States and private persons. These organizational proposals are instrumental for the authors’ central quest for a comprehensive, coherent, balanced and forward looking human rights policy, “cut from a single cloth”. This implies that there is a specific field of human rights policy similar to consumer law or environmental law. One might doubt that such a circumscribed policy field exists. Human rights affects the most diverse policy fields. It is difficult to imagine a coherent approach covering property issues, freedom of movement, freedom of information, equality issues, the fight against racism or the improvement of the situation of women. The provisions of the Charter contain something for almost every aspect of life. What could a comprehensive and coherent approach mean: precedence for human rights? That leaves the most difficult question in the human rights field, the collision of human rights, unresolved. The authors provide an indication when they demand a “forward looking human rights policy”. However, in that case, the pertinent theory of historical development has yet to be presented; in fact, it is quite possible that the high tide of sovereign intervention in society with the aim of furthering human freedom has passed. There might be the possibility of a coherent human rights policy when it comes to safeguarding basic standards of humanity, i.e. those rights which the Charter lays down in Chapter I “Dignity”, and some basic political rights. However, this is a concern only for the EU external policy. For all further aspects, it is hard to see a comprehensive approach in the sense of a specific policy area. There is a fundamental difference between horizontal clauses such as those concerning gender equality, Article 3(2) EC, and human rights in general.

Similar doubts persist as to why human rights should become a policy with a proper administration. There is no specific human rights minister or administration in any Member State. The dominant way of safeguarding human rights questions irrespective of the possible source of the infringement, whether the Union, Member States, corporations or individuals. It therefore assumes a general “Befassungskompetenz” in the field of human rights, cf. EP-Dok. A5–60/2000; A5–50/2000.

21. Alston and Weiler insinuate that the Union requires third States to maintain a human rights record which the Union and its Member States do not live up to, (see op. cit. p. 7, 28 et seq). If that were the case, severe criticism would be justified; further evidence is, however, needed.
human rights is the rule of law. The rule of law is secured by the internal control of most acts by legally trained persons (and human rights is a crucial topic in legal education), for example the legal service of the Commission, and finally the courts. Only with respect to very specific rights do some Member States have specific administrative institutions, for example women’s rights and racial discrimination.22

The quest to set up specific political and administrative bodies is closely linked with their substantive focus. It is important to note that Alston and Weiler do not discuss any deficiencies in protecting classical rights against the intrusion of the EU institutions. They do not at all share the concern forwarded in particular by some German scholars: the concern that the ECJ’s scrutiny of acts of the Union institutions is insufficient.23 That is a non-issue. Their concerns are very different and closely connected with their demand to move from “negative to positive integration” in the field of human rights.

These concepts are well known with respect to the building of the internal market through the deregulating effect of the four freedoms as enforced by the courts (negative integration) and the European regulation of some economic fields (positive integration) through the Union’s political institutions.24 In their view, the established way of looking at human rights in the Union takes only the negative aspect of integration, i.e. the prohibition of certain acts, into account. They propose complementing it by positive integration, namely through a comprehensive European human rights policy.

One might ask whether there is a need for such a new policy. A new policy is needed when a given situation is no longer satisfactory. According to the Charter, there appear to be no substantial shortcomings in the protection of human rights in the Union. The primary function served by the Charter is not to improve an unsatisfactory situation, but just “to enhance the protection . . . by making those rights more visible” (Preamble Consideration 4). Alston and Weiler, by contrast, would challenge this as a too complacent view; they present a rather unsettling picture of human rights in the European Union. However, the cases they forward in order to prove the necessity of a vigorous human rights policy are far removed from acts of EU institutions or national institutions implementing EU law, i.e. from the traditional focus of EU law.

23. See part 3 infra.
25. The Charter provides important evidence for the thesis that the European Communities have been fused within the organization of the Union, since the Charter only addresses the Union and its institutions, whereas the Communities are simply fields of activity for those institutions; see in detail v. Bogdandy, “The legal case for unity”, 36 CML Rev. (1999), 887.
human rights, now laid down in Article 50(1) Charter. The authors put as core themes of the EU human rights policy phenomena such as “a resurgence in racist or xenophobic behaviour, a failure fully to live up to equality norms or to eliminate various types of discrimination, major shortcomings in the enjoyment of economic, social, and cultural rights of disadvantaged and vulnerable groups, unsatisfactory treatment of refugees and asylum-seekers”. The US experience informs further proposals, such as legislation against sexual harassment in the working place or for an obligation of employers to monitor the composition of the workforce. Alston and Weiler therefore demand legal reform not only with respect to institutions and procedures, but also with respect to substance. If their approach prevails, the human rights perspective will change the type of discourse in most areas of social and legal policy: whole policy areas will be discussed in the light of the realization of a given fundamental right, which is at least partly protected against the majority’s decisions.

Although the Charter does not go as far as Alston and Weiler would wish, it nevertheless introduces some explicit obligations to protect human rights (e.g. Arts. 1, 8, 24, 25 Charter) and contains – in particular in Chapter IV – a number of provisions which had previously been mere tasks under the European Social Charter. Certainly, these provisions are carefully circumscribed. Nevertheless, their legal status is not very clear. They can be understood as constitutionalizing basic entitlements, currently provided for under normal parliamentary legislation, and requiring the Union to uphold and even develop this status. If that is the case, the Charter’s rights have a most important administrative and policy dimension for the EU. The Charter’s provisions also permit a more restrictive reading: they simply provide a right against Union actions which might restrict the pertinent entitlements and protection mechanisms set up by national legislation (see in particular Arts. 28, 29, 33 and 34 Charter). Even on the more restrictive reading, though, the impact of the Charter could become extremely important: there is the prospect that

27. Alston and Weiler, supra note 12, p. 14 et seq.
31. No right to employment, but access to free placement service (Art. 28 Charter) and protection in the event of unjustified dismissal (Art. 29 Charter), no right to housing, but a right to housing benefit (Art. 33(3) Charter).
32. See in particular the provisions in Chapter IV, Articles 26 to 37, e.g. social security, health care and protection against unjustified dismissal.
the national labour law and social security systems will be reformed by the
Union, given the incapacity of many national political systems to undertake
such a far-reaching reform.\textsuperscript{33} The Charter might then become the lifeline for
maintaining the status quo, giving grounds for complex litigation. Article 29
Charter can easily be interpreted as guaranteeing a level of protection equal
to the one afforded under current German labour law.

A third interpretation understands these provisions to lay down – as the
current Social Charter – only tasks, not individual rights, so that the crys-
tallization into enforceable rights is entirely left to secondary Community
law. However, on this reading, the provisions might have an important con-
stitutionalizing function: it is to be remembered that the ECJ considers the
provisions on equal treatment in Directive 76/207/EEC as providing a funda-
mental right,\textsuperscript{34} though this may be because it realizes a primary law duty to
 legislate.\textsuperscript{35} Thus, the Charter might, on this reading, have a constitutionaliz-
ing function on legal positions granted through secondary law.\textsuperscript{36} The fourth
reading is that those provisions only provide policy objectives. The disad-
vantage of this understanding is that it affects human rights in their traditional
core function; it could yield long-term negative effects on the understanding
of human rights in general.

Many of the questions about which interpretation should prevail will depend
on how Preamble Consideration 2, which stresses the indivisibility of free-
dom, equality and solidarity, is to be understood.\textsuperscript{37} A “forward looking” read-
ing of this statement of indivisibility, such as the one proposed by Alston and
Weiler, asserts the \textit{identical} importance of each element because this “reflects
the doctrines embodied in both the Universal Declaration of Human Rights
and the Council of Europe’s human rights regime (and) also the consensus on
the importance of the European social model”.\textsuperscript{38} The authors believe that the
contrary view only triggers “sterile debates over what is in fact a non issue”.\textsuperscript{39}
Nevertheless, the issue must be debated.

\textsuperscript{33} Scharpf, \textit{supra} note 24, p. 165, 174. One should not forget that an important function
of European integration has always been to modernize those parts of societies where national
reform was too costly or cumbersome, not least because of entrenched human rights positions.
\textsuperscript{34} Cases 75 and 117/82, \textit{Razzouk and Beydoun}, [1984] ECR, 1509, para 16.
\textsuperscript{35} Schilling, “Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechts-
\textsuperscript{36} For further details see Kaul, “Die Diskussion um die Grundrechtscharta der EU aus
\textsuperscript{37} There is a further role of this consideration: putting solidarity on the same footing
as human dignity, freedom and equality might provide the Charter with a specific European
flavour, contrasting with the American understanding of fundamental rights. The United States
has not even signed the International Covenant on Economic, Social and Cultural Rights of 19
\textsuperscript{38} Alston and Weiler, \textit{supra} note 12, 31.
\textsuperscript{39} Alston and Weiler ibid., p. 43.
The position that negative fundamental rights should be accompanied by corrective regulative and distributive mechanisms is convincing. Important steps of European integration consisted in the introduction of such mechanisms to accompany the Common Market’s creation of new spheres of private freedom. The best proof of this is a reading of the successive versions of Articles 2 and 3 EC. However, such mechanisms need not be cast in human rights terms, let alone in terms of a human rights policy. There is no logical, dogmatic or historic indivisibility of traditional negative human rights and the “new” rights which should form the core of the human rights policy as defined by Alston and Weiler. Rather, the national constitutions, the actual practice of the Union as well as the ECHR differentiate clearly in substance and procedure between negative rights, which protect the individual against sovereign intrusion, and political rights which protect against a manipulation of the political process on the one hand, and most of the rights which should form the core of the human rights policy on the other. This result is confirmed rather than contradicted by the two United Nations convenants on human rights and other international human rights instruments.

The scholarly discussion has revealed the profound differences between rights against sovereign intrusion and those which demand sovereign action. Political links between liberal freedoms, political rights and social entitlements are not of a nature such as to create a specific and coherent field of human rights. Alston and Weiler also underestimate the constitutive func-

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41. In detail in v. Bogdandy, Grabitz and Hilf (Eds.), EU-Kommentar (Beck, 2000), Art. 2(1) EC, 19 et seq.
45. To avoid any misunderstanding: this article does not discuss the adequacy of the proposed policies but only whether they should be considered as realizing human rights. Nor does it
tion of legislation. The very broad human rights perspective hits hard limits when moving beyond the core function of prohibiting certain acts on the part of public authorities. In general, a multitude of possible modes for the realization of human rights are imaginable: through public, civil or penal law, through procedural or substantive instruments, through regulatory policy or through financial means. From a continental perspective, little is to be gained by considering parts of consumer law, environmental law, social security law or labour law as parts of a human rights policy. Rather, such an approach might complicate their realization, given that basic rights would be at stake. For all of these reasons, the prospects for the development of a coherent and comprehensive human rights policy appear dim. The advent of a human rights charter should not be understood as a starting point for a “comprehensive and forward looking human rights policy”. The vision of reconstructing broad policy fields from the perspective of human rights might in the long run even corrupt the concept of right as such, because the very essence of a right is that it is accorded immediate protection by the courts.46

2.2. A progressive human rights policy and subsidiarity

There is another reason which speaks against such a policy. If it has taken almost fifty years for European integration to arrive at the threshold of a human rights charter, one important reason is the Member States’ concern that a EU human rights charter might have strong centralizing effects.47 Since a human rights policy goes far beyond traditional human rights, the fear of centralization must be allayed by those who ask for a forceful EU human rights policy. Alston and Weiler assert that their proposal to make human rights a core policy of the European Union does not necessitate a constitutional change and that it can be realized without a major realignment in the relationship between the Union and Member States.48 If that were convincing, the much more moderate Charter would not have to cope with this objection.

However, Alston’s and Weiler’s view is not totally convincing. First, although the authors underline that the EU human rights policy should be limited to the fields of competence of the European Union, the specific policies challenge the principle that social entitlements are to be understood as individual rights, not subject to bureaucratic discretion.

they demand and the monitoring aspect in general show that if their proposals are realized, the Union will be the crucial agent in Europe for devising and implementing progressive human rights policy. It is highly probable that the human rights secured by the national constitutions would be overshadowed by a European human rights policy if the Union established itself as the organization devising and implementing a “coherent, forward looking human rights policy”. It is quite likely that Member States would have to justify any different approach. Moreover, the independence of the national legal orders would also seem to be at stake. Judging from a German perspective, one can see that human rights are the core of the Federal Constitutional Court’s activity, which informs many parts of the legal order.49 The present situation, which leaves the Member States a great degree of autonomy with respect to their approach to human rights, is crucial in very practical terms – at least from a German perspective – to the autonomy of the national legal order. In sum, the prospect of a forceful and comprehensive human rights policy might upset the constitutional balance within the Union, infringe the subsidiarity principle and encroach on the guarantee of constitutional autonomy as part of national identity (Art. 6(3) TEU).50 Moreover, it appears unlikely that the Union’s institutions have enough political legitimacy to engage in progressive human rights policy, which can be deeply divisive. There are doubts whether the Union’s institutions are deeply enough embedded in the public discourses, and whether they wield enough political and moral clout in order to devise and implement such policies, for example to enforce gay rights in Ireland or minority rights in Corsica.

This critique does not question that some policies might be conducted and reconsidered as policies for human rights. It appears, for example, that the European asylum and refugee policy, which according to Article 18 Charter is at least partly a human rights policy, contains elements far more favourable for those affected than is the case under the national political process.51 Since human rights are often an elite interest, the Union, an organization having little exposure to popular fears and convictions, has more room to further minority interests than Member States.52 And yet, precisely this remoteness

49. Cf. for more detail below, part 4.
52. Most interesting are the reactions in the United Kingdom with respect to the Human Rights Act, see e.g. Eaglesham, “The full weight of the law”, FT Weekend, 2 Sept. 2000.
appears as a formidable limit for any comprehensive human rights policy. To sum up: there are substantial doubts whether it is to the benefit of the Union, Member States and human rights if the Union massively expands into the field of progressive human rights policy.

2.3. Three human rights standards

At the same time, the Union cannot remain aloof with respect to the general human rights situation in the Member States. The current Treaties already foresee a human rights policy towards the Member States, and the Charter will have a function in this setting, whatever its legal status. The most important provisions are to be found in Title I EU where the Treaty explicitly lays down requirements for structural compatibility. Article 6(1) TEU, read together with Article 7(1) TEU, enshrines common standards of democracy and the human rights for all public authority, i.e. also for the Member States. Moreover, Article 7 TEU gives the Union the power to act against a Member State that seriously and persistently violates the principles of Article 6(1) TEU. The Treaty thus entrusts the Union with the protection of the liberal-democratic constitutions. The Union, as the last instance, is supposed to guarantee the essentials of the constitutional whole of the Union and the Member States. It thereby also safeguards the national legal orders, if national safeguards fail. Thus it becomes an organization of collective order which stabilizes the constitution of its Member States. This innovation is a change in quality, as the previous situation lacked provisions overarching the entire system, and can be considered as a most important step in its constitutional development.

The Amsterdam Treaty provides the Union with the power to develop a democracy and general human rights policy in relation to the Member States and a competence for a general monitoring role. The Austria-Haider question shows that the Union is willing to consider this provision serious business. As mentioned above, the proposed Charter – which, on its own understanding, expresses common values – will have a natural function in providing a yardstick for this monitoring function. This role of the Charter


56. Schorkopf, supra note 53, p. 209 et seq.
In the course of the general monitoring of the Member States is not excluded by Article 50 Charter, since that monitoring is an activity of the Union’s institutions.

In light of this constitutional situation, this article proposes that a *triple human rights standard* be developed, i.e. the opposite of a human rights policy “cut from a single cloth”. There should be a *first* standard which is applied by the European Union to foreign States in its conduct of foreign policy (Art. 177(2) EC). In order not to appear as an imperialist power and not to infringe the principle of non-intervention, this policy must be limited to countering grave human rights violations. For example, if the Union tried to enforce the social standards of the proposed Charter on a third State, in particular on developing States, that could easily lead to aggressive protectionism. Moreover, this would conflict with the law of the WTO. A *second* standard has to be applied for the mechanisms through which the Union monitors and controls the general human rights performance of the Member States. This standard must also leave considerable space for autonomous human rights regimes in the Member States, given their crucial function in the national legal orders and political cultures. If more stringent, this policy will encounter all the objections developed in this chapter and will ignore the crucial constitutional difference between Articles 6(2) and 46 lit. d TEU on the one hand, Article 6(3) and 7(1) TEU on the other. The “Austria-Haider case” shows the burning necessity for developing such a standard. Then there must be a *third*, far more stringent standard which provides protection against acts of the Union’s institutions and those of the Member States when implementing EU law.

An example might be useful. The right to property as applied to a third country (first standard) should imply a standard against arbitrary expropriation and nothing more. With respect to the general human rights performance of Member States (second standard), the traditional, liberal right to private property would be guaranteed. The Union, would, however, have no business in questioning as a human rights issue an autonomous policy of ending the use of atomic energy. Such a policy, if devised by the institutions of the Union, requires a third and detailed human rights standard that provides guidance for the institutions for protection of the enterprises and the invested capital. The freedom of expression and of information might provide another example. Towards a third country, the EU has no business in deciding on a human rights basis how advertising is to be tackled or to demand uncontrolled access to the

57. Treblicock and Howse, *The Regulation of International Trade*, 2nd ed. (Routledge, 1999), pp. 441 et seq. Moreover, if they become part of foreign policy, human rights will easily become nothing more than a part of larger strategic plans, thus running the risk of undermining the whole idea, see Vismann, *supra* note 44, 335. Caution thus also appears appropriate from this perspective.
internet. With respect to the general human rights performance of Member States (second standard) a complete ban would fall short, but little else. With respect to the Union, a strict standard would be required that balances the human rights aspects with competing public and private interests. One of the most challenging prospects for EU human rights is the development of convincing standards for each of these three levels, attuned to the respective international and constitutional setting. Of all standards, only the one with respect to the Union’s institutions is fully developed.

3. Stricter judicial protection?

The development of human rights as general principles of Community law, protecting against acts of the Union’s institutions, has been one of the ECJ’s greatest achievements in the process of constitutionalizing the founding Treaties. Yet this protection is considered insufficient by a number of scholars. Three main criticisms are voiced. The first regards procedural questions, arguing that the narrow construction of Article 230(4) EC makes it too difficult to obtain adequate legal protection in all cases. This contribution will focus on the second and third critiques: that the ECJ’s scrutiny is not strict enough, i.e. that it leaves too much to the institutions’ discretion, and that its approach should be more differentiated.

3.1. Insufficient scrutiny

A standard reproach concerning the ECJ’s treatment of human rights is that the scrutiny is insufficient. On this reading, freedom from sovereign intrusion, the traditional core objective of human rights, is lost in the process of European integration. The critique mostly aims at the ECJ’s handling of the proportionality principle. First, it is said that within the necessity-test, the


ECJ does not take possible alternatives, which might be less detrimental to the affected person, seriously enough into account. Second, the balancing of the public interest against the private interest is considered to be too superficial since the situation of an especially affected person is not considered. Moreover, it is alleged that the ECJ uses a double standard: a tight control of Member State measures under Article 28 EC etc., a lenient control of acts of the EU institutions. In this light, the reproach can be formulated even more strongly: that the Union leads structurally to an increase in the freedom of those actors (mostly large enterprises) who operate on the European market (because of the freedoms directed against Member States), and a loss of freedom for all others. In short, freedom for the pike is death for the minnow, and it is the pike that is being nurtured.

The demand is that the ECJ should tighten its control when human rights are at stake, guaranteeing more individual freedom against intrusion by the Union’s institutions. It has become almost a standard element in pleadings by some German lawyers to hint at an alleged higher German standard in protection and to the Maastricht (Brunner) decision of the German Federal Constitutional Court in order to further their positions. Therefore, this challenge also wants human rights to be more central in the Union’s legal order, although in an almost opposite way to Alston and Weiler: the balance between regulatory policies and individual freedoms should tilt much more in favour of the latter. The proclamation or even enactment of the Charter might provide further strength to this position.

In fact, the practical human rights record of the Court appears poor, judging by numbers. There seems to be a mismatch between the range and depth of the EU activities and the tiny number of human rights cases involving EU intrusion brought – or the even smaller number which are successful. Moreover, the ECJ is far more sensitive to discrimination issues than to


63. See infra note 95.

64. BVerfGE 89, 155.


66. De Witte points out that there are only a handful of human rights cases a year heard by the ECJ, which compares strangely with the high number of human rights cases processed by some national constitutional courts, de Witte, supra note 59, 869. He also provides some explanations.
outright freedom issues. Nevertheless, the reproach is not well-founded. First, there is little evidence that the ECJ’s level of protection is actually lower than that afforded by national constitutional courts. In fact, there are very few practical cases where the issue has surfaced at all. The legal problem in the most discussed case, resulting from the application of the Banana Regulation No. 404/93 to German enterprises, is revealing. The crucial concern is set out by the Frankfurt administrative court. It justified its request that the FCC should declare the foreign trade title of the Banana Regulation inapplicable in Germany as follows: the Regulation lacks a hardship clause for especially affected traders which would allow them to adapt to the new situation within a certain time limit. Therefore the argument concerning the lack in the depth of scrutiny boils down to the reproach that the ECJ did not declare the regulation void to the extent that a hardship clause was missing. And yet, only a month after the decision by the Frankfurt court on 24 October 1996, the ECJ handed down its judgment of 26 November 1996, giving Article 30 of the contested regulation precisely that meaning, and thereby resolving the human rights problem.

The adequacy of this solution and the ECJ’s general line on human rights issues are acknowledged by the German Federal Constitutional Court in its decision of 7 June 2000. The FCC held the Frankfurt administrative court’s reference inadmissible because there was no evidence that the level of protection afforded by the ECJ was insufficient: in fact, the FCC declared that it would decide the case as the ECJ did. Moreover, the FCC’s decision contains important general statements. Above all, it rectifies the often voiced interpretation of its 1993 Maastricht decision that the FCC was tightening its control over the Union’s human rights performance with respect to its earlier,

67. The reason might be the central role that equality before the law has played in the ECJ’s jurisprudence, serving as the basis for such doctrines as direct applicability, supremacy and many others which limit the discretion of Member States when implementing Community law, Kutscher, “Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts aus der Sicht eines Richters”, in EuGH, Begegnung von Justiz und Hochschule am 27. und 28. September 1976 (Luxemburg 1976), p. I-8. 35; Nettlesheim, “Der Grundsatz der einheitlichen Wirksamkeit des Gemeinschaftsrechts”, in GS Grabitz (Beck, 1995), 447 et seq.


69. For the relevant literature see the articles mentioned in note 62, and Everling, “Will Europe slip on bananas?”, 33 CML Rev. (1996), 401, 417.


73. BVerfGE 89, 155.
more “integration friendly” “Solange II” decision of 22 October 1986. The
decision of 7 June 2000 makes clear that the FCC will scrutinize European
acts or their implementation through national bodies only if the necessary
protection is not generally given („der jeweils als unabdingbar gebotene
Grundrechtsschutz generell nicht gewährleistet ist“), for which there is no
evidence at all. The crucial word is “generell”. That requires a comprehensive
review of how the European institutions protect the human right in question.
Any claimant will have to prove that the ECJ’s general human rights record
with respect to this interest is insufficient; he cannot limit himself to proving
a discrepancy between the European and the national level of protection.

Nevertheless, the harmony is not certain to last. Rather, substantial diver-
gences might appear, and in any case the ECJ will have to decide how to
determine its level of scrutiny in light of new policy fields. Until today, the
ECJ has only been called upon to protect human rights against intrusion by the
Union’s institutions acting in the economic sphere. In this sphere, the human
rights protection awarded by any European court is low and the discretion
of the political and administrative institutions broad. However, more sens-
itive issues will emerge in the future. Legal acts under Title VI EU Treaty
on police and criminal matters are particularly obvious candidates, given the
profound differences in the legal traditions of the Member States. Recent
friction between the jurisdiction of the ECHR and national courts shows the
potential of discord. The harmonization of direct taxation, a crucial element
for economic union, is another candidate for human rights divergences, given
the close interaction between taxation, wedlock, family and an almost infin-
ite number of possible situations of discrimination.

EU legislation under Article 13 EC could raise difficult questions of conflict between a forceful
human rights policy on discrimination and the protection of individual free-
dom, for example freedom of contract. The prospect remains that legal acts
of the Union will fall short of what is considered by one or more national
constitutions as the adequate standard of human rights protection. The reason
for these differences lies in the application of the proportionality test. Differ-

74. BVerfGE 73, 339.
75. In detail Due and Gulmann, “Community fundamental rights as part of national law”,
76. See e.g. judgment of March 28 2000, case C-7998, Krombach, nyr.
NVwZ, 161 et seq.; and on the other, BVerwG (federal administrative court) of 27 April 1998,
78. The jurisprudence of the FCC is most complex in this field and presents a formidable
example of how a well-meaning human rights policy through the Court might manoeuvre a
political system into a most difficult position, see in detail Lehner, Einkommenssteuerrecht und
Sozialhilferecht (1993), pp. 133 et seq. It appears almost impossible to reproduce a similar
logic for European acts aimed at the harmonization of direct taxation.
ent applications yield different levels of scrutiny. Furthermore, the ECJ could decide on its own that in these fields it will apply stricter scrutiny. The advent of the Charter will have a strong impact on such considerations.

The critics suggest that the ECJ apply the highest (maximum) standard of human rights protection and exercise the strictest scrutiny. This is part and parcel of the aim to make human rights more central.79 Article 51(3) and in particular 52 Charter could be forwarded as arguments. However, this proposal would have several pitfalls, making such a reading of Article 51(3) and 52 Charter unconvincing. First, there is the question of determining the highest standard, in particular when an intrusive public policy aims at furthering competing human rights.80 Given the broad scope of the proposed human rights Charter which gives a fundamental rights dimension to environmental protection, consumer protection, and social security, this will be the case in many policy fields. But even in cases in which an intrusive policy cannot be regarded as human rights policy, the application of the highest standard and the closest scrutiny appears to be a dubious approach.

Strictness of scrutiny and the determination of the adequate level of protection is to a lesser extent a methodological, to a larger extent a division of powers question.81 Since there are almost no human rights which prohibit any form of intrusion,82 the crucial question is that of striking the correct balance between competing objectives: the interests which are protected by the human right on the one hand, the interests furthered by the public policy on the other. The ECJ has decided to formalize this balancing according to the diverse elements of the proportionality principle.83 The decision about the necessary means in order to realize a particular policy aim, and even more so the balancing of competing public and private interests, mainly consist in value judgments not determined by legal norms.84 Since courts have always had a much more prominent role in the legal system than being simply “la

81. De Witte, supra note 59, 881.
82. On this see below, Part 3.2.
83. Pache, “Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der EG”, (1999) NVwZ, 1033; on the development of this principle from a European perspective see Sandulli, La proporzionalità dell’azione amministrativa (CEDAM, 1998), pp. 39 et seq; the ECJ could have accepted an alternative, for example the British unreasonable-test, which constrains discretion to a much lesser extent, Craig, Administrative Law, 3rd ed. (1994), pp. 407 et seq.
84. That is a standard insight of legal theory, Koch and Rüßmann, Juristische Begründungslehre (Beck, 1982), p. 242, 245; Schlink, Abwägen im Verfassungsrecht (Duncker & Humblot, 1976), pp. 127 et seq. The most important tool for securing legal certainty comes
bouche de la loi” it is conceivable that such decisions are taken by courts. The main function of human rights would then be to empower courts – and in particular those with a constitutional function\textsuperscript{85} – to give close procedural and substantive guidelines to the political process in policy fields covered by the relevant rights. Some courts do this with great success. For example, the Italian Constitutional Court has been crucial in shedding elements of the fascist past from the Italian legal order,\textsuperscript{86} and the FCC has decisively furthered the democratization of the German administration and major societal reforms through its forceful intervention mostly on a human rights basis;\textsuperscript{87} some even claim that the FCC takes part in the “Staatsleitung”.\textsuperscript{88} Nevertheless, even this Court finds itself confronted with doubts about whether the juridification of the political process is a positive feature.\textsuperscript{89} The sheer size of the relevant commentary work shows to what extent the FCC determines broad legal fields;\textsuperscript{90} the law of public broadcasting, for example, has, in all important aspects, been determined by the FCC on the basis of freedom of speech and information.\textsuperscript{91}

Although the ECJ has been a forceful constitutional court, it has been very cautious about substantively guiding the European legislative process. At this point, an important feature of the ECJ’s case law comes to the fore: most of the great judgments which led to a constitutionalization of the Treaties are not meant to implement substantive principles, but focus instead on furthering integration through ensuring that the results of the political process, i.e. primary or secondary law, are enforced.\textsuperscript{92} Even the introduction of human rights, the most important substantive element, responds to a large extent to

from the case law of the courts. The question here is to what extent the ECJ should develop such a human rights case law.


86. See the contributions in Occhiocupo (Ed.), La Corte Costituzionale tra norma giuridica e realtà sociale. Bilancio di vent’anni di attività (1978).


90. See e.g. Scholz and Papier, in Maunz, Dürrig, Herzog, Grundgesetzkommentar, Art. 12 (freedom of enterprise and profession) which has more than 200 pages, Art. 14 GG (property) which takes up over 300 pages.


the need to strengthen European law: moreover, their role in policy orientation is small. The “gouvernement des juges” in the EEC, as it was described by Robert Lecourt, has to date had little in common with the role forceful constitutional courts have had in the national political processes. The ECJ, in its role as a constitutional court, has been very cautious with respect to substantive policy.

This assumption is likely to be challenged on the basis of the ECJ’s well-developed, detailed and successful case law concerning the fundamental freedoms of the EC Treaty, which some scholars even consider to be human rights. The ECJ has developed an impressive case law on such sensitive issues as the admissibility of national standards for food safety or environmental protection. There therefore appears to be little reason not to develop a pertinent primary law on a human rights basis with respect to the Union’s institutions. Moreover, this case law appears particularly critical in this context because it is considered as proof of a fundamental bias in the ECJ’s administration of justice: lenient with respect to the EU, tight with respect to the Member States. At issue is the reproach of a double standard when applying proportionality: the critics argue that if the ECJ applied to EU acts the type of scrutiny it applies to Member State acts when a violation of a basic freedom is claimed, it would have to strike down many acts of the Union. In short, the case law on the four freedoms appears to prove the possibility and necessity of strict scrutiny of the Union’s acts on a human rights basis. As an additional argument, one might cite the ECJ’s decisions which state that, in general, supranational and national acts should be judged by the same standards.

However, a closer look at this case law reveals that the ECJ is not acting here as a constitutional court that guides the political process. There is a crucial difference between the basic freedoms case law and the human rights case law. The basic freedoms do not provide – with the exception of free movement of workers and their access to employment – fundamental rights

94. Due and Gulmann, supra note 75, 407; Oppermann, Europarecht, 2nd ed. (Beck, 1999), para. 490; aside from this, the Court has developed only two large bodies of substantive primary law: competition law and gender discrimination law, neither of which restricts the European legislative process.
and the jurisprudence of the ECJ on these issues is not one of human rights.98 In this context, the most important difference between the human rights case law and the basic freedoms case law is an often overlooked reservation the ECJ makes: the Court applies the basic freedoms only if there is no secondary instrument.100 This signifies in substance that the Member States – through the Council – can regulate the issue differently from the way it was decided by the Court on the basis of the basic freedom. No decision of the Court that a national obstacle is illegal because it violates a basic freedom is written in stone, because it can be “overturned” through a later regulation or directive. Therefore – and this is a crucial difference with a human rights decision either by the ECJ or the ECHR or national constitutional court – a decision on the basis of the four freedoms does not put the issue out of the reach of the normal political process.101 The balancing of interests is, in the end, left to the political process. The relevant decision is a settlement of the issue that can be corrected by secondary law. This line of case law can be interpreted as follows. The ECJ clearly sees the numerous disadvantages in guiding the economic and social process through constitutional adjudication which – given that the rigidity of the procedure under Article 48 EU makes constitutional reform much more cumbersome than most national procedures – could seriously inhibit necessary reform.102 This line of argument also explains why the basic freedoms are not applied with respect to Council legislation as strictly as to Member State acts unless the basic tenets of the Common Market are jeopardized through Community acts: only flagrant violations of the principles of the Common Market are prohibited, above all discrimination.103

98. This understanding is confirmed by the Charter. In Consideration 3 it distinguishes clearly between common values and human rights, on the one hand, and the freedoms on the other. Furthermore, no freedom except the freedom of movement and residence is mentioned in the Charter (Art. 44).
99. See Schilling, supra note 58, 10.
100. Case 120/78, Cassis de Dijon, [1979] ECR 649, 662 para 8; Case C-51/94, Sauce hollandaise, [1995] ECR I-3599, 3627 para 29; Case C-470/93, Mars, [1995] ECR 1-1923, 1940 para 12; this formula does not appear in all judgments, see e.g. Case C-412/93, Leclerc, [1995] ECR 209, 216 paras. 18 et seq. The reason is that it is established, see the textbooks, e.g. Streinz, Europarecht, 4th ed. (1999), para 742. This also explains why primary law is interpreted in light of secondary law, which may, at first glance, seem a puzzling if not downright astonishing method of interpretation, see Case C-9/93, Ideal Standard, [1994] ECR I-2789, 2853 et seq., paras. 56 et seq.
101. The same is true for the two other important bodies of primary law, i.e. competition law and gender discrimination law: they do not affect the discretion of the Union’s legislature.
102. Since the ECJ belongs to an organization (the EU) without an institution competent for constitutional reform, it lacks the constitutional counterweight all other constitutional courts have.
Summing up, the case law of the ECJ is consistent when it leaves considerable discretion to the Union’s political institutions. The Charter might, however, be a signal for the ECJ to change its approach and tighten its scrutiny, even though it appears – as can be deduced from Consideration 4 – fairly satisfied with the current level of protection. In any event, the advent of the Charter will certainly trigger such demands.

A court that develops a strong position with respect to the political process needs a sufficient basis. The authoritative text as such is not sufficient, because it does not determine the depth of scrutiny. Neither Article 51 nor Article 52 Charter determines the depth of scrutiny. One possible basis could be to consider the ECJ as an institution of civil society rather than an institution of a political organization, and human rights as a legitimate instrument for forcing societal convictions and claims upon the government. However, this model has – for good reasons – never been proposed for the ECJ, although it might be an attractive vision to see the ECJ (“Luxembourg”) as an agent of society against “Brussels”. A different model considers the courts as institutions that work out – mainly through their human rights case law – the societal consensus on common values.105 This model has been applied to European integration. Some scholars perceive an increasing homogeneity of constitutional values and an increasingly strong consensus on other values within Europe.106 This approach can find support in the Charter’s first Consideration, which stipulates a “peaceful future based on common values”, and the function of the Union and therefore the ECJ to “contribute(s) to the development of these common

para 24; Maduro, op. cit. supra note 24, pp. 76 et seq., p. 78: “What the Court does when it considers Article 30 is not to impose a certain constitutional conception of public intervention in the market, but to compensate for the lack of Community harmonisation”; Matthies and Borries, in Grabitz and Hilf, op. cit. supra note 41, “Art. 30 EC Treaty”, para. 43; Oliver, Free Movement of Goods (Sweet & Maxwell, 1996), paras. 4.08 et seq.; a tighter control is exercised with respect to movement of workers, given its human rights dimension, Case 41/84, Pinna, [1986] ECR 17, para 21; O’Leary, “Free Movement of Persons and Services”, in Craig and de Burca (Ed.), The Evolution of EU Law (Oxford, 1999), pp. 377, 378 et seq. 104. This is said to be the case in the United States, Lepsius, Verwaltungsrecht unter dem common law (Mohr, 1997), pp. 31 et seq., 212 et seq. 105. There is a broad, complex and controversial debate as to whether, and if so, to what extent, a national constitutional court has a function in furthering social cohesion and in developing common social values into legal norms which guide the discretion of the political institutions. For the most recent contributions see Schuppert and Bumke (Eds.), Bundesverfassungsgericht und gesellschaftlicher Grundkonsens (Nomos, 2000). 106. Pernice, “Eine Grundrechte-Charta für die Europäische Union”, (2000) DVBL., 847; Steinberger, “Aspekte der Rechtsprechung des Bundesverfassungsgerichts zum Verhältnis zwischen Europäischem Gemeinschaftsrecht und deutschem Recht”, in Festschrift Doehring (1989), p. 951, 968; Häberle, Europäische Rechtskultur (Suhrkamp, a1994), p. 37 and passim; id., “Europa als werdende Verfassungsgemeinschaft”, (2000) DVBL., 840. On this basis some even see the advent of a European nation, Bahlmann, “Abschied vom Gerichtshof der Europäischen Gemeinschaften”, (1988) EuR, 347.
values”. The Charter in itself might be considered a result of a developing fundamental normative basis of European society.

And yet, many contest that Europe’s development reveals such a direction.\textsuperscript{107} Of course, not even the sceptics question that the Union’s general goals – maintaining peace and securing freedom and prosperity within the framework of a close European Union\textsuperscript{108} – enjoy widespread agreement; the same is true of basic civil rights. However, in the pluralistic conception, this consensus is held to be far less substantial than is generally assumed for the Member States. The Union can rely only to a minor extent on a basic material consensus, with obvious consequences for the European courts in their administration of justice.\textsuperscript{109}

The European Union is far more dependant on political avenues to settle conflicts of competing interests than many national systems with an accepted constitutional court. There are also doubts whether the ECJ enjoys the sort of social acceptance on which the FCC’s tight scrutiny is based. Some scholars even assume a profound distrust of the ECJ.\textsuperscript{110} But even those who do not hold these views will acknowledge that the ECJ’s role on substantive issues should not resemble the politically most active constitutional courts. Moreover, a tight control of European legislation and broad and well-entrenched human rights position would seriously endanger an important function of European integration, namely, of allowing for political reform where the national political systems are largely blocked.\textsuperscript{111} In sum, the conviction of this article is that, given the constitutional and social setting of the ECJ, human rights should not be used to move the ECJ and its case law to a position of centrality in the European political process. A fundamental change in the Court’s handling of the proportionality principle in scrutinizing European legislation


\textsuperscript{111} See note 33 supra.
is not advisable. This statement should not be understood as an invitation to lower the guard: much of the ECJ’s reputation will depend on how it succeeds in protecting human rights in the rapidly expanding universe of law aimed at the creation of an area of freedom, security and justice in the European Union. The task of the ECJ to develop a convincing strategy of protecting human rights adequately in the policies under Title IV EC and IV TEU is monumental, given its limits on the one hand, and the expectations on the other.

3.2. The method of analysis

Another criticism voiced in relation to the ECJ’s handling of human rights regards the method: the analytical approach is considered insufficient. In order to discuss this reproach, a methodological reflection is helpful. There are different possibilities of analysing whether an act is illegal because it infringes a fundamental right. Basically, a one-level and two-level analysis can be distinguished. The whole reasoning can be done in a single step according to the method of “Conciliation”. The French approach, for example, appears to use this method. The ECJ appears to follow a two-level analysis, as has been developed by the German speaking scholarship. At the first level, the general scope of a fundamental right has to be determined, whether the affected interest falls within this scope and whether the act encroaches on the protected interest. At the second level, it has to be analysed whether an infringement is permissible at all (that is generally the case) and whether the infringing measure meets the requirements for a legal curtailment of the protected interest. Among these requirements, proportionality is the most important.

The ECJ acknowledges almost any alleged human rights position as being protected by the legal order of the EU. However, it hardly ever defines what the reach of that right actually is. This is the critique’s objection: first,

112. Arnold, “Ausgestaltung und Begrenzung von Grundrechten im französischen Verfassungsrecht”, 38 JöR N.F. (1989), 197, 209. The French approach appears, however, to inform the ECJ and the supranational order when it comes to adding further rights, e.g., to good administration. For a detailed discussion Schilling, supra note 58, 24 et seq.


114. Often proportionality is considered a separate test, without, however, changing the logic or reasoning; see Case C-280/93, Germany v. Council, [1994] ECR I-4973, para 88.

115. Only in one case was an interest that was protected under a Member State’s constitution not recognized as enjoying the same protection, Case 46/87 and 227/88, Hoechst v. Commission, [1989] ECR paras. 17–18.
it is detrimental for the visibility of rights if their scope is not determined, and second, the specificity of the protection of property is considered to be lost. For the visibility of human rights it would be certainly helpful if the scope of a human right and the relationship between different human rights were better determined. However, this situation is to a large extent due to the fact that the ECJ developed the fundamental rights – in the same manner as the French Constitutional Council – as general principles. The relationship between general principles is more difficult to define than the relationship between positive provisions of an authoritative text. The advent of the Charter might therefore lead to a more precise handling of fundamental rights. This, however, will produce an important side-effect: the relevant concretizations of the abstract provisions will immediately create a more developed and complex human rights case law, and the influence which it will exercise on the political process should not be underestimated.

At the second level, where the requirements for an intrusion to be legal are analysed, two different approaches are possible: specific requirements or a general formula. The “specific requirement approach” can best be studied in the ECHR. Except for the general rule in Article 18 ECHR, each provision lays down specific requirements in order for an infringement of a right to be legal, if the right is not absolute. The German Basic Law follows a similar technique. For each fundamental right – if not absolute – more or less specific requirements are set out, supplemented by the general requirements in Article 19(1) and (2) Basic Law. The ECJ has mostly adopted the general formula approach on the basis of the proportionality principle, which is criticized as being too indefinite and not doing justice to the different needs of the diverse human rights. This criticism also affects the Charter because it has adopted the same general approach in Article 51(1).

This critique appears largely unfounded, because the “specific requirements” approach has not worked properly. In German constitutional practice and scholarship it has been almost completely abandoned as simply

117. Schilling, supra note 58, 12.
118. For the parallels, see de Witte, supra note 59, 864.
119. For the importance of the French public law doctrine in the ECJ’s human rights case law, see Schilling, supra note 58, 24 et seq.
120. Besselink, supra note 79, 633.
122. Besselink, supra note 79, 636; Caspar, supra note 61, 357; Pauly, supra note 61, 254, 255; see also supra note 62 for further references.
impracticable. Instead, the general requirements of an adequate statutory basis and the respect for the proportionality principle are the decisive yardsticks to judge the legality of an intrusion. The findings with respect to international instruments are similar. It is also revealing that the new Swiss Constitution has adopted a general approach which is very similar to that of the Charter on this issue. Articles 7 to 34 Swiss Constitution set out “fundamental rights” and Article 36 lays down the requirements for an intrusion to be legal, namely a statutory basis, the pursuit of a legitimate aim, proportionality and a total protection of the core. Therefore, the solution adopted by the ECJ and the Charter is sound. One serious shortcoming, however, cannot be overlooked: the Charter neglects to take into consideration the fact that fundamental rights might need secondary legislation in order to be effective. Moreover, Article 52 Charter is framed in a most unfortunate way because it appears to permit torture and capital punishment. Even though this interpretation is excluded by Article 51(3) Charter, the text should be clearer, given its “visibility” function.

There is a radical alternative to the present understanding. The current construction of fundamental rights extends their scope to almost any legitimate interest or activity, with the consequence that an intrusion is possible for almost any public or competing private interest. This approach, the one chosen by the ECJ, construes human rights broadly, and considers almost any legitimate private interest and behaviour as protected by human rights. In the end, this leads to the consequence that there is a basic human right to free activity which can be encroached on for any reasonable and proportionate policy grounds. The alternative, in contrast, is to understand human rights as a response to particularly important interests of the individual. Such an understanding leads to a specific human right being much more narrowly focused, but much tighter protection if that field is invaded. In my view, this understanding of human rights is preferable: it gives better protection to the endangered interest and leads to a better separation of power between the judiciary and the political process. And yet, it is not commendable or even feasible for the European Union. The ECJ has developed its human rights based on the Member States’ common traditions and in line with international human rights instruments. Since the ECHR and many national legal orders

125. Hesse, supra note 42, 154 et seq.; Pieroth and Schlink, supra note 113, 60 et seq.
126. Sudre, supra note 30, 148 et seq.
127. In detail Müller, Grundrechte in der Schweiz, 3rd ed (Stämpfli, 1999).
128. Tomuschat, supra note 4; in detail Gellermann, supra note 42.
construe fundamental rights broadly, the ECJ is forced to follow the broad approach.

It should be noted that the human rights jurisprudence is the least “autonomous” part of the supranational legal order. In no other field does the ECJ rely so much on the national legal orders and international law. This approach was not necessary; human rights could have been developed on the basis of provisions in the EC Treaty, leading to a far more autonomous human rights case law. Perhaps the ECJ embarked on this avenue because it saw – very much in line with national constitutional courts – fundamental rights as an expression of societal values, and European society in the 1970s as not being developed enough to serve as a convincing source of specific European values. Article 6(2) TEU endorses this approach. In any event, the rights which the ECJ provided with “teeth” through its constitutionalizing case law were not fundamental rights based on common traditions, but individual rights resulting from the Treaties and the secondary law. Thus, human rights have a rather marginal role in the legal order from this perspective, too. Whether or not that should change is this article’s last point.

4. New Foundation for the legal order?

The last challenge moves human rights to the core of the supranational order in yet another way, by attributing to human rights a founding function for the entire legal order. The very idea is to give the process of constitutionalization of European law a new dimension. This thesis requires that the essence of constitutionalization be reconsidered.

The process of constitutionalizing the founding Treaties began by imposing a constitutional type of relationship between the supranational order and the national legal orders, mostly through direct applicability and supremacy. In the German legal order constitutionalization means something very different: it indicates that the whole legal order is informed by the principles of the constitution, especially by fundamental rights. Constitutionalization does not therefore simply indicate normative superiority, i.e. the possibility of declaring a legislative act void if it contravenes the constitution and human rights in particular. Rather, it concerns what normative supremacy does not

130. Pernice, supra note 1, 66 et seq.
133. Schuppert and Bumke, supra note 60.
explain: the constitution’s principles penetrate non-constitutional law and the process of its creation. Some constitutions even explicitly foresee this form of penetration: Article 35(1) of the new Swiss Constitution requires that “fundamental rights shall be applicable to (zur Geltung kommen) the entire legal order”. At this point, two different visions of the function of fundamental rights appear. One vision understands human rights as normative orientation and foundation for the whole of social relations in the polity, whereas the other vision understands fundamental rights as safeguards against sovereign intrusion without any further plan of how society should develop. The reason behind the first vision is the insight that the basic aim of human rights is to guarantee liberty and dignity and that these objectives cannot be realized on an individual basis alone but require a free community. In this light, the intimate relationship between fundamental rights and a democratic polity comes to the fore. On this basis, German legal scholarship has reconstructed many legal fields on the basis of the relevant basic rights, with profound influence on legal practice. It is considered one of most important legal developments in the Federal Republic.

The quest is for reconstruction and constitutionalization of the supranational legal order on a human rights basis. The difference between this challenge and the one put forward by Alston and Weiler is that the latter’s focus is on the realization of progressive social rights.

Reconstructing the EU on a human rights basis is also less likely to challenge the constitutional relation between the supranational and the national.
legal orders, because it focuses on the Union’s legal order. It concerns a development more internal to the legal system and therefore has less general visibility. The assertion that the supranational legal system already has at its “very heart the protection of the fundamental rights of the individual”\(^{142}\) is not convincing; European constitutionalism has, in many aspects, still to be developed.\(^{143}\) The European legal order uses human rights to a large extent simply as limits to discretion.\(^{144}\) In fact, human rights do not figure among the objectives either of Article 2 TEU, or Articles 2 and 3 EC, and Article 6(2) TEU lays down limits, but not objectives.\(^{145}\) However, Article 6(1) TEU might support an understanding which attributes a more central position to fundamental rights.

The Charter contains elements that appear to give human rights a much more central role in the supranational order. Consideration 2 states that the Union “places the individual at the heart of its activities”. This can be understood as a simple truism: the Union is not an end in itself, but, rather, all its activities must benefit men and women living under its rule. It can, however, also be seen as a request for a far-reaching reconstruction of the legal order. There is further evidence: the first Consideration presents the Charter’s fundamental rights as being based on the “common values” of the European peoples, which presupposes not only that they are shared on a European-wide basis, but also that they are also deeply embedded in European society. This is confirmed by Consideration 6, which underscores the reciprocity of rights and duties with regard to other persons. That implies that all social relations should be moulded to some extent according to those values. Furthermore, human rights, in order to be “more visible”\(^{146}\) to the citizen in real terms – a crucial objective of the Charter according to Consideration 4 – must be present throughout the legal order. It would be a grave misunderstanding to reduce the visibility of human rights to being laid down in a document. Moreover, Article 49(1) Charter obliges the Union and Member States not only to respect and observe human rights, but also “to promote the application

144. Besselink, supra note 79, 669; Schilling, supra note 58, 33.
thereof". However, there are also different elements in the Charter which support a more restrictive understanding, since it is, as can be clearly seen from Consideration 4, quite complacent with regard to the current human rights situation. In this light, the Charter cannot be understood as requiring far-reaching reconstructions. Moreover, the Charter declares in Article 50(2) that no new tasks are established.

Legal scholarship should discuss the appropriateness of restructuring the European legal order thoroughly. If it does, it will lead to a monumental task with enormous consequences. Studies aiming at a reconstruction of the supranational legal order with the individual and his or her fundamental rights as the focal point, often based on the concept of citizenship, \(^{147}\) show that such a restructuring of the body of law is an enormous undertaking which brings to the fore many critical questions. Not only secondary law will be affected, but the institutional law of the European Union, too. \(^{148}\) Major changes in Union law must occur if it is to change into a legal order that places human rights or the citizen at its center.

Is this really a convincing prospect and should this reconstruction be considered as the most crucial task of European legal studies at the outset of the 21st century? Should European law be freed from its function as an instrument of politically induced social change to a legal order that focuses on the protection of the individual? The author might be forgiven for leaving this point open. As such a process is feasible only under specific historic, political and social circumstances, as the German example proves, one might also be forgiven for a certain degree of scepticism. Nevertheless, legal scholarship should investigate this possibility, in particular in those legal fields which are the most sensitive, such as the nascent police cooperation law, freedom of movement or access to justice. Asylum and refugee law – as already mentioned – are further examples where developing policies from a Common Market perspective is just not convincing. Apparently, an important transition has taken place between the negotiations which led to the Amsterdam Treaty and the Charter: whereas the Amsterdam Treaty approaches asylum and refugee policy from a Common Market perspective and places them between capital movement (Arts. 56 to 60 EC) and transport (Arts. 70 to 80 EC), Article 18 Charter handles this policy in much more convincing way.


\(^{148}\) Denninger, *supra* note 137, 145.
5. Concluding remarks

The Common Market is exhausted as a vision for further integration, neither does it provide an indication where European integration should go from here. Human rights, by contrast, provides a most intriguing prospect. Nevertheless, this article has taken a cautious position on whether human rights should be moved to the core of the supranational order. Neither the purported need for a “fundamental rethinking”\(^\text{149}\) of the current situation in the Union nor the proposal that a “comprehensive and forward looking” human rights policy should become a core policy are convincing. There are good arguments against the proliferation of human rights and human rights discourse in ever more legal fields, policy areas and spheres of society, and particularly so if this discourse originates in the Union’s legal order.

The Union as an organization focused on progressive human rights policy would easily endanger the European constitutional set-up between the Union and the Member States without any real need for protecting human rights, at least as they are traditionally understood. Given the strong centralizing effects, a forceful human rights policy will, nevertheless, be advocated by those who wish courageous steps to be taken to strengthen the European federation.\(^\text{150}\) Europe could finish its federalizing process under the flag of human rights. This prospect is certainly more appealing, at least from a legal perspective, than a similar development arising from a common defence or a common currency.

Should the federalizing process should be accelerated? This article recommends that a more cautious approach be taken and advocates developing the Union according to its proper and hitherto successful constitutional logic. The crucial consequence is the need to develop three different human rights standards: a first, very basic standard which applies to foreign States in the conduct of EU foreign policy; a second standard which serves as a standard for monitoring the general human rights performance of the Member States under Article 7 TEU; and a third, more stringent one which applies to acts of the Union and implementing measures of the Member States. The systematic development of these three standards presents a challenging task for European legal scholarship.

This article also opposes the second challenge that the ECJ should scrutinize European legal acts more strictly. Such a move would tilt the balance of power within the EU between the judiciary and the political institutions. The

150. Majocchi, \textit{La difficile costruzione dell’unità europea} (Jaca, 1996), pp. 35 et seq.; for a different vision of Europe as a federation cf. v. Bogdandy, \textit{supra} note 55, 50 et seq.
necessary foundations to cope with such a monumental sea change are not present. However, a more precise handling of human rights with more respect for their core function is desirable. With respect to the third challenge, i.e. that human rights should become the axis of the European legal system, this article confesses a certain scepticism as to whether it is feasible as a general approach. It should, however, be noted that, certain critical legal fields, such as migration law, police cooperation law or access to justice, are most adequately addressed by this approach.

The core objectives of the Union should, for the moment at least, remain peace, wealth and an ever closer union among its peoples. Human rights, though important, should not be understood as the *raison d’être* of the Union.151 And yet, the discussed challenges should not be discarded lightly. Human rights are in many legal orders important instruments for continuous adaptation to changing social needs, fears and convictions. Legal scholarship has an important role in articulating the demands and furthering the process of change. If this article discusses the challenges frankly, it is in order to further the discussion on human rights in general and the Charter in particular. This contribution recognizes its limitations, not least because its cautious position is at odds with an important statement of European constitutionalism. Article 2 of the Declaration of the Rights of Man and the Citizen states: “The aim of every political association is the preservation of the natural and inalienable rights of man.”

151. That, however, is the idea of the sages, in Alston, *supra* note 6, p. 926.