This paper was written in 2002, revised in 2004 and is awaiting further updating in 2007

From Heteronomous to Autonomous Protection of Fundamental Rights – The EU Protection of Fundamental Rights as an Evolving Constitutional Concern

Leonard F.M. Besselink

Eric Stein was the first to speak of an 'Emerging European Constitution'.[1] That was in 1978 and he was quite apologetic about the title's pompousness. Significantly, with that emergent European Constitution he did not merely refer to the evolving law of the (then) European Communities. That, in his view, was only one half of that emerging constitution. The other half was the European Convention of Human Rights. The two subsystems were interacting at that moment, but he significantly added that 'a substantial adjustment of the relationship will be in order in due course'.

This paper attempts to assess the broader relationship between the European Union and the human rights standards which have originated and still exist outside the EU itself. It tries to assess what changes and adjustments have occurred in the relationship between the autonomous European legal order and those external legal on the issue of human rights in the process of constitutionalization over the last decennia. The paper argues that the EU fundamental rights standard has in that process developed from a substantively heteronomous standard to an autonomous standard. However, this has not decisively resolved the issue of the relationship of the EU standard to national and international standards.

The constitutional settlement until the Charter: Substantive heteronomy

The concept of the autonomy of European Community law, as declared in the case law of the European Court of Justice has remained somewhat fuzzy. It has connotations which go in various directions. In dualist contexts it might have a strictly non-hierarchical connotation. However, in Community law it has a number of uncertain connections with the doctrines of primacy, supremacy, exclusive competence and even with the doctrine of direct effect. This is probably due to the fact that the idea of an autonomous legal order was proclaimed in the very cases which developed some of these doctrines. At least for the purposes of this paper, I consider the major aspect of Community law's autonomy its proclaimed independence from national law. This aspect was prominently formulated in *Van Gend en Loos*, which speaks of rights and duties which exist independently from the national legislation.[2]

In the field of protection of fundamental rights, the concept of autonomy has been problematic. Precisely the autonomy of the EC legal order was for the ECJ the reason not to apply fundamental rights which private parties relied on. Those classic fundamental rights were found in the national catalogues and were therefore not part of the law which the Court would protect. As the Court put it in the *Internationale Handelsgesellschaft* case:

> 'In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question.'[3]

[1] Eric Stein, The Emerging European Constitution, Am. Soc. Int'l L. Proc., vol. 72, 1978, p. 166-169.

[2] Case 26/62, 5 February 1963, 1963 ECR 1: "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 heritage."

[3] Case 11/70, 17 December 1970, 1970 ECR 1125, para. 3.

The Court admitted in this case, seemingly convinced by the threat of the referring Court not to apply Community which contravened perceived fundamental rights standards, that

> 'the protection of such rights, *whilst inspired by the constitutional traditions common to the Member States*[4], must be ensured within the framework of the structure and objectives of the Community'.

The words in italics show that it was with some regret, if not a grudge, that recourse had to be had to Member State law.

The grudge disappeared soon enough. The new approach the Court took was universally welcomed. It was a decisive step in the constitutional development of European integration in the framework of the Communities. The constitutional momentum of this case law is still often underestimated. I claim that this case law's importance may well be considered a more important constitutional turn than the case law of *Van Gend en Loos* and *Costa/ENEL*. At the time *Van Gend en Loos* was considered of primary political significance, a boost for integration after the De Gaulle's *"non"* on the accession of the UK.[5] As has been pointed out, *Costa/ENEL* can be considered an extrapolation of the development of public international law, applied in the particular field of the European Treaties.[6] One can quibble if at the time of these judgements a European constitution in any traditional sense was already called into existence then and there. Much depends on one's conception of what turns a legal order into one of a constitutional nature. However this may be, in hindsight it can easily be agreed that these judgments were of constitutional importance. But if this case law created a constitution, it was not a very constitutionalist constitution. The mere fact that individuals can invoke suitable provisions in court is no revolutionary thing – in all of the six Member States involved, this possibility existed both in theory and in practice, whereas it can be argued that in a majority of these such provisions would have priority over conflicting national law. Moreover, the use to which the EEC Treaty was put in these cases was that of granting a right of citizens in favour of EEC law against their national law. In a sense the role of the individual became instrumentalized in asserting the European Communities against the Member States. The issue was one of effectively binding Member States to the law, the law of the EC. This was in cases involving direct effect to the profit of private actors. But not until *Stauder* and *Internationale Handelsgesellschaft* and their offspring did the case law take a more radical constitutionalist turn. For only as of then, the Communities and their institutions themselves were bound and restricted in order to protect the fundamental rights of the citizens of the European polity.

But to what rights was the exercise of Community powers to be bound? The formula consecrated since *Nold II* in the case law is:

> 'The Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the

[4]German: 'Die Gewährleistung dieser Rechte muss zwar von den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten getragen sein'; French: 'tout en s'inspirant des traditions constitutionelles communes aux Etats Membres".

[5]See for instance the annotations by I. Samkalden, CMLRev 1963, 88-92 and CMLRev 1964, 213-220.

[6]See Bruno de Witte, Retour a Costa, Retour à "Costa". La primauté du droit communautaire à la lumière du droit international. Revue Trimestrielle de Droit Européen. Paris. 1984. p. 425-454, for an analysis of relevant arguments.

protection of human on which the Member States have collaborated or to which they are signatories.'

If we set aside the niceties of this formula, we can say that the fundamental rights to which the institutions and Member States acting within the framework of Community law are bound, are the rights found in the constitutional traditions common to the Member States and in the international human rights treaties to which they are a party.[7] This is to say that the fundamental human rights standard is substantively dependent on the state of the collective Member States' constitutional law and the relevant international human rights instruments to which they wish to be a party (or not).

It is not entirely clear to what extent a single Member State's law immediately affects the EU human rights standard. With regard to the constitutional traditions, the Court sometimes seems to take an evaluative approach to the body of constitutional law of the various Member States. The Court has made it clear in the *Hoechst* cases, that if there "are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded" an asserted right, it cannot be considered a right which is part of the common constitutional traditions which the Court is to uphold.[8] When such divergencies are *in*considerable, we do not know. What this means in terms of being able to protect certain fundamental rights over which a certain amount of divergence exists, is also uncertain. Particularly, the earlier *Hauer* case suggested that also rights are protected which do not exist as constitutional rights in some Member States. On the other hand, the *Hoechst* cases show that the Court can extend protection on the basis of certain principles of Community law which are based on those found in some Member States only,[9] although they might then not be recognized as fundamental rights protected as EC principles.

Nor is it entirely clear whether the Court would ever consider a right which is contained in a human rights treaty which is not signed and ratified by all Member States, to be part of the fundamental rights which the Court protects. I have no knowledge of an example in the case law concerning such a human rights treaty, but it is not excluded that an issue comes up, for instance with regard to reservations to treaties to which Member States are a party.[10]

What is clear, nevertheless, is that if several Member States do not or no longer constitutionally protect a certain fundamental right which is protected in other Member States, or if a new common constitutional right develops, or if several Member States accede to or withdraw from certain human rights treaties, the EU community standard changes

[7]The formula 'international treaties on which they have collaborated' has curiously survived the particular circumstances of the Nold case, in so far as at the time of the events of that case France had not yet ratified the ECHR; it did so only 11 days before the judgment.

[8]Joined cases 46/1987 and 227/1988, 21 September 1989, 1989 ECR 2859, at para 17. Interestingly, after denying that the right to the inviolability of the home extended to business premisses was a fundamental right which forms part of the general principles of Community law, the Court next proceeded to construct a general principle of Community law which amounted to much the same as the Court would have ended up with had it considered it a fundamental right.

[9]See ECJ 18 May 1982, Case 155/79, AM&S, ECR 1982, 1575.

[10]The issue may come up sooner or later for instance with regard to Article 27 of the ICCPR (minority protection), of which no equivalent exists in the Charter, while not all of the prospective Member States consider themselves bound to it: France made a declaration to the effect that Article 27 does not apply to the French Republic; Germany has objected to this declaration and considers it a declaration meaning that this right has already been fully guaranteed by the French Constitution – a view which begs the question.

accordingly. We must therefore conclude that with regard to the human rights standard developed in the ECJ case law, Community law is substantively not autonomous but heteronomous.
But this may not be the end of the story, because it remains possible to claim that Community law is indeed autonomous in a formal sense. This can be argued by pointing out that the human rights standard is not as such the common constitutional traditions and the human rights treaties to which the Member States are parties. The rights found in these sources are protected *as principles of Community law*. In a certain sense they undergo a transformation from an external source into a legal source within the Community legal order itself.
This argument is correct, but merely formal and hence does not detract from the substantive heteronomy of Community human rights. In the unthinkable case that through autonomous action by the Member States there were no common constitutional traditions and sufficient Member States withdrew from human rights treaties – and one Community lawyer has already suggested that the Member States should withdraw from the ECHR[11] – then we would be left with an empty Community fundamental rights standard.
Another argument against the heteronomy thesis could be that it is precisely because general principles derive from what is *common* to Member States in their constitutions and their shared partnership in human rights treaties, that its European nature is constituted. The 'filtering out' of what Member States hold in common concerns the content of the human rights standard, hence concerns the substance. This makes their transformation into principles of Community law into more than a formal operation. One might point out that this is demonstrated by the manner in which the Court adjudicates measures restricting fundamental rights. This shows Community law characteristics of their own: the *Community* general interest is balanced in a particular manner against other interests, as well as the particular doctrine concerning maintaining the core of a relevant fundamental right.
This argument against the heteronomy thesis will not hold. It fails to acknowledge that this type of Community assessment of fundamental rights restrictions is logically secondary to the primary existence of these rights. To use the same hypothesis which we just framed: in the unthinkable case that through autonomous action by the Member States there were no common constitutional traditions and sufficient Member States withdrew from human rights treaties, then there would be an empty Community fundamental rights standard; so an assessment whether a certain measure considers a legitimate restriction of those rights could then not be made. This shows the subservient character of adjudicating restrictions on the exercise fundamental rights.

Some conclusions
The following conclusions suggest themselves.
The constitutional settlement found within the core field of constitutional protection of fundamental rights is based on substantive heteronomy. This was an enormous concession by the Court to the alleged autonomy of Community legal order, but at the time unavoidable.
The acceptance of substantive heteronomy is indeed coupled with an assertion of formal autonomy. This formal autonomy exists in the formal adoption and reception of this outside

[11]Toth has already suggested that the Member States should withdraw from the ECHR, though not with a view to leave the Union without fundamental rights, see Toth, The European Union and Human Rights: the Way Forward, 1979 CMLRev 34: 491-529.

external source of law in the form of principles of Community law. But here, as in other situations, substance precedes form.
In the combination of formal autonomy and substantive heteronomy, a certain balance is struck between autonomous Community law and exogenous sources of law, a balance which directly touches on the relationship between autonomous Community law and autonomous Member State law. Because of its concentration on what is common to Member States, the substance of the fundamental rights standard is not merely national. Yet, autonomous acts by Member States necessarily influence what is common to them. And although the relevant substance concerns that which is *common* to the constitutional law of the Member States, a common law which in a sense is somewhere in between the Member States, this standard is not a as such within the reach of Community law and remains external to it, however important it may be in the actual functioning of the Community.[12]

The relationship with national constitutions
The conclusions we drew above, acquire a certain edge if we consider the approach of actual human rights standards by national courts. Points I raise in this section have been discussed and elaborated in a set of writings of various authors, to which for the sake of brevity I may refer.[13] I here revisit only some points and briefly comment on them.
As we intimated, it were national courts which convinced the ECJ to provide protection to fundamental human rights against Community measures by the institutions and Member State authorities acting within the framework of Community law. It is too well known to be repeated in any detail, that particularly the German constitutional court reserves its autonomous powers to review whether fundamental rights equivalent to the nationally applicable standard have been respected. The Italian constitutional court presumably takes a stronger view, that it will review European measures against its national fundamental rights in the unlikely but not impossible case that a certain nationally guaranteed fundamental right is not protected by the European standard (*Fragd*). I here add that in the Netherlands, courts have reserved their power to review the compatibility of treaty regimes, including the ECHR against non-human rights regimes.[14] Also here the nationally applicable standard (of the ECHR) will autonomously be used if there were to be a conflict with EC law.

[12]The same applies *mutatis mutandis* to the law on non-contractual liability of Article 288 EC.

[13] Stefan Griller, Primacy of Community Law: A Hidden Agenda of the charter of Fundamental Rights, in: Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004, Dimitries Melissas and Ingolf Pernice (eds.), Nomos Verlagsgesellschaft, Baden-Baden 2002, 47 ff.; Jonas Liisberg, Does the charter of Fundamental Rights Threaten the supremacy of Community Law, in: 38 CMLRev (2001), 1171 ff.; Weiler, Fundamental Rights and Fundamental Boundaries, in: The Constitution of Europe, Cambridge 1999, 102 ff.; Armin von Bogdandy, The EU as a Human Rights Organization, 37 CMLRev (2000), 1307 ff; B. de Witte, The Past and Future Role of the European Court of Justice in the Protection of Human Rights, in The EU and Human Rights, Ph. Alston (ed.), OUP 1999, 859 ff.; Daniel Thym, Charter of Fundamental Rights: Competition or Consistency of Human Rights Protection in Europe, in: Finish Yearbook of International Law, vol. XI (2000) [2002], 11 ff.; Besselink, Entrapped by the Maximum Standard, in: 35 CMLRev (1998), 629 ff.; ibid., The Member States, the National Constitutions and the Scope of the Charter, in: Maastricht Journal 2001, 68 ff.
[14]It should be pointed out that the standard which a national constitution imposes on courts is not only a national bill of rights, but may be a human rights treaty to which the relevant Member State is a party; in some Member States a national court may constitutionally be called to apply such a human rights instrument. There are cases in for instance the Netherlands in which the Dutch Supreme Court was faced with two conflicting treaty regimes. In one such case one treaty provision was Article 3 of the ECHR, the latter Article VII (3) of the NATO Status Agreement; the former forbids the delivery of an American soldier suspected of murder to the American authorities, thus exposing him to death row, while the other obliges the delivery of a soldier suspected of the relevant crime. The Supreme Court balanced the interests involved in this case in favour of those of the

Although for the Germans and to a lesser extent the Italians may occur only in extreme cases (for the *Bundesverfassungsgericht*, whose role will be triggered when there is no longer equivalence of protection), theoretically this poses a threat to primacy of Community law in so far as in that hypothetical case a national court may refuse to apply Community law and hence may refuse to set aside a conflicting national measure. This could occur when a national court is confronted with a standard which his national constitution urges him to apply, which in his perception differs (for the Germans: differs significantly in the sense of there being no equivalence) from the relevant Community standard, and more particularly in the sense that this nationally applicable standard is judged to offer a higher level (for the Germans: more than equivalent) protection than the relevant Community standard. Such deviations have their origin in the fact the Community standard is based on the fundamental rights standards which Member States hold in common, but in the perception of national courts next to this European standard specifically national constitutional standards may exist. This is the case when a national bill of rights contains a right which is not shared by other Member States; or if a Member State is a party to a human rights treaty to which not all Member States are a party.

This approach has been criticized on several grounds. I mention two: one concerning the alleged impossibility of judging which of two fundamental rights provides better protection, the second concerning the pluralist co-existence of fundamental rights.

The first alleges in essence that it is not possible to compare normative standards; hence, it is impossible to speak of 'better protection'. In support of this, several arguments are put forward, most frequently the argument of collision of human rights standards in particular cases. It points out that if in a particular cases two fundamental rights collide, it cannot be said in the abstract which of the two prevails.

This argumentation is flawed.[15] Because the earlier refutation has so far not been falsified, but is nevertheless still much used, I here point out briefly some of its flaws. For one thing, it seems to confuse the normative ('nomothetic') aspect and that of the practical application of norms. We are dealing mainly with the first, that is to say at the level of abstract norms. Precisely at that level, courts – both national and European – prove very well able to judge whether a certain right is protected at all or to a higher or lower degree. The ECJ's *Hoechst*-cases which we mentioned before is a case in point. There is no inherent incapacity in courts ascertaining which of two existent norms provides a citizen with a higher level of protection.

As to conflicts of rights it should be pointed out that in practice, courts are rarely faced with having to resolve a collision of human rights norms in a particular case in cases between public authorities and a private party. In cases between citizens *inter se* the potential of a collision of fundamental rights norms is much greater. However, fundamental rights primarily apply to 'vertical' relationships. 'Horizontal effect' of fundamental rights remains a controversial issue, to the point that many reject the direct application of human rights provisions in cases between private parties. Even if fundamental rights would apply in horizontal relationships, it would hold it to be wrong to infer without further ado from these private law relationships to legal relationships in public contexts.

In fact, the very large majority of cases concerning fundamental rights at the Court of Justice are not concerned with collision of such rights at all. In fact, the only cases where something

---

soldier and his right under Article 3 ECHR not to be treated in an inhuman manner. See Hoge Raad HR 30 March 1990, NJ 1991, 249 (*Short*).

[15]Entrapped by the Maximum Standard, in: 35 CMLRev (1998), 629 ff..

similar can be traced, are of collisions between a classic fundamental right and the Community economic rights. In the *Schroeder*, *Vick and Conze*, and *Sievers and Schrage* cases,[16] the Court stated that the economic aim of eliminating the distortion of competition between enterprises as it is served by the non-discrimination provision of Article 119 (now 141) EC was secondary to the classic fundamental human rights meaning of this provision. This suggests that classic fundamental rights prevail over the fundamental economic rights under Community law.[17] In *Schmidberger*, however, the Court balanced the classic freedom of expression, demonstration and assembly against the right of free movement of goods, in the light of the circumstances of the case.[18] It is true that in this approach there is no abstract priority of one fundamental norm over the other – just as it true that it is unclear what the Court is exactly doing with the classic fundamental right (is it a mandatory requirement, or an exception like the explicit ones imposing a restriction on the free movement of goods, or is the free movement of goods a restriction of the classic fundamental right?). Yet also in this case the result of the balancing of the two rights is that the Court does give priority of one norm over the other. One can say that on an *adhoc* basis a norm is established as to which of two norms applies to the detriment of the other. This is in essence simply determining which of two norms should apply, in the course of which these are compared in terms of which should provide more or less protection.
Finally holding that it is impossible to judge whether one norm provides better protection than another, has pernicious consequences for the protection of fundamental rights. Holding this implies that in case of a collision of fundamental rights there is no applicable standard; this would imply that none of them should apply. This is a radical anti-fundamental rights outcome, which defeats the purpose of discourse about fundamental rights at all.

We turn now to the pluralist argument, which seems a more important objection from the perspective of the relationship between the European and national constitutions.
The crux of this argument is that primacy is not in play. Put briefly, it holds that the Community standard applies only in the framework of Community law, both when it concerns acts of the institutions and when it concerns acts of Member State authorities in the framework of Community law. Only outside this framework could national fundamental rights standards apply; within the framework of Community law, only the Community standard applies.
In effect, this view is based on a radically pluralist view of the relations between Member States and the Union. Its fundamental assumption is that matters of Community law constitute one separate field of competence, whereas national competence is another and separate field. The Community human rights standard applies to the first, the national standard to the second, and never the twain shall meet.

[16]ECJ (Sixth Chamber), 10 February 2000, in Case C-50/96, *Deutsche Telekom AG v. Lilli Schröder,* Joined Cases C-234/96 and C-235/96, *Deutsche Telekom AG v Agnes Vick and Ute Conze*, Joined Cases C-270/97 and C-271/97, *Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage*.

[17]In these pension cases the Court got itself into a knot on the relationship of the limitation in time of *Defrenne II* and the German Grundgesetzes non-discrimination provision's effectiveness stretching back to 1948, by saying that because it contributes to the implementation of Community law and ensures a result in conformity with Community law, more favourable national law could be applied; see *Schroeder* paras 47-48, *Vick and Conze*, and *Sievers and Schrage*, paras. 49-50.

[18] Case C-112/00, 12 June 2003, paragraphs 70-81.

This pluralist view may be doubted on a number of accounts. First of all the claim that primacy of Community law is not in play is curious. Suppose that the ECJ in *Stauder* (and shortly after in *Internationale Handelsgesellschaft*) had refused to acknowledge the relevance of fundamental rights issues to the case. Would the application of EC law not be at stake? The Italian *Corte costituzionale* is in *Fragd* quite explicit on the applicability of a national constitutional standard, and it is difficult to see how this could not affect the application of Community law, were it to find that Community law did not live up to these national standards. So in fact, what the pluralists argue is not that primacy *is* not at stake, but that primacy *should not be* at stake.

On this score, the pluralist argument holds that national courts are wrong in assuming that national standards ought to play any role at all with regard to the application of Community law in the Member States. This is based, as we just said, on a rigid distinction of the realm of Community law from the realm of national law. One may wonder whether such a rigid distinction is justified, particularly in the field of human rights. The essence of human rights standards is that at least in principle *all* exercise of public power is to comply with such standards, at whatever level it is exercised and by whatever authority. So the question arises what makes Community power so different from powers exercised within states? *Pace* all those who claim that the Community or the EU is not a state, I see no difference in the nature of public power being exercised by EC/EU institutions and national institutions. It is hard to think why certain nationally applicable human rights standards should apply when national authorities are acting within the scope of their autonomous national powers, but not when these very same authorities are doing practically the same within the scope of Community law. Precisely the mixture of authorities exercising non-exclusive Community powers, plus the fact that even in case of more or less exclusive powers there may be an executive role for national authorities, seem in the eyes of the citizen (and this author) to make it hard to understand why the exercise of such powers should be immune from the regulative norms of citizens' fundamental rights which might not be articulated or protected at the EU level but are applicable in the Member States. In other words, even if a particular fundamental right standard would be merely a local standard, it is not quite clear why the local application of EU law would not be subject to that standard without detracting from the fundamental nature of that standard.

Some more conclusions: the constitutional settlement before the Charter

The upshot of all this is that the Community human rights standard is heteronomous, because it is derived from that of the Member States. Member States' constitutional standards may still challenge the EU standard, thus imperilling the uniform application and direct effect of Community law. This challenge arises from 'local' standards which are stricter than the EU standard. This is not an acute problem, but theoretically it is still held at least in Italy, Germany, but arguably also in other Member States, possibly even in the Netherlands. The importance of this theoretical stance is that it demarcates the position taken by national courts in a core field of the EU constitution: there is a reserve power of review in order to protect fundamental rights. This again shows the balance of powers between the EU and the Member States' constitutions. This balance could be upset if the ECJ were not sensitive to the fundamental rights concerns of Member State courts who deem the EU standard insufficient. This would rock the boat, and if worse comes to the worst it could even wreck the ship of European integration.

An illustration of the Court's sensitivity to national human rights requirements proper to one state only is a procedural incident in *Gaal* and its aftermath.[19] It proves that the Court can only function if it takes specific national standards into account. If it had not done that, it would mean that all judgments of the Chambers of the Court would have no legal validity in Germany – a high price to pay.[20]

> During the hearing of this case the representative of the German government asserted that it was unclear how the Sixth Chamber, hearing this case, was formed, nor for that matter how the Chambers were composed dealing with any other case. It pointed out that according to the EC Treaty as it then read, a chamber was to be composed of either three or five judges, whereas the Official Journal contained a decision which appointed six judges to the Chamber. The German government alleged that this was in conflict with the former Article 165 (2) EC. In reality, although this does not appear from the public documents of the case, the concern of the German government was caused by the fact that according to an established case law of the *Bundesverfassungsgericht*, any litigant should be able to know in advance which judge is to hear the case and the distribution of cases over the judges should be based on neutral and objective criteria established by general and published rules. If this is not the case, this would conflict with the right of citizens of access to the judge which the law assigns him, *seinem gesetzlichen Richter* – which right is the equivalent of what is elsewhere in Europe known with such fascinating names as *egalité devant la justice*, trial by peers, *ius de non evocando*, or *giudice naturale*.[21] The strict interpretation which the Germans have of this fundamental right aims at the independence of the judiciary and the right to fair trial, of which the proceedings and outcome cannot be manipulated in any manner. In Italy a similar practice for the composition of courts and chambers is followed for similar reasons, although it is controversial to what extent it is prescribed by the Constitution.
>
> Although the issue in the *Gaal* case was couched in terms of Community law, the seriousness of which was not grasped by the Advocate-General witness his conclusion, and the Court rejected the view that the practice was in conflict with Article 165 EC (old), the Court at the first occasion after the incident occurred during the *Gaal* hearing, published a decision on the assignment of judges to specific cases on the basis of objective criteria, which gives certainty in advance of which judges are to hear a specific case. This entirely changed the practice followed until then.[22]

The situation since the Charter of Fundamental Rights

The jurisprudential formula of *Nold* and its successors has in part been codified in Article 6 (2) of the TEU. It codified the Court's formula in part only, because it fails to refer to other international human rights treaties than the ECHR. But this has not changed, nor could it, the

---

[19] Case C-7/94, 4 May 1995, 1995 ECR I-1040.

[20] I would argue that the events surrounding Gaal concern a case in which there is no equivalence of fundamental rights protection, in the sense of the Banana judgment. Clearly, the composition of chambers was based on arbitrary criteria which could not be known in advance; as far as could be judged, and is confirmed by insiders, chambers were composed on the basis of convenience and required expertise upon a brief examination of the case put before the Court. There was no rule of Community law, let alone a fundamental right to know who was to sit on what case.

[21] See Article 101 (1), second sentence, Grundgesetz; BVerfGE 4, 416; BVerfGE, 6, 51; BVerfGE 17, 299; BVerfGE, 18, 69; BVerfGE 18, 349-350; BVerfGE 40, 36.

[22] OJ 4 March 1995, 95/54, pp. 2-3, a decision taken in the Court's meeting of 25 January 1995. The only uncertainty which remains is that one does not know in advance which chamber is to hear which case. The problem has not existed for the Court of First Instance, which has always used objective and neutral criteria both for the assignment of judges to cases and of cases over the various chambers.

jurisprudential standard, based as it is on the unchanged Article 220 (1) (formerly 220, before that 164) EC. So the TEU did not change anything to the state of affairs created by the case law of the 1970's. The fact that the jurisprudential formula that is still in use to this day, shows that for the Court Article 6 (2) TEU, though dutifully mentioned in relevant cases, [23] has made no change. The question arises whether the enunciation at the Nice summit of the Charter of Fundamental Rights makes a difference.

In answering this question, the fact that the Charter is to date not a legally binding text is to be taken into account. This does not render the Charter meaningless. Because the Charter is not legally binding, it is as yet no direct and autonomous source of rights at the EU level. The force of the rights contained in the Charter must still be construed via the general principles of Community law which the Court is to protect. Nevertheless, the process of articulating the relevant fundamental rights in the context of the European Union, that is to say in a setting which is not within the purely autonomous sphere of Member States, means an important step towards an autonomous fundamental rights standard. The very attempt to formulate that common stock of fundamental rights in a document which has status merely in the Community context, albeit non-binding status, must be understood as an attempt to formulate an autonomous Community bill of rights.

Several aspects of the Charter confirm this. The formulation of some of the rights seems occasionally to go beyond the common core of fundamental rights to be protected in the Member States. The typical free movement rights in Article 15(2) of the Charter are not contained in what is part of the common constitutional traditions, nor the exogenous human rights treaties – and the same goes for the right to access to public services of Article 36. The former are simply autonomous EC rights, the latter reveal a particularly French concern.

Also one may question if Article 47 of the Charter, concerning the right of access to a judicial remedy, really reflects the scope of this right as it is protected as a fundamental right in the Member States, either as a matter of constitutional rights or under the human rights treaties to which Member States are a party.[24] The ECHR does not grant an unrestricted right of access to courts, although the case law of the Strasbourg Court seems to go a long way in that direction. Still in several Member States there exist certain restrictions on the right of appeal against generally applicable regulations, particularly as regards primary law (acts of parliament and certain forms of legislation by the executive). The existence of an unrestricted right of access to a court with regard to all forms of legislation as a fundamental right common to the Member States, is not corroborated by the present state of law.

---

[23] See e.g. *Schmidberger*, above footnote 18; Joined casesC-20/2000 and C-64/2000, 10 July 2003, *Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v. the Scottish Ministers*. The element of human rights treaties "on which the Member States have collaborated or to which they are signatories" is now obsolete, see footnote 7 above.

[24] Article 47, *Right to an effective remedy and to a fair trial:*
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Article 47 of the Charter played a role in the *Jégo-Quéré* and *Unión Pequeños de Agricultores* cases.[25] It focussed on the restriction of access for private parties to the Court under Article 230 (4) EC Treaty for disputing the legality of – briefly – generally applicable Community measures, particularly the requirement of being individually concerned by those measures. We see here a focus on a problem arising in a particular Community situation. It may well be so that such access is desirable, particularly given the weaknesses which may exist with regard to the democratic legitimacy of relevant measures of general application. In this respect it may be pointed out that it is precisely the strong democratic legitimacy, particularly of primary legislation, combined with the doctrine of the separation of powers, which in the national context constitutes a reason for restricting in various manners the access to courts which exists for other types of public acts. Access to the EU courts may provide a counter-balance for the relative lack of democratic accountability of at least some of those measures. Here concerns proper to the EU enter into the forefront; these cannot always very easily be addressed by reference to what is common to the legal orders of the Member States. Here a proper and autonomous right at EU level might have a useful role.

These things taken together, give reason to say that the Charter is a step towards the development of an autonomous EU fundamental rights standard. But that does not resolve all of the problems we identified in the previous section. First of all, as long as the Charter is not a legally binding document, its normative force is weak. Secondly, the issue of the relationship to the nationally applicable human rights standards is not resolved by the Charter. It may still be so that if the (perhaps more autonomous) EU standard falls short of nationally applicable standards, national courts may possibly revert to the application of the stricter non-EU standard. The problem we discussed in the previous section, recurs in the same manner as before. In this respect we need to say a few words about Article 53 of the Charter:

> Article 53: Level of protection
> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

This Article was originally designed as an equivalent to Article 53 ECHR[26] and Article 5 (2) ICCPR and similar subsidiarity clauses in other human rights treaties.[27] All of these provide that those treaty instruments cannot be understood and applied so as to adversely affect existing human rights standards in the legal orders of the parties to those instruments. If this was originally the point also of Article 53 of the Charter, then it should be read as a safeguard against a lowering of standards as a result of Community law and its Charter.

---

[25]T-177/01, 3 May 2002, *Jégo-Quéré et Cie SA*, C-50/00 P, 20 July 2002, *Unión Pequeños Agricultores.*

[26]'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.'

[27]Article 5, para. 2, ICESCR, Article 41 Convention Rights of the Child, Article 23 Convention Elimination of All Forms of Discrimination against Women.

Article 53 of the Charter in its final version has been read differently by some authors. This is due to the fact that the text contains various elements which confuse the matter. In fact, in its present form Article 53 seems to skirt the problem rather than resolving it.
The two confusing elements are the use of the expression 'in their respective fields of competence', and the mention of 'human rights and fundamental freedoms as recognized by ... human rights treaties to which all Member States are a party, including the ECHR, and by the Member States' constitutions'.
The words 'in their respective fields of application' may be understood to introduce the idea of separate fields of competence, which above we associated with a pluralist view. The text is not altogether clear. On the one hand it assumes that the various human rights standards could interfere with each other – otherwise there is no point in asserting that the Charter cannot restrict or adversely affect those other fundamental rights standards. Also the heading 'Level of protection' above the Article suggests that there is a possible problem of varying standards. If the point of Article 53 was only to separate fields of application of fundamental rights standards, there would be no problem regarding the level of protection that applies.
But on the other hand it stipulates that these various standards operate 'in their respective fields of competence'. What are those respective fields of competence? The use of the word 'respective' may indeed suggest that those fields are separate from each other. If this were to be the correct meaning of Article 53, it would mean that Article 53 is not really about levels of protection but of spheres of application as intended by Article 51 (1). Article 53 would then merely say that the Charter does not apply outside the scope of Community law.
Also, the interpretation of 'respective fields of application' as referring to separate fields, begs the question whether they are in fact all that separate. The reference to the human rights treaties to which all Member States are a party and to the Member States' constitutions, clearly hint at the sources of the EU fundamental rights standard as contained in the Charter itself – so it refers to a field of application where the EU field and the national fields are co-extensive.[28] This implies that the respective fundamental rights standards can indeed interfere with each other. Article 53 resolves this problem by safeguarding the highest level of protection.
The reference to the ECHR corroborates the co-extensiveness of the 'respective fields of application'. What is the field of application of the ECHR? That is constituted by Article 1 of the ECHR: every person within the jurisdiction of the states party to the ECHR. This has always been taken in the broadest possible sense. The European Court of Human Rights has made it abundantly clear that parties to the ECHR have to apply its standards also when they are carrying out obligations under other treaty regimes, such as the Dublin agreement and in the field of primary EU law. [CHECK MORE RECENT CASE LAW ON KOSOVO/SERBIA BOMBINGS; BOSPHORUS][29] This means that the fields of application

[28]The Preamble of the Charter says in its fifth recital: "This Charter reaffirms, [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States..."

[29]ECrtHR 21 January 1999, Matthews v. UK, para. 32. "The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be secured. Member States' responsibility therefore continues even after such a transfer"; ECrtHR 7 March 2000, Decision as to the admissibility of Application no. 43844/98, by T.I. against the United Kingdom: "Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite

of the ECHR and EC/EU law are not separate but overlapping. The EC and EU institutions themselves are not bound for the reason that they are not a party to the ECHR; but once they are – as the Draft Constitutional Treaty urges – the respective fields of application of the ECHR and the EU will coincide entirely both for the EU and for the Member States. In fact, the official explanation to the Charter is quite clear that the purpose of the reference in Article 53 to the ECHR is to guarantee that whenever the Community or Charter standard is lower than the ECHR's, the latter will prevail:

> "The level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR."

There is another problem with the phrase 'human rights and fundamental freedoms as recognized by [...] human rights treaties to which *all* Member States are a party, including the ECHR, and by *the Member States' constitutions*'. First of all, it leaves aside the problem of the higher standards of treaties to which only some Member States are a party. Secondly, it is unclear what is meant by 'the Member States' constitutions'. It might be interpreted to mean that which is recognized by all Member States' constitutions. This would be in line with the requirement concerning treaties ('to which *all* Member States are a party'). However, the omission may also be considered significant. In the same manner the omission of any reference to the 'common traditions' – which is the classic way of referring to the communality of constitutional fundamental rights – may be significant. At best the matter is undecided, though a reading which safeguards existing higher standards is generally plausible and as regards the ECHR the one given by the official explanation.

These reasons taken together lead me to reject a radically pluralist reading of Article 53 which proposes to consider all problems concerning possible higher national or international standards resolved by asserting the separateness of the 'respective fields of application'.

Let us, for the sake of the argument, nevertheless assume for a moment that Article 53 of the Charter must be understood as claiming full autonomy of the EU standard as separate from the nationally applicable standards. Still the question would be whether in practice national courts would accept this claim if things come to the worst and in the perception of a national court the exceptional situation arises in which it deems that there is no longer equivalence in fundamental rights protection. We do not know under what circumstances a national court would take this stance. Only for the *Bundesverfassungsgericht* there some indication that this is a quite theoretical position – although we do not precisely know what "equivalence of protection" ends up to. But whether that would be the case for all national courts, for instance when Title IV EC or third pillar cases would come to court, involve highly sensitive issues of policy and fundamental rights protection may arise, is unclear.[30] I submit that although at

---

and Kennedy v. Germany judgment of 18 February 1999, Reports 1999, § 67). The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered."

[30] Thus it is evident that in the first case on involving Schengen law, the ECJ made an *error iuris* on the applicable law of the Member States in its construction of the *ne bis in idem* principle. It assumed in Gözütok and Brügge that the decision to conclude a transaction preventing bringing the case to court in ciminal proceedings constitutes the use of the *ius puniendi* in all Member States. This is simply wrong for the criminal law system of the Netherlands where there is a sharp distinction between a transaction which *prevents* prosecution, and leaves no traces in terms of criminal record and can never be considered as any admission of guilt or something equivalent thereto, on the one hand and prosecution and infliction of punishment by a court (or under certain circumstances by the prosecution) on the other. Law students may be failed if they do not know of this distinction, but it is also important for those of them who buy second hand bicycles which turn out

present this is theoretical, it is not impossible that courts, with all due respect to the work of their colleagues in Luxembourg, will give preference to the higher standard, even if this would entail a violation of Community law. This could only be avoided if the ECJ remains sensitive to such diverging national and international standards.

The Draft Constitution

Finally, I make a few remarks about the situation if the Draft Constitution were to enter into force. These remarks concern the question whether it will mean a change in the state of affairs as we have analysed it so far. In this context I make some remarks about Article 10 (1) of the Draft Constitution and about the changes made by the second Convention in the text of Article 51 and 52 of the Charter.

First, the EU Constituion intends to elevate the Charter to the status of a legally binding text. This may further enhance the autonomous aspect of the EU human rights standard, with one exception. This is the one foreseen by Article 7 of the Draft Constitution. This provides that "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." This means that an evolution of the common constitutional traditions and of the ECHR may result in additional protection to that of the Charter. Obviously, such an evolution is not within the autonomous reach of the EU.

The new Article 10 (1) may further contribute to considering it as an autonomous standard. Article 10 (1) states that the Constitution and EU law have primacy over the law of Member States. Many commentators have taken this to be a mere codification of the case law. This is in part patently wrong and for the rest disputable. Clearly, titles V and VI of the EU Treaty, the so-called second and third pillars, have no such status in all Member States. They have for instance not been incorporated at all into the national legal order of the UK. The doctrine of direct effect – if it could at all – has never been applied or asserted in these pillars nor has that of primacy as we know it in EC law. Article 10 (1) therefore extends much further than the doctrine of primacy at the moment.

Secondly, the doctrine of primacy of EC law has come up in case law, necessarily developing from case to case. Its precise contours are therefore also difficult to abstract from the particular cases in which it was used. Particularly, it is still unclear whether the doctrine of primacy is to be seen as inextricably linked to the doctrine of direct effect – incidentally, a doctrine which is not found in the Draft Constitution. If primacy and direct effect are so linked, then one may wonder what the point is of disengaging primacy in a legally binding provision from the doctrine of direct effect.

More generally one may doubt the wisdom of turning a doctrine into a binding legal formula. The doctrine of primacy, precisely because it is a doctrine, has lent itself both to hierarchical and to non-hierarchical interpretations. In the former, primacy may mean that EU law is superior law and Member State law subordinate (either with regard to directly effective EC law or in general). In the latter, primacy means that EU law is first among equals; so that if there is a conflict EU law prevails, not because it is inherently superior, but because in cases of conflict one will have to have precedence before the other, just like on a level crossing traffic from one direction has to give right of way to traffic coming from the other direction, otherwise there could be nasty collisions.

---

to be stolen, this is very important because they should insist on a transaction as this avoids a criminal record which would make entrance to the bar very difficult.

It is arguable that not having codified primacy in a fixed, legally binding text, it has been possible to keep up the kind of 'dialogue' between the EC and Member States' legal order, which has so strongly facilitated the acceptance of European law within national legal orders. By codifying the doctrine of primacy as we find it now in Article 10 (1), it is hard to distinguish from a supremacy clause, with all the hierarchical connotations which supremacy clauses have. This would put a stop to pluralist interpretations of the relationship between the EU and Member States legal orders and take away the legitimacy of the dialectic between the national and European constitutional orders.

Other questions arise as well. One of them is how Article 10 (1) relates to Article II-53 of the Draft Constitution (the latter being identical to the present Article 53 of the Charter). Does Article II-53 make an exception to primacy in so far as it salvages stricter fundamental rights norms, as we argued above? Or is Article II-53 in the light of Article 10 (1) to be regarded as not intending to do away with primacy, but only to state that outside the scope of Community law those other fundamental rights standards apply? If the latter were true, on the basis of Article 10 the Charter would always overrule any national or nationally applicable international standard, even if these provided better protection to citizens.

One reason could be advanced why Article II-53 could be seen as an exception to primacy of the Constitution and as dealing with levels of protection in the sense that the Charter's rights will have to give way to better standards, is the fact that Article 53 also mentions the ECHR. This reference to the ECHR, additional to II-52 (3) which states that the Charter must be interpreted in conformity with the ECHR, must mean that the institutions of the EU (including the Court) will have to apply the ECHR in the theoretical case that this would provide a better level of protection. This will be the case not only after, but also before the EU has acceded to the ECHR in conformity with Article I- 7 (2) of the Draft Constitution. Because the ECHR can be autonomously interpreted by national courts and is ultimately authoritatively interpreted by the European Court of Human Rights, which is a court outside the EU framework with whose judgments national courts have to comply, it means that EU law has no primacy over ECHR law.[31] [HAS BOSPHORUS CHANGED THIS?] This will remain the case when the EU had acceded to the ECHR. If this interpretation of Article II-53 is correct, than it is difficult to see why the same reasoning would not apply to national constitutions, at least in so far as the common constitutional traditions are concerned, but possibly also as regards more individual constitutional standards.

It remains difficult to be categoric about these matters. But if Article II-53 would not be an exception to EU primacy, and if possibly higher standards of national and international human rights would have to yield to lower EU standards, this would seem to have the potential of provoking resistance in national quarters.

National concern both with regard to the vertical division of powers between Member States and the Union, and to the horizontal division of powers between the EU courts and the EU legislature, are revealed by the amendments which the Convention has made to Articles 51 and 52 of the Charter in what is now Articles II-51 and II-52 of the Draft Constitution.

[31]However, the national courts are bound by ECJ interpretations of the ECHR which go beyond what is held by the European Court of Human Rights. An example may possibly be the Akrich case of ..., where different from the ECrtHR the ECJ derived from Article 8 ECHR the right of entrance to a Member State to which the person involved had no previous title. National courts would have to follow the ECJ interpretation of Article 8 ECHR, not that of the ECrtHR, because it involves the free movement of persons, and therefore concerns a matter of Community law.

The changes contained in Article II-51 are really a repetition of what was already there.[32] It simply elucidates the nature of fundamental rights norms. The point of this provision was and remains that fundamental rights provisions merely regulate the powers which have been conferred on the relevant authorities, they do not confer new powers. (This does not at all prevent those rights from imposing positive obligations on those authorities; in case of positive obligations, these have to be carried out in accordance with the constitutional attribution of powers.) The new additions to Article II-51 should be understood as driving this home. The pleonastic nature of the amendments is an expression of the concern that this regulative nature of fundamental rights norms should not spill over into creating new powers at EU level. This concern basically concentrates on safeguarding the division of powers between the EU and the Member States.

The addition of paragraphs (4) and (6) should again be understood in the light of the relationship between national constitutions and the EU constitution. Paragraph 4 expresses the necessity of letting the Charter, to the extent that it is based on common constitutional traditions, remain in touch with these traditions (paragraph 4).

Paragraph 6 concerns the references in chapter IV of the Charter, the solidarity rights, to national laws and practices. It is an exhortation to take full account of national laws and practices in interpreting these solidarity rights (Chapter IV of the Charter). Also this paragraph 6 should be viewed as emphasizing the relationships between the EU constitution and the national legal orders.

Also, of course, there is in paragraph 6 a confluence of the concern to keep the relevant powers at national level intact, thereby safeguarding the non-exclusive nature of the (vertical) division of powers in this respect, as well as a concern not to overextend the autonomous meaning of the relevant solidarity rights (which presumably can be justiciable) in the case law of the European Court.

Also the addition of paragraph 5 to Article 52, introducing a distinction between principles and rights, the first being justiciable only when it concerns the implementation of such principles, it has suscitated controversy in the commentaries on the Draft Constitution.[33] It is quite true that it remains fundamentally unclear what the distinction between principles and rights precisely amounts to. I submit we should not be too afraid of its meaning; this very vagueness may actually guarantee the limited impact of this amendment, as I will presently

---

[32] Italics indicate the amendments: 'Article II-51: Field of application

1. The provisions of this Charter are addressed to the Institutions, bodies *and agencies* of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers *and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution*.

2. This Charter does not extend *the field of application of Union law beyond the powers of the Union or* establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.'

[33] Italics indicate the amendments: 'Article II-52: Scope *and interpretation* of rights *and principles*

[…] *4. Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

suggest. The amendment should most of all be understood as an expression of concern to uphold a horizontal division of powers, particularly of distinguishing the powers of the legislature from those of the judiciary. While the American bill of rights has the recurring formula "Congress shall make no law ….", the intention of II-52(5) is "The Court of Justice shall make no law…".
It is true that there are human rights which have the function of policy objectives – they are in modern constitutions sometimes dubbed thus. It is in general not within the province of the judiciary to decide which specific legislative and executive measures these require. This is a normal approach which is shared by the national courts of the Member States. That the amended Article II-52(5) states that such principles are nevertheless justiciable when assessing the measures implementing them, is not a bad thing. The distinction between principles and rights has not been fixed in the Charter. This being so, the Court of Justice can be trusted to assess to what extent a certain provision in the Charter should be understood to be a principle and to what extent such a provision is a right in the sense of Article II-52(5). I would expect or at least not be surprised if the Court would make the justiciability dependent on its own assessment whether its application with a view to a particular case should be left to the discretion of the competent legislative and executive bodies. Hence, whether a provision is a "principle" or a "right" in the sense of Article II-52(2) will turn out to depend on its justiciability (and not the other way round, as the text suggests).

By way of a final conclusion
The human rights standard as it has developed in the case law of the ECJ was substantively a heteronomous standard. Since the enunciation of the EU Charter of Fundamental Rights, this standard has begun becoming autonomous. This autonomy may finally be attained when it is elevated to a constitutionally binding text with the entering into force of the Constitutional Treaty. The EU standard will then have largely become autonomous, that is to say legally independent from the autonomous influence of the Member States. The primacy clause (Article 10 (1) Draft Constitution) may reinforce the autonomous status of the Charter. This same primacy clause could develop into an hierarchical supremacy clause, in which the law and the constitutions of the member states become subservient to EU law.
It is unclear whether Article II-53 of the Charter should be considered an exception to this supremacy. It can be argued that at least for the ECHR this is the case. Whether that is the case also for autonomous national human rights offering a higher level of protection, remains uncertain.
There are some openings in the what otherwise could be seen as a closing up into itself of the EU. Thus Article 7(3) explicitly guarantees that evolutions in the law of the ECHR and the common constitutional traditions remain of influence within the EU law of human rights, because it stipulates that these sets of human rights standards remain part of the principles of EU law.
The importance of these matters regarding the relationship between the EU Constitution and the member state constitutions cannot be overestimated. We have to keep in mind that the success of European integration has been based on a careful balancing of the constitutional concerns of Member States and those of the EU. It came into existence by the dialectic enforced by certain national courts, and was most specifically triggered by the *Verwaltungsgericht* in Stuttgart (in *Stauder*, and shortly after the *Verwaltungsgericht* of Frankfurt-am-Main in *Internationale Handelsgesellschaft*), a dialectic which continues to this day. The ECJ has been responsive in this 'dialogue', even to the point of taking over in its

practice specifically 'local' understandings of the right of access to an impartial court (the procedural incidents in *Gaal* and OJ 95/54).

The drawing up of a special EU bill of rights in the form of the Charter was an attainment of a more autonomous standard – although it could not be enforced as such. This autonomous status might have a chilling effect upon the dialectic between the national and European constitutional orders. If the primacy clause would turn out to be a supremacy clause to which there were no exceptions, this would do away with the room within the EU constitutional framework for such a dialectic. The metaphor of the "dialogue" or even "conversation" between the courts, which is so often used, has always been a bit of a peculiar conversation. Speaking to each other by means of fixed texts which claim to be authoritative and binding rulings in specific conflict which need to be resolved, is not really an ideal form of conversation or dialogue. Also, when it came to concern the real questions that 'conversation' has always had something of the one saying something which the other might or even would consider naughty or cheeky things.[34] Nevertheless, at least conceptually the framework seemed open for the ensuing dialectics. If this framework of the relationship would be closed in terms of assertion of supremacy, self-contained autonomy and strictly separate fields on which the other should not trespass, the responsiveness in national courts might be one of simply ignoring what is said in Brussels, Strasbourg and not least Luxembourg, not out of ignorance, but as the only way out.

Would this happen, than the turn to a more autonomous human rights standard might not be the improvement which is was intended to bring. But the likelihood of this happening is reduced by the openings mentioned in the form of the continued relevance of the development in the ECHR and the common constitutional traditions, and perhaps by reading Article II-53 as an exception to EU law's primacy. And of course, the ECJ can contribute to a more inclusive balance by showing sensitivity to particular national constitutional issues, as it has done in the past.

[34] I may refer to the conclusion of Advocate-General Tessauro in the Gaal-case, for an illustration how an unrecognized reference to a national fundamental rights concept was considered in terms of a chicane which meant an unnecessary hold up.