Human rights case law of the European Court of Justice, January 2003 to October 2003.

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Introduction

To review the development of fundamental rights in the EU in 2003 is to concentrate on an eye in the middle of a storm. Since December 2002, the EU has experienced its most severe political crisis since its inception, as the issue of support for the invasion of Iraq threatened the whole post-1945 Western European settlement. At the same time as the integration contract was threatened, with Member States divided into opposing camps on the issue of war, the EU was in the final stages of planning the pinnacle of integration by drafting a Constitution. More trivially, this period of time also witnessed the President of the European Council seemingly lose control of his senses before the European Parliament and degrade his office with an inappropriate jest about Europe's traumatic past.[1] And, finally, all this takes place against the backdrop of ten more States preparing to join this exclusive (and often eccentric) club. It would not be surprising therefore to observe that fundamental rights protection appeared less significant than it might do in a less highly charged moment of EU history. However, to the contrary, 2003 has witnessed important advances in the development of EU fundamental rights. These include the triumphing of freedom of expression and assembly over free movement of goods in *Schmidberger*, the application of Article 8 ECHR to UK immigration law (*Akrich*) and the extension of citizenship rights in *Garcia Avello*. Less progress was seen in relation to compulsory military service for men (*Dory*), property rights (*Booker*) and principles of access to justice (*Jégo-Quéré*).

[1] "Berlusconi 'Nazi' slur provokes outrage", *Financial Times*, 3 July 2003, at 1.

A sentimental jurisprudence?[2]

A little knowledge of EU law can be a dangerous thing; this we see in the case of Hacene Akrich, a case which deals with the relationship between reverse discrimination and fundamental rights.[3] This preliminary ruling from a UK Immigration Appeal Tribunal arose in the context of a deportation order issued against Mr Akrich (a Moroccan citizen) in 1997. Akrich had married a British citizen in 1996 after various, largely illegal, entries to the UK since 1989. He and his wife had gone to live and work in Ireland in 1997 (Akrich having been deported there by the UK authorities) and, in 1998, Akrich applied for the revocation of the deportation order and also for entry clearance into the UK as the spouse of a British citizen/EU worker (his wife had worked in Dublin since August 1997). The Akrich couple appear to have carefully planned this sequence of events in the knowledge that EU law, specifically the decision of the ECJ in *Singh*[4] gave rights and protection to people in their situation. In interviews with immigration officials they were even honest (or naive) enough to admit that their sojourn in Dublin was based on their understanding of Singh law. This honesty was to prove to be their downfall as regards the UK authorities. The Home Office refused to revoke the deportation order as

> "*... the Secretary of State considered that Mr and Mrs Akrich's move to Ireland was no more than a temporary absence deliberately designed to manufacture a right of residence for Mr Akrich on his return to the United Kingdom and thereby to evade the provisions of the United Kingdom's national legislation and that Mrs Akrich had not been genuinely exercising her rights under the EC Treaty as a worker in another Member State.*"[5]

The Home Office seems to be have been piqued on two levels: firstly, that Akrich would have the *chutzpah* to use his knowledge of EU law to improve his immigration position and, secondly, that his wife, who did genuinely work in another Member State, would have done so for "non-genuine" reasons. There are already echoes of the *Levin* case here.[6] The ECJ in that case did not look behind the pretence of Mrs Levin working as a part-time chambermaid in The Netherlands in order to assure the residence rights of her South African husband; a worker is a worker is a worker, the Court had been happy to declare in 1982: "Regulation 1612/68

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[2] Ward argues persuasively for a more humane and compassionate form of judging ("a jurisprudence that inclines to think rather more about the human and worry rather less about what a 'right' is supposed to be"), relying on Nussbaum and Rorty among others. He cites, for example, Rorty, on human rights: "human rights is as much about listening to 'sad and sentimental stories' as it is agonising about the meaning of enumerated rights": Ward, "The Echo of a Sentimental Jurisprudence" (2003) 13 *Law and Critique* 107, at 118. My assessment of the *Akrich* case is that it approaches this form of humane judging. There is evidence here of the Nussbaum "good judge ... one who is capable of fancy and sympathy, can imagine pain and suffering and understand what it means to be oppressed and excluded" (cited in Ward at 123).

[3] Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, Judgment of the ECJ, 23 September 2003.

[4] Case C-370/90. *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, [1992] ECR I-4265

[5] Para. 37 of the Judgment.

[6] Case 53/81, *Levin v Staatssecretaris van Justitie*. [1982] ECR 1035.

contain[s] a general affirmation of the right of all workers to pursue the activity of their choice within the Community, irrespective of whether they are permanent, seasonal or frontier workers ...".[7] The Court goes on to state "... the rules on freedom of movement for workers ... cover only the pursuit of effective and genuine activities ... these rules guarantee only the free movement of persons who are desirous of pursuing a genuine economic activity".[8] Effectively, the Court was saying that the purpose or motive of the worker is immaterial once he or she is pursuing a genuine and effective economic activity.[9] So far, so good, it would seem for Mrs Akrich. Whatever the UK may claim about her intentions, it was not disputed that she did indeed engage in paid work while in Dublin. In other words, *Levin* would suggest that the second argument of the Home Office was immaterial. The Immigration Adjudicator had concurred with this reading of EU law, finding that there had been an effective exercise by Mrs Akrich of her Community rights which was not tainted by the intention of the spouses. However, the precise situation of Mr and Mrs Akrich had been anticipated by the ECJ in *Singh*, where it stated that "the Treaty cannot have the effect of allowing persons who benefit from [it] to evade the application of national legislation"[10] and it was to this that the Immigration Appeals Tribunal directed its attention upon appeal by the Home Office. In order to determine the precise scope of *Singh*, two questions were therefore referred to the ECJ.

In his Opinion, AG Geelhoed adopts an interesting perspective on the case, framing it as a one of a clash of competence: the competence of Member States to control immigration of non-EC nationals on the one hand and the competence of the EU to control free movement of persons within the Union on the other. Although Mrs and Mr Akrich might not have thought about their actions in these terms they were effectively seeking to bring themselves squarely within the realm of EU competence (rather than national competence) by moving to Ireland. However, the flaw in the *Akrich* case, as identified by the AG, can be located at the very origin of Mr Akrich's relationship with a Member State of the EU, that is, at his point of entry into the UK. This matter of entry onto the territory in the first place (by a non-EC national) is an issue pertaining to national competence, altogether different from the question of a non-EC spouse to remain within the EU, which is governed by EU competence. Geelhoed thus relocates what he calls the "nub" of the case from the rights of a Member State national to be accompanied by her/his spouse to a question of entry into a Member State of a non-EC national. The Akrichs, as Geelhoed sees it, are seeking to use EU legal competence (*Singh*) to "circumvent" national control and competence over immigration legislation.[11] So it is not, according to the AG, a question of the scope of *Singh* or whether intentions can affect one's classification as a worker, but a question of reasserting the borders of competence in the interplay between Member State

[7] Para. 14 of the Judgment.
[8] Para. 17 of the Judgment.
[9] AG Geelhoed acknowledges this in his Opinion in *Akrich*: "the intentions of persons making use of [an] EC right may not be inquired into", para. 102 of the Opinion.
[10] Para. 24 of Judgment.
[11] Para. 9 of the Opinion.

immigration law and EU free movement of persons law. Member States can still control entry into their territory of non-EU nationals and it is that competence which is challenged by the Akrich claims and their reliance on EU law. Their case was effectively flawed from the outset as Mr Akrich had not abided by UK immigration law when entering the territory. He had entered in a clandestine fashion in 1992 and remained in the UK unlawfully until his deportation to Ireland in 1997. Because of this "original sin", Akrich becomes a much easier case to decide according to Geelhoed. Had Hacene Akrich been resident lawfully in the UK, then there would be no issue of a competence clash as national competence would have been exhausted and the case would be confined to the more interesting issue of the alleged "deliberate exploitation" of EU rights to overcome a negative national immigration decision. But that not being the case, the Akrich ruling turns into an opportunity for Geelhoed to reflect upon the "trends" in national immigration laws (as they affect non-EU nationals), which he categorises as "steadily becoming more restrictive".[12] The "trends" in EU free movement law are also analysed, especially the rights of family members who are not nationals of an EC state. The AG, in this context, sees *Akrich* as being similar to *Baumbast and R*[13], in that it raises a situation not envisaged by the early legislation in 1968 on free movement of workers.

The case raises several anomalies, amongst them the fact that Mr Akrich used EC law to lawfully gain entry to Ireland, as that country (and all other thirteen Member States) could not refuse him entry as the spouse of an EC worker, but the UK claims that it, alone, has the right to refuse entry. In other words, the UK claims priority for its competence to control entry over provisions of EU law. What is the basis of this claim, a claim which cannot be made by the other Member States? It is the fact that Mrs Akrich is a UK citizen, and so the UK can treat her "worse" than the rest of the EU because of reverse discrimination. That can be the only basis of the claim, as the other Member States are bound by EU law, but the UK claims the right not to be. Geelhoed views this as a competence issue, but in reality it is just the old-fashioned and arguably outdated[14] rule on wholly internal situations. But *Akrich* does not raise a wholly internal situation - there is clearly a period of work in another Member State involved. So, is the UK caught out? It cannot claim a superiority for its own legislation, as to do so would put it in an advantageous position as regards the other Member States, yet it cannot rely on reverse discrimination as the situation is not wholly internal. So, we are inevitably led back to *Singh* and the question: does *Singh* apply if the non-EC spouse seeking to rely on it did not lawfully enter the EU? After much meandering in the complexities of competence issues and the history of EU free movement this is then the real "nub" of the case after all. UK immigration law would prevent entry into the UK by Mr Akrich, but EC law (*Singh*) would facilitate his entry. Can or should *Singh* be applied without

[12] Para. 47 of the Opinion.
[13] Case C-413/99, *Baumbast and R*, [2002] ECR I-7091. AG Geelhoed was also the AG for these joined cases. See Lyons, "Human Rights Case Law of the European Court of Justice" (2003) 3 *Human Rights Law Review* 157, at 157-77 for a discussion of that case.
[14] See Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 *Common Market Law Review* 731.

reservation or qualification? Geelhoed's resolution is that *Singh*-based rights "do not subsist under any circumstances"[15] and *Singh* "does not create a right in favour of the national of a non-Member State to entry the territory of the European Union".[16]

At this point, Geelhoed's analysis begins to read like an apology for the "steadily more restrictive" national immigration laws he had referred to earlier. In stating that, in order to make a better Union for citizens, we must increase controls at external borders,[17] he could well have been merely citing the manifesto of any number of European right-wing political parties. There is something a little unsavoury about this conclusion - a year earlier, the Court in *Baumbast and R*,[18] *MRAX*[19] and *Carpenter*[20] had endorsed an expansive approach towards various aspects of third-country national rights in relation to or under EU law. Common to two of those cases was the fact that female non-EC national spouses benefited from their relationship with the male EC worker/citizen. The nationalities involved were Philippine American and Columbian. All three of the cases evidenced an extension either in principle (*MRAX*) or in concrete terms of the rights of non-EC citizens who find themselves in the territory of the Union. In none of those cases was it thought appropriate to resort to populist notions of the need to protect the privileged EU "insiders" by controlling the borders. Yet, in *Akrich*, a Moroccan man seeking to rely on what was thought to be well established EU law potentially sees that law restricted and curtailed rather than upheld. Was he the "wrong type" of EU law beneficiary, with his (minor) criminal record, his unlawful entry into the UK and his claim for asylum? Or is it the case that you are more likely to succeed in an EU law-based immigration case if you are a female married to a male worker/citizen, thus suggesting the perpetuation of support for the stereotypical but outdated marriage relationship where the male is the breadwinner? Or was it the Akrichs' openly admitted reliance on (what they believed to be) established Union law that was so persuasive to the AG? Whatever the basis of the analysis, we are now back in antediluvian territory, with the suggested restriction of *Singh* by Geelhoed, a case which for so long saved many non-EC nationals from the restrictive influence of national immigration laws. As such, his Opinion adds little to the canon of jurisprudence on free movement, reverse discrimination or citizenship, all of which are seemingly pushed aside in the attempt to justify a Member State's "overriding national interest" to control those who enter their territory.

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[15] Para. 132 of the Opinion.
[16] Para. 134 of the Opinion.
[17] Para. 135 of the Opinion.
[18] See *supra* n.13.
[19] Case C-459/99, *MRAX v Belgium*, [2002] ECR I-6591.
[20] Case C-60/00, *Mary Carpenter v Secretary of State for the Home Office*, [2002] ECR I-6279. For a critical commentary on the case see: Editorial Comments, "Freedoms Unlimited? Reflections on Mary Carpenter and the Secretary of State" (2003) 40 *Common Market Law Review* 537, and also Reich and Harbacevica, "Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice With Regard to Free Movement of Persons" (2003) 40 *Common Market Law Review* 615.

However, AG Geelhoed eventually concludes that there was no "misuse" of Community law in this case: "the installation of a worker in another Member State in order to benefit from a more favourable legal system is by its nature not a misuse of Community law".[21] Despite the positive response in this instance, there is some potential for concern inherent in this notion of "abuse" of EC law. Article 10 EC might well bind the Member States to "abstain from any measure which could jeopardise the attainment of the objectives of the [EC] Treaty", which comes close to a prohibition on abuse of EC law. But nowhere in the Treaties can we observe a specific "instruction" to individuals to refrain from "misuse" of EC law or any definition of what that might constitute. The only provision that comes close to hinting at this is Article 17 EC, which states that EU citizens "shall be subject to the duties imposed [by the EC Treaty]". Is a duty not to abuse the law to be read into this Article? I suggest that we are on thin ice here. This concept of "duties" to be imposed directly on citizens has been largely ignored since it first appeared after the Maastricht Treaty amendments.[22] But the flip side of the recent expansion in citizen rights in cases such as *D'Hoop*[23] and *Baumbast* is the potential for an expansion in the notion of citizen responsibility towards the Union. The concept of abuse of EU law edges us towards that definition of duties and, while no abuse was rightly found to have taken place in this case, it is only a matter of time before abuse or misuse is argued with more success. The 40-year-old Van Gend[24] made us subjects of a new legal system and gave us new rights, which have been continuously exploited ever since. The time for "pay back" may well be nigh if the arguments raised in *Akrich* are taken seriously.

The Court (composed of 11 judges) had far less difficulty in dealing with this case, displaying none of the discomfort of Geelhoed, who seemed to struggle to reconcile a repugnance towards the blatant disregard of UK immigration law with respect for EU rights. The ECJ issued another judgement which, at one level, is a triumph for citizen rights, in the same vein as *D'Hoop* and *Baumbast*. Indeed, the use of language is one of the first remarkable aspects of this short decision: Akrich was fighting his case based on his wife's status as a "worker" and all arguments before the Court were confined to worker legislation and Treaty references. Yet, the ECJ segues rapidly from a discussion of Article 39 EC (free movement of workers) and Regulation 1612/68 to the use of "citizenship" as the framework within which to analyse this situation. The case, according to the ECJ, turns upon the rights of the spouse of a citizen, not merely the rights of a worker's spouse. There is, however, no mention whatsoever of either citizen case law or of Articles 17-22 EC (Citizenship of the Union). "Citizen" is simply read into "worker" legislation and case law. This is strong evidence indeed of the Court's support for an expansive interpretation of the meaning of citizenship under EU law. Citizenship can now be said to be the original status of all EU Member State nationals in terms of

[21] Para. 181 of the Opinion.
[22] The words of Article 17 are repeated in the EU Draft Constitution without any definition or elaboration. See Article 8 (2) of the Draft Constitution 2003.
[23] Case C-224/98, *D'Hoop* [2002], ECR I-6191.
[24] Case 26/62, *van Gend en Loos*, [1963] ECR 1.

their relationship with and under EU law. The Court is implicitly (if rather imprecisely) moving away from the need in the past to "box in" people, particularly in free movement cases. It is well known that you had to prove that you fitted into either a worker box or a service provider box in order to benefit from EC rights. But increasingly, as more and more people found themselves in irregular, outside-the-box situations as regards putative rights under EC law, this trend began to wane. The cases of *Martinez Sala* (non-worker),[25] *D 'Hoop* (child, non-worker) and *Baumbast* (ex-worker) are all testaments to the erosion of the precise classifications under free movement law, and the gradual acceptance that citizenship of the Union has a higher status than the worker *et al.* and is justiciable as such. But in *Akrich*, this evolution, which is of very recent vintage, is merely assumed in the Court's assessment with the replacement of "worker" by "citizen" throughout almost the entire judgement. We are, the Court implies, now "citizens first"[26] under EU law and it is from that starting point that our rights are measured.

The "original sin" of Hacene Akrich is immediately identified by the ECJ as a possible flaw in his case. In order to benefit from Article 10 of Regulation 1612/68, the non-EC national spouse or family member must be lawfully resident in a Member State. This statement by the Court is a matter of some concern: effectively the Court is reading a condition into the legislation, making family members' rights dependant on initial lawful entry into the territory of the EU. Are spouses and family members to be forever penalised for breach of this newly formulated condition? If a non-EU national husband or child enters a Member State unlawfully, the implication of the Court's statement is that there can be no remedying of that unlawful entry and that it will affect their rights thereafter no matter how long they may live and work in the EU. But the Court does not expand on this and much of the remainder of the judgement is confined to examining the position of the EC citizen (and not her unlawfully resident spouse, the position of whom so taxed both the AG and the Home Office). The focus is on Mrs Akrich here and not on her husband and, despite his lack of rights, it is stated that EU citizens such as Mrs Akrich should not be deterred from their free movement rights to move to and work in another Member State. In short, if you have the misfortune to marry a non-EC national who is in an irregular position as regards national immigration law, that fact should not have the effect of eclipsing your EU law rights. Furthermore, return by the citizen to her/his own Member State must equally not be affected by the spouse's lack of right to remain in that state. The Court does not concern itself with the niceties of competence issues and pays little heed to the question of Member State control over immigration (except for the very brief attention to the need for "lawful residence within a Member State"). However, it does, significantly, turn to an examination of the concept of "abuse" of Community law. Here, the Akrichs' honesty is rewarded in a sense, as "motives which may have prompted a worker of a Member State to seek

[25] Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691.

[26] "Citizenship of the Union is destined to be the fundamental status of nationals of the Member States", Case C-148/02, *Garcia Avello v Belgium*, Judgment of the ECJ, 2 October 2003, at para. 22. See below for a discussion of this case.

employment in another Member State are of no account ...".[27] But there is one situation in which the Court would be willing to concede the possibility of an abuse, which is that of marriages of convenience. This is a rather confusing level of analysis, as any determination of the authenticity of a marriage in an immigration context is always made by the Member State authorities. The two implications that flow from this are: a) despite the fact that there are no concessions in this case to Member State competence in relation to immigration, there is a suggestion that a determination of a marriage of convenience is acknowledged as a Member State prerogative; and b) a concept of abuse of EC law is predicated upon a decision at national level, outside the limits of EU law.

The second of these possible scenarios has the more serious consequences for EU citizens. If they are to be accused of abuse, misuse or fraud in relation to EU law, surely the appropriate level of determination of that abuse is the Union level and not that of the Member State? As a final determination of this point was not necessary in this case the point is speculative and the jury is still out effectively as regards what is and who should determine such an abuse. Some "guidance" is provided by the ECJ nonetheless in relation to any determination of a marriage of convenience and Member States are reminded (or warned?) that the protection of the right to family life (Article 8, ECHR) would have to be respected. The Court resorts to a very deliberate citing of *Carpenter* in this context. That was a case in which the ECJ's use of Article 8 ECHR very firmly trumped UK immigration law. As there was no question of the authenticity of the Akrich marriage, the resort to *Carpenter* and the family life discussion seems otiose, except to the extent that it can be seen as a very clear suggestion by the ECJ that a combination of EU rights and ECHR fundamental rights will override much national immigration law. But the judgment has by now taken a direction entirely different to that of the AG, one barely hinted at in the referring Tribunal's questions and hardly justified by the facts of the case. There is perhaps nothing much in this, but Ninon Colneric, one of only two women judges at the Court (a former labour law judge in her native Germany) was the Juge Rapporteur for *Akrich*. Whatever the reasons, the ECJ has produced one of it most quietly subversive decisions of recent years. Not only does it directly declare the priority of EU law over national immigration law, not only does it disregard the acknowledged attempt to evade national law by relying on EU law, it also, most significantly, turns directly to the Strasbourg Convention as providing the necessary solution to the case.

The UK's attempt to "keep out" a Moroccan national are, ultimately, to be thwarted by Article 8 ECHR, applied via Luxembourg law. As in *Carpenter*, the Court once again uses the ECHR (and Article 8) in a manner that is more expansive than the Convention's "mother" institutions in Strasbourg. Firstly, "family" here is read as including "close family members" and not just the spouse of the claimant.[28] Were Hacene Akrich

[27] Para. 55 of the Judgment.
[28] Para. 59 of the Judgment.

prevented from being with his close family members in the UK (though none such are actually mentioned in the judgement papers, apart from his wife's brother), then that "would amount to an infringement of the right to respect for family life".[29] This is a significant step forward indeed as regards EU law determinations of what constitutes a "family" and, implicitly, a marriage. The latter, as defined in both secondary legislation and ECJ case law, is confined to the "standard", legalised marriage of a man and woman. EU law as it currently stands offers no specific protection to either non-formalised partnerships, or lesbian or gay relationships.[30] However, the loose wording of the Court in *Akrich* seems to offer some prospect of a progressive extension of the law in the future. Finally, the judgement is a resounding defeat for national immigration laws in face of benefits conferred by Community law. As long as a marriage is genuine, people in the situation similar to the Akrichs, who make inventive use of the law, are not to be penalised and Member State immigration authorities must henceforth act at all times with a copy of Article 8 ECHR (metaphorically) engraved on their desks.

Tradition wins the day: the Advocate General Opinion in *Jégo-Quéré*

The tale of two courts and their conflicts in relation to access to justice under Article 230 EC continues with the publication of Advocate General Jacobs' Opinion in the appeal in the Jégo-Quéré case.[31] The background is well known. In the *UPA* case,[32] the ECJ effectively handed the baton of reform of judicial review back to the political actors and refused to follow some very persuasive arguments by Jacobs in that case calling for a new wording of Article 230(4) EC in order to increase the rights of individuals to challenge EC measures.[33] In the time between the Opinion and the Court decision in *UPA*, the Court of First Instance (CFI) had lent its support to a firm reform of Article 230(4) EC in its judgement in *Jégo-Quéré*, where it too suggested a new, but different, form of wording for that provision.[34] This whole saga involves an interesting interplay of all the key actors in Luxembourg, with the CFI pitted against the ECJ and judicial rejection of the senior AG's opinion. More importantly, these two cases serve to highlight one of the most important rights issues faced

[29] *Ibid*.
[30] See the cases of 59/85, *Netherlands v Reed*, [1986] ECR 1283 and Case C-122/99P, *D v Council*, [2001] ECR I-4319.
[31] Case C-263/02P, *Commission v Jégo-Quéré*, Opinion of AG Jacobs, 10 July 2003.
[32] Case C-50/00, *UPA v Council*, [2002] ECR I-6677.
[33] For analysis of recent developments see, amongst others: Albers-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62 *Cambridge Law Journal* 72 and Ragolle, "Access to Justice for Private Applicants in the Community Legal Order: Recent (R)evolutions" (2003) 28 European Law Review 90.
[34] Case T-177/01, *Jégo-Quéré v Commission*, [2002] ECR II-2365.

by the EU Courts in recent years, set against the background of widespread calls for increased participation by citizens in EU affairs.[35]

In his Opinion, AG Jacobs was required to assess the CFI's judgement (finding in favour of "individual concern" based on a new reading[36] of Article 230(4) EC) in the light of the ECJ's defiant decision in *UPA* to uphold the "traditional" interpretation of individual concern. Jacobs is succinct to the point of sparseness in his evaluation of the Commission's appeal. He represses his own passionate and convincing calls for reform in the *UPA* case and displays model AG behaviour in stating that "in the light of the [ECJ] judgement in *UPA* it seems clear that the Commission must succeed in its second plea that the Court of First Instance erred in law when it departed from the traditional interpretation of individual concern".[37] In other words, it is the role of an AG and also the role of the CFI (merely) to follow the ECJ interpretation of EC law. This is quite an indictment of judicial functions in Luxembourg. At the time of the CFI decision in *Jégo-Quéré*, there was arguably a very strong doctrinal case for reform of the EU definition of individual access to an effective judicial remedy.[38] The suggestion here by Jacobs that the lower Court has no scope for its own (re-) interpretation of the law, crucially denigrates the function of the CFI and, moreover, in a context in which all judicial review claims by individuals are brought before that Court, seems to pre-determine the outcome to the extent that a reading of ECJ utterances is all that is permitted.

Undoubtedly, there is an element of faux acquiescence in Jacobs's words. He reiterates how "highly problematic" he finds the strict, traditional interpretation,[39] but despite this, a traditional interpretation flowing from the Treaty must be applied "regardless of its consequences" for the fundamental right to an effective judicial remedy.[40] This makes a mockery of the Union and of "... human dignity, democracy, equality, the rule of law and respect for human rights".[41] The Treaty must be applied at all costs, even to the detriment of human rights, is what Jacobs alleges against the highest Court in the EU. Politics must be respected by the law and we must await political reform, even if it means rights of judicial protection are breached. But the reality of the *UPA* judgement is that, although the ECJ is declaring that Treaty change is a matter of politics, in effect, Member States being "requested" to change Article 230 EC is tantamount to a

[35] The EU Draft Constitution has directed its attention to Article 230(4) and suggests a new form of wording (which is not however similar to either AG Jacobs's or the CFI's proposals). It reads "Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing provisions", Article 111-270(4), Draft Treaty Establishing a Constitution for Europe, CONV 850/03, 18 July 2003.

[36] The CFI proposed that "a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him", para. 51, CFI judgment.

[37] Para. 42 of the Opinion.

[38] As evidenced by and discussed in Jacobs's own Opinion in *UPA*.

[39] Para. 44 of the Opinion.

[40] Para. 46 of the Opinion.

[41] Article 2, Draft Treaty Establishing a Constitution for Europe, *supra* n.35.

judicial function being performed by the political actors. It is the strict judicial interpretation of Article 230(4) EC originating in *Plaumann*[42] that has brought about the need for reform of judicial review, not the words of the Treaty *per se*. The ECJ in *UPA* refuses to perform this function and reverse previous case law, masking its refusal as a question of politics not law. This Court coyly suggests that it is not for the judges to express their will in relation to a Treaty change, but that is precisely what they do nonetheless. They, the judges, are determining any future Treaty change in stating that they will refuse to alter their approach until the Member States provide them with new Treaty wording. It is, ultimately, the will of the judges that is determining the future of individual access to judicial review, dressed up in a question of politics. But whatever reform may come about in relation to improving the unsatisfactory position of judicial review under EU law, it will almost certainly not come about in time to help those whose livelihood is fishing for whiting and hake in the Celtic Sea, or those olive oil farmers in Southern Spain. I do not pass judgement here on the complexities of the Common Fisheries Policy or the Common Agricultural Policy and nor, indeed, was it the task of the Courts to do so. But there seems to be an air of *mauvaise foi* surrounding this whole episode in EU judicial history. Everybody involved in the cases - claimant parties, Council and Commission, AG Jacobs, CFI and ECJ - all acknowledge that the EU does not offer effective judicial remedies under Article 230(4) EC, yet no reform is permitted or forthcoming. A comparison with the "good old days", when an "active" Court was able to formulate fundamental principles of integration with nary a nod to the political actors, is futile. Those days are clearly over. It is just more than a shame that a principle with such widespread significance for the meaning of rights within the EU legal system had to be sacrificed to show us this.

For many years, fisherfolk and farmers were the beloved beneficiaries of EC budgets. These two cases (Jégo-Quéré, a French fishing company, and UPA, an association of Spanish olive oil farmers) provide tasty intellectual fodder for analysts of European justice but, at root, they symbolise a very real change in mood in Europe. A fight over access to justice is really a fight about the right to pursue a livelihood. These two court cases say nothing but everything about the morality and purpose of (new) European integration. Sectoral integration was Monnet's mantra, and sectoral disintegration might now be said to be Prodi's legacy, at least to the fisherfolk of Peterhead and the farmers of Andalucia, for whom grand principles of participation of civil society and OMC are as nought as they watch their boats burnt and their crops destroyed in the name of closer Union.

[42] Case 25/62, *Plaumann & Co v Commission*, [1963] ECR 199.

Conservative approach towards *Booker*

The Scottish case of Booker[43] directs us precisely towards some of the dilemmas faced by people who earn their living fishing in EU waters. The case raised the question of the fundamental right to property of people whose diseased fish stocks had to be destroyed under the provisions of EC Directives.[44] The claimants managed fish farms in Scotland, which fell victim to diseases proscribed in Directive 93/53 in two separate episodes: in 1994 (Booker) and 1998 (Hydro). Compensation claims by both affected companies were refused given a "long-established policy [in the UK] of not paying compensation to those subjected to measures taken for the control of fish diseases".[45] The fish companies then sought to rely directly on Community law general principles (fundamental rights, particularly that to property) to require their Member State to adopt measures providing for compensation as Member States, when implementing Community law, are required to respect fundamental rights. The Directive contained no reference to compensation, therefore general principles offered the sole possible solution here. The Court of Session in Edinburgh saw fit to refer this issue to the ECJ. The delicate question of the extent of fundamental rights obligations of Member States when implementing or applying Community measures was the first issue tackled by AG Mischo. He had little difficulty in finding that a "Member State must respect fundamental rights when it implements a directive".[46] The subsequent examination of the extent to which the right to property was protected in this case looks at both the order for slaughter[47] and the refusal to give compensation. The AG recalls that the right to property is not an absolute right[48] and although, clearly, the "systematic slaughter" of the diseased fish stocks affected the property rights of the claimants, it was "very far from a disproportionate and intolerable interference" with their property rights.[49] As regards the denial of compensation, Mischo finds no breach of Community fundamental rights here either: "the case law developed by the Court on the right of property does not require the payment of compensation",[50] primarily because the loss of property is imputed to outbreak of disease in the first place and not to any action by the UK authorities. However, he then turns to a lengthy discussion of both ECHR case law on compensation and Member State constitutional traditions in a classic, student-friendly examination of the sources of EU fundamental rights.[51] All that is to no avail as regards the claimants' case, as he concludes that no right to

[43] Joined Cases C-20/00 and C-64/00, *Booker Aquaculture and Hydro Seafood v The Scottish Ministers*, Opinion of the AG, 20 September 2001 and Judgment of the ECJ, 10 July 2003.
[44] Primarily Council Directive 93/53/EEC of 24 June 1993.
[45] Para. 36 of the Judgment.
[46] Para. 59 of the Opinion.
[47] In this context, *Booker* foreshadows a more infamous, later slaughter case, namely that of Case C-189/01, *Jippes & Others*, [2001] ECR I-5689 where foot and mouth related slaughter was found to be justified. The case also made it clear that there is no general principle of animal welfare in EU law.
[48] See cases 4/73, *Nold v Commission*, [1974] ECR 491 and 44/79, *Hauer*, [1979] ECR 3727.
[49] Para. 78 of the Opinion.
[50] Para. 100 of the Opinion.
[51] He also discusses the EU Charter's Article 17, while admitting that it is not legally binding.

payment of compensation can be read into the protection of fundamental rights. He finishes his Opinion by also finding that the Directive is not invalidated for any breach of fundamental rights.

The eleven judges of the ECJ begin their assessment with this question of validity of Directive 93/53. In contrast to *Carpenter* and *Akrich* and the suggestion by Jacobs in *Garcia Avello*, the Court here adopts a much more conformist line on its relationship with ECHR case law. Interestingly, the Rapporteur here is Fidelma Macken, the other female judge at the ECJ (Colneric had the same role in *Akrich*), but the style of judgment is very different and reads in a textbook like fashion as the history of the right to property is reeled off, leaving very little to the imagination or to the interpretative skills of future claimants and their lawyers. The Directive is found not to breach any fundamental rights, as indeed its provisions are directed towards enabling fish farm owners to carry on their businesses by encouraging immediate destruction and slaughter. It is not surprising, therefore, to find that Member State implementation of the Directive (including the lack of compensation) is also considered to be compatible with the fundamental right to property. The "Booker Prize" goes to the vigilant Community and the Member State authorities. There is to be no departure from standard fundamental rights law here (whether that be ECHR or Community derived); the status quo on the right to property is upheld and the fish fanners lose out. Perhaps, at some level of the prevailing dynamics of the closed decision making rooms in Luxembourg, there is currently more sympathy for those involved in immigration or citizenship cases than there is for more old-fashioned claims like those in *Booker* and *Jégo-Quéré*, where conformity rather than invention reigns.

Old values, new rights: *Schmidberger v Austria*

In June 1998, an Austrian environmental protection association held a demonstration on a stretch of the Brenner motorway designed to draw attention to the level of heavy goods traffic on the motorway and the pollution caused thereby. The demonstration was allowed to go ahead by the local authorities and the motorway was closed to all traffic for about thirty hours over the days of 12 and 13 June. A small German transport company, Eugen Schmidberger Internationale, which made frequent use of the Brenner motorway, brought proceedings against the Austrian State, claiming that the authorities had failed in their duty to guarantee free movement of goods when permission was granted for the demonstration and the motorway closed. The case reached the Oberlandesgericht Innsbruck, which referred several questions to the ECJ.[52] Essentially this is a *Francovich*/State liability case, which turns on the balancing of interests between one of the fundamental freedoms of the EU (goods, Article 28 EC) and the holding of political demonstrations. AG Jacobs, having assessed the temporary blockage of the motorway and found it capable

[52] Case C-112/00, *Eugen Schmidberger v Austria*, Opinion of the Advocate General Jacobs, 11 July 2002 and Judgment of the ECJ, 12 June 2003.

of constituting a restriction on the free movement of goods attributable to the Austrian authorities, turned his attention to the question of justification. *Schmidberger* is the first case in which a Member State has raised the protection of fundamental rights to justify a breach of a fundamental freedom. Moreover, the fundamental right in question must be respected under the provisions of the Austrian constitution. We are, therefore, in the classic extreme case of a clash of Treaty and a national Constitution - a clash of absolutes. Jacobs thought it necessary to first question whether Austria was pursuing a legitimate objective when it authorised the closure of the motorway. The fact that freedom of expression and freedom of assembly are protected as part of the general principles of the Community, guaranteed by Article 11 ECHR and "reaffirmed" in the EU Charter, led to the establishment of a legitimate public interest that was also deemed to be proportionate, given especially the short duration of the disruption to traffic. His conclusion is therefore rapidly reached: there was not a sufficiently serious breach of Community law. The Court (thirteen judges) unusually takes longer than the AG to wade through the issues only to reach a similar conclusion: the protection of fundamental rights by the authorisation of the demonstration is not incompatible with the principle of free movement of goods.

This is a watershed case for fundamental rights protection in the EU. Integration was established for, and then subsequently supported by, the likes of Eugen Schmidberger Internationale and the other thousands of lorry drivers who speed across a Europe "*sans frontieres*", the very embodiment of the success of the Single Market. But customs barriers may well have been replaced by obstacles of a different kind for those who thought they could securely rely on the primacy of fundamental freedoms.[53] The facts of the case were fortuitous, if not for Schmidberger, for the environmental activists who benefit from the case vicariously, not having to pursue the rocky road of judicial review but instead seeing their rights upheld and defended by a Member State. There is a sense of the end of an era in the Schmidberger judgement. The "subjects" of integration have moved on from the economic actors to embrace those so often outside the scope of Community law in the past. (As such, a parallel with *Akrich* is apt here; an "outsider" (in more senses than one) benefits from fundamental rights of a citizen in that case, whereas in *Schmidberger* a group of people with ostensibly no connection to Community law are the indirect beneficiaries.) The over-use of "fundamental" in Community law may have led to confusion for the referring Court, but the ECJ is able to point to the "most" fundamental when it states: "the protection of [fundamental] rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".[54]

[53] A case like that of *Grogan* (Case C-159/90, *SPUC v Grogan*. [1991] ECR I-4685) was a very graphic testament to that primacy and the prevailing "mood" that held the Four Freedoms in such high esteem.
[54] Para. 74 of the Judgment.

What's in a name [in Belgium]?

This issue of the right to a name has preoccupied the EU Court before, most notably in *Konstantinidis*,[55] where AG Jacobs issued his memorable call for a wide interpretation of the fundamental rights of citizenship under EU law. It is the same Advocate General who turns his attention to names once again in *Garcia Avello*.[56] The case concerned, first of all, the Spanish custom for children to be given the first element of their father's surname and the first element of their mother's surname. The father of the children in question here, dual nationals born in Belgium to a Spanish father and a Belgian mother, who had been registered at birth with their father's (composite) surname (Garcia Avello), subsequently applied for a change of name to Garcia Weber so that it reflected the Spanish practice (Weber being their mother's surname). It is surprising at times to reflect upon the nature of cases which reach the ECJ via the preliminary ruling mechanism. Belgium must surely have the highest number of non-Belgian Europeans living and working within its borders, with many people in the situation of the Garcia Avello/Weber family. Yet this case, after a refusal by the Belgian authorities to change the name, reached the highest court, the Conseil d'État, which referred the question as to the compatibility of such a refusal with EU citizenship and free movement law. Like many of the cases reviewed in this piece, this case is fundamentally one about competence of courts and the right of a Member State to control the identity of people born within their jurisdiction.[57] The detail of the case may seem trivial (at least in a common-law jurisdiction, where there are few legal rules governing the naming of children), but the line-up of thirteen ECJ judges to rule on the matter demonstrates just how seriously the issue of names is taken in the EU. There are underlying issues in this case too. It represents a direct clash of two Member State's highly valued naming systems; it calls into question issues of custom, tradition and culture which feed into the root of those naming systems; and, finally there is a feminist element to the case, in that the Spanish double name practice specifically links children to their mother, whereas the Belgian law deprives children of the possibility to have a link with both parents.

The case is also of interest in that, on one reading, it involves non-worker citizens under EU law, that is, the Garcia Avello/Weber children. Children were long ignored or disregarded by EU law but, increasingly, as the nature of free movement changes, they are inevitably drawn into the sphere of Community law.[58] However, the children in this case had never exercised their free movement rights, which fact, according to the intervening Member State governments, took this case outside the scope of EU law. AG Jacobs sees the case as concerning the rights of their free-moving father, however, whose request to have the names changed

[55] Case C-168/91, *Konstantinidis v Stadt Altensteig*, [1993] ECR I-1191.
[56] Case C-148/02, *Carlos Garcia Avello v Belguim*, Opinion of the AG, 22 May 2003, and Judgment of the ECJ, 2 October 2003.
[57] Indeed, the Belgian government, and also the Danish and Dutch governments who intervened in the case, all argued that this situation did not fall within the sphere of Community law at all.
[58] See Case C-224/98, *D'Hoop, supra* n.23, and for a discussion of that case as regards the rights of children see Lyons, *supra* n.13, at 160-2.

was refused. His analysis of the relevant EU law suggests that a prohibition of discrimination against somebody in the position of Mr Garcia Avello can be found in a combination of *Konstantinidis*, Articles 12 and 17 EC and Article 8 ECHR. Having argued that there was discrimination on the basis of nationality (based on Articles 12 and 17 EC) in this case, Jacobs did not believe it necessary to examine the impact of Article 8 ECHR in detail. None the less, his few words on that provision are highly charged and suggestive. Recalling that the Convention's case law on naming permits a wide margin of appreciation to Contracting States, Jacobs finds it important to point out that EU law in this context would not necessarily ape that of the Strasbourg organs: "the existence of a wide margin of appreciation in the context of the Convention does not, in my view, have any direct bearing on the breadth of margin available in the different context of citizenship of the European Union".[59] Along with *Carpenter* and *Akrich*, this is, once again, evidence of the recent willingness of the Luxembourg judicial personnel to lay claim to a different and dedicated interpretation of the ECHR in an EU context. Perhaps these cases foreshadow an era of a legally binding Charter, or perhaps it is a growing confidence of the EU judiciary to formulate their own fundamental rights principles that pay heed to the ECHR but are not bound by their Strasbourg colleagues' interpretations of that instrument. Thus, a Belgian law, alleged to be a founding principle of social order in that country and in fact dating back to the era of law-making in revolutionary France (1794), is found by AG Jacobs to discriminate on the basis of nationality and, furthermore, not to be justified on any of the grounds put forward. We live, Jacobs reminds us, in a Union characterised by "increasing numbers of divorces and remarriages", and where the notion of free movement is no longer based on the "hypothesis of a single move from one State to another", but rather "possibly repeated or even continuous movement" within a Union, in which both "cultural diversity and freedom from discrimination are ensured".[60] This sophisticated view of the modern European worker, no longer merely moving to contribute to the economy of his host State but rather to help her/himself, rounds off an Opinion that shows that there is no longer a need to establish an interference with a specific economic freedom to use EU discrimination law to your advantage. It is time for the underlying purpose and focus of nationality discrimination law to be reappraised. Which begs the obvious question: if EU non-discrimination law is no longer concerned with integrating a migrant worker into the ways and customs of the host state, what function does it serve?

This, unsurprisingly, is not a question addressed by the ECJ. The judgement is a restatement of the Court's perspective on EU citizenship as being "the fundamental status of nationals of the Member States",[61] and the jurisprudential stalwarts of *D'Hoop*, *Grzelczyk*,[62] and *Bickel and Franz*[63] are all cited to support this

[59] Para. 66 of the Opinion.
[60] Para. 72 of the Opinion.
[61] Para. 22 of the Judgment.
[62] Case C-184/99, *Grzelczyk*, [2001] ECR I-6193.
[63] Case C-274/96, *Bickel and Franz*. [1998] ECR I-7637.

elevation of Article 17 EC from mere rhetoric. Citizenship will not apply to purely internal situations, but the necessary link with Community law is provided for in this case by child nationals of one Member State who are residing in another one. In other words, the children citizens who are dual nationals are not required to have moved in order to benefit from Articles 12 and 17 EC. Unlike AG Jacobs and the Commission, the Court, therefore, regards the Garcia Avello/Weber children as the putative victim of discrimination in this case, not their father. That fact alone is an extension of the scope of EU citizenship, not only explicitly to minors but also to non-moving minors. This expansive principle is supported by an examination of Belgian naming laws and the finding that the decision of the authorities was a disproportionate discriminatory practice which could not be justified. Articles 12 and 17 EC prohibit and preclude such a practice, states the Court, thus according direct effect to Article 17 EC. Future claimants relying on EU law now have the direct effect of both Articles 18 (*Baumbast and R*) and 17 EC in their armoury, thus according some new significance to the meaning of *aux armes citoyens*.

The ECJ washes its hands of German military service

Alexander Dory, a young man (aged only 17 when the case began) living in Germany, sought to be exempted from compulsory military service.[64] His claim for exemption was based on one ground only, namely that German law on military service (the Wehrpflichtgesetz, which is based on Article 12(a)(1) and (4) of the Grundgesetz (the German Constitution)) was contrary to Community law, in particular the case of *Kreil*.[65] That case, brought by a female electrician wishing to work for the armed wing of the German army and prohibited by the German Constitution from doing so, was won on the basis of a breach of EC discrimination law, especially Directive 76/207. Dory claimed effectively that the principle of equality espoused by the ECJ in *Kreil* should also apply to the issue of compulsory military service for German men.[66] Following a legally sophisticated ruling from the District Recruiting Office, which rejected the request for exemption having distinguished *Kreil* and claimed lack of competence for EU law in matters of national defence, Alexander Dory's case went as far as the Stuttgart administrative court, which referred the case to the ECJ.[67] This was an awkward moment indeed for the Luxembourg court. Watched over on a permanent basis since the

[64] He apparently wanted to be exempted from military service because he wanted to study law: a fact noted by Judge Ninon Colneric in her (unpublished) lecture entitled 'The Court of Justice of the European Communities as a Court Judging Competence Disputes' given at Aberdeen University, on 9 May 2003, as part of the series of Ledingham Chalmers Annual European Law Lectures. I would imagine that this may not be the last we hear of Alexander Dory in the EU law field, given this interesting start to his legal career, delayed though it will be by military service.

[65] Case C-285/98, *Kreil v Federal Republic of Germany*. [2000] ECR I-69.

[66] Dory was represented before the ECJ by the firm of W. Dory and C. Lenz. The match of names may have been pure coincidence, or alternatively a test case taken by somebody supported by those with knowledge of ECJ case law and the resources to pursue such a case.

[67] Case C-186/01, *Alexander Dory v Federal Republic of Germany*, [2003] ECR I-2479. For a discussion of the case and related issues see Raible, "Compulsory Military Service and Equal Treatment of Men and Women - Recent Decisions of the Federal Constitutional Court and the European Court of Justice" (2003) 4 *German Law Journal* 299.

Brunner[68] case by the German Federal Constitutional Court, it cannot but be wary of any possible interference with the German constitution. Yet the ECJ had issued a quietly radical judgement in *Kreil*, which impacted directly upon German constitutional competence, when it found that the general prohibition on women in the armed services was contrary to Directive 76/207. German women should have the right to bear arms for their country if they so chose and the German constitution that had prohibited this was changed after the decision in *Kreil*. That case went to the root of many EU, often unvoiced, taboos and psychoses, in particular the issue of control of the German army and the difficult relationship between German law and EU law. But in a David v Goliath scenario, the ECJ took a risk and found in favour of Tanja Kreil and challenged Germany's competence to manage defence matters. A little of the romanticism of European justice surrounds the case, as a court upholds sexual equality over outdated constitutional principles and imposes European standards on a constitutionally cherished and guaranteed German custom.[69]

However, a mere three years later in Dory, it is as if a completely different judicial institution is ruling upon similar issues. Apart from the obvious observation that most of the judicial personnel had changed since *Kreil*, this case was decided in quite a different "moment". In March 2003, the EU was well on the way towards the drafting of its own Constitution and matters of defence were also sharply in focus, given the invasion of Iraq. However, none of these factors explain or excuse what is ultimately a U-turn by the ECJ in *Dory*. Like *UPA*, *Dory* is about politics and - as in the former case - the individual claimant loses out to an assessment of the higher status of matters of principle and competence. The Court implicitly requests a specific reference to defence matters in the Treaties before it will deign to rule upon such an issue. Once again, a Court that has embraced innovative transgression in the past without the leave of the political actors here halts before the implications of an interference with the management of the German military. Less than 60 years before *Dory*, the manner in which Germany organised its army was very much a matter of concern to the whole of Europe. It would be surprising if such sensitivities were referred to in EU judicial discourse, and it would be impossible to prove that memories and history have any real effect on modern day judging.[70] But there is something disquieting about *Dory*, not only for the *volte face* as regards *Kreil*, but for the

[68] *Brunner v The European Union Treaty*, [1994] 1 *CMLR* 57.

[69] Indeed, as if to emphasise this emotional aspect of the case. Tanja Kreil is reported to have said after the ECJ decision. "I feel a little bit more European", "A European Identity: Nation State Losing Ground", New York Times. 17 January 2000. The complex question of the empowerment or otherwise of women being given the right to bear arms is outside the scope of this review. Suffice it to mention that ever since a link was made between the benefits of citizenship and the bearing of arms in revolutionary France (the latter denied to women) this issue has preoccupied most modern European nation states at some level.

[70] Can one nonetheless argue that all that which happens in the European Union is only a few short steps removed from dealing with the wounds of war and that all EU judging, therefore, implicitly refers back to that wound? Slaughter, in a piece on American Indian Tribes, has an epigraph which reads thus: "All writing comes from an initial wound" (Edna O'Brien): Slaughter, "American Indian Tribes: 'Not Belonging to But as Existing Within'" (2000) 11 *Law and Critique* 25, which is called to mind here.

unexpressed, almost pious yielding to, and ceding of, sovereignty to Germany's discriminatory military service regime.

The awkwardness surrounding the case began with the AG Opinion. AG Stix-Hackl essentially found that the military service system of Germany was outside the scope of EU employment and discrimination law, on the basis that a period of such service would affect the employment of German men but did not regulate access to employment, as men were only temporarily prevented by military service from seeking a job. The Court was, initially, more courageous and direct, acknowledging that, in principle, the organisation of the armed forces was not excluded in entirety from the application of Community law. But there is a twist in the tale at the end, when it eventually states that a discriminatory military service regime is a Member State "choice", which Community law will respect. The ECJ hands the baton to Treaty makers. If you want to do battle in Europe about military service and defence matters, then the ECJ will not soil its hands or reputation with the German Constitutional Court by entering this difficult arena. Member States are ordered instead to "get thee to an IGC", to do the necessary there (along with, of course, access to justice and dealing with all that Charter business). The ECJ in *Kreil* had had no such qualms in ruling that a general provision that all measures relating to public security are exempted from the scope of Community law cannot be deduced from the Treaty. This was despite the arguments of Germany, supported by the UK and Italy, that defence and organisation of the armed forces remained within the sphere of national sovereignty.[71]

Despite the fact that *Kreil* and *Dory* share the same Juge Rapporteur (Puissochet) and three other judges, a completely different approach is adopted in the latter case. In *Kreil*, the judgement declares that the binding nature of Community law (in particular the social provisions of the Treaty) requires that it shall apply to the organisation of the armed forces. The conclusion is couched in general terms, that is, the total exclusion of women from military posts involving the use of arms is precluded by Directive 76/207. The active part of the judgement carefully refrains from even mentioning the German Constitution, let alone considering any consequences for that document. Three years and three months exactly later, a different sensibility prevails at the ECJ. It repeats its words in *Kreil* only to immediately overturn them: the organisation of armed forces is within the field of application of Community law but choices of military organisation for the defence of Member State territory or their essential interests are not governed by Community law.[72] The choice of military organisation chosen by Germany is "enshrined in the Grundgesetz"[73] and, even though it may act to the detriment of access of young people to the labour market, Community law is not applicable. The use of "enshrined" is significant. It encapsulates a respect for the superiority of the Grundgesetz, which may not be

[71] For a discussion of the case see Schwarze, "Judicial Review in EC Law - Some Reflections on the Origins and the Actual Legal Situation" (2002) 51 *International and Comparative Quarterly* 17.
[72] Para. 35 of the Judgment.
[73] Para. 38 of the Judgment.

challenged. There is no mention of either *Kreil*, where indeed a ban on women in the German armed forces was also "enshrined", nor of *Grogan*[74] for example, where the enshrining of the right to life of the unborn in the Irish constitution did not bring about such reverent behaviour by the ECJ. The careful wording in *Dory* raises an important question as regards Member State "choices" enshrined in Constitutions. What kinds of choices ultimately will the ECJ permit the Member States to engage in? The Irish Constitution, for example, contains the following:

> "*The State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.*"[75]

Is this a "choice" with which the ECJ would not interfere in the future? *Dory*, in other words, is a loaded precedent, because, having acknowledged a potential Community law competence, it then ceded that to a Member State's constitutionally enshrined choice.

What alternatives did the ECJ face when judging *Dory*? It could have intruded into the national cultural and constitutional background, and found it to discriminate against men and therefore to breach EU equal treatment law, with the result that either a) women would have to be exposed to the same compulsory regime or b) compulsory military service in Germany would have to be abolished.[76] But it was not incumbent on the ECJ to decide either of these issues, indeed it is outside the scope of its Article 234 EC competence to do so. The response to the Stuttgart Court could have been limited to a re-statement of the applicability of equal treatment law to armed forces and the German legislature would subsequently have had to deal with the consequences of that (as indeed was the case in *Kreil*). In other words, the ECJ masquerades a respect for the will of the German people in *Dory* in refusing to upset a constitutionally protected practice. But, ironically, the result of the case is a form of denial of expression of that general will of Germans, as *Dory* closes a door upon any rethinking of a constitutional measure in changed circumstances (that is, a European-wide respect for the equal treatment of men and women in employment related situations). This is ultimately, for all its careful wording, a weak judgement; in its combination of both deciding the case (in stating its view of the likely consequences of decision in favour of Mr Dory)[77] and equally not deciding the case in ceding to Member State competences, it portrays a Court with inflated views of its powers, but insufficient spirit to exercise them to the full.

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[74] *Supra* n.53.
[75] Article 41(2) of the Constitution of Ireland, enacted 1 July 1937.
[76] See Raible, *supra* n.67, at 306.
[77] Para. 41 of the Judgment.

It is impossible not to compare *Dory* with *Akrich* and *Carpenter* from a competence perspective. Immigration control and defence are at the root of the nation state's sovereignty, yet the former is increasingly finding itself taking second place to EU law fundamental principles. Yet, match defence control with EU discrimination law in *Dory* and the ECJ maintains a respectful distance. According to the judges, Member States still have the power to exercise "choices" but obviously not in every aspect of a state's "management". To paraphrase the cliche, "it's the competence question stupid" that will dominate EU politics of the future. Unresolved competence issues will inevitably find themselves before the ECJ, but on the basis of the patterns discerned in this review there are few clear guidelines to aid litigants.[78] Fundamental rights frequently take precedence when an immigration issue is analysed, but have little consequence for a property dispute. Equally, Member State's military service systems in some cases seem "safe" from EU law interference, but some cultural matters (e.g. naming laws) are obviously at risk. It is not undesirable that there should be scope for the dissection of competence matters within the EU polity and political actors can never anticipate every situation that would raise a competence question. Nonetheless, it is the preferences seemingly being adopted by the Court that must call into question its standing as the last, and sometimes only, arbiter of competence within the EU. Barnett has spoken of the tendency in the US not to question the legitimacy of the Constitution, perhaps out of fear of finding nobody behind the curtain were it to be lifted.[79] The authority of the ECJ has been challenged and questioned in the past of course, for, as every student knows or thinks they know, the sin of judicial activism.[80] We have moved beyond that rather crude characterisation of EU justice, but are not past the need to reappraise the "slings and arrows" of judging in Luxembourg. Perhaps one solution lies with that curtain metaphor? We know there is somebody there, at the very least, the Juge Rapporteur for each case, but would it not greatly assist the understanding and legitimacy of Union law were we able to see everybody behind that curtain? Ward says "Judging becomes a matter of entering into the dramatic life of a community. It becomes a necessarily democratic facility too. Law is no longer the possession of judges ... but the moral and political expression of that community of sympathetic 'spectators'".[81] How, in the European Union, are we to constitute such a community if we see not what the judges do?

[78] See di Fabio, "Some Remarks on the Allocation of Competences Between the European Union and its Member States" (2002) 39 *Common Market Law Review* 1289.

[79] "Few stop to consider whether the Constitution is legitimate ... it is as though we are afraid to find there is no man behind the curtain", Barnett, "Constitutional Legitimacy" (2003) 103 *Columbia Law Review* 111, at 111.

[80] It all began, as we know, with Rassmusen, *On law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht: Nijhoff, 1986).

[81] Ward, *supra* n.2.

Straining at the seams? The relationship with Strasbourg

The relationship between the two higher European courts that deal with fundamental rights is at one level one of mutual respect. But it is a far from complex relationship. The essence of the difficulties that lie at the heart of the Luxembourg/Strasbourg connection is the ECJ's limited competence in fundamental rights issues. This is limited in two ways: a) it is essentially limited to matters within the field of EU law; and b) it is limited by the stance the Court itself has taken as regards certain fundamental rights breaches and issues with which it will not deal. Because of these limitations, there is a void in respect of remedies for certain fundamental rights breaches issuing from or attributable to the Member States acting as the EU, and indeed to the EU institutions. This is a void that can, arguably, be filled only by the ECtHR. The ECtHR demonstrated in *Matthews*[82] that it was willing to scrutinise potential violations in this void by the (then) EC (or any international organisation), as Member State responsibility for prevention of violations continues even after a transfer of national competences. Ultimately, the implication of *Matthews* was that the EC/EU was put on notice that even though it had not acceded to the Convention, it would still be subject to its jurisdiction. In the admissibility decision in the *SEGI* case,[83] the Court dismissed the application, but came very close to holding the EU as a whole responsible for a breach of the ECHR. In March 2002, a Madrid Court declared SEGI (a Basque youth movement) to be "an integral part of ETA" and ordered the detention of eleven members of SEGI. The Spanish judge based his decision on EU Common Position 001/931/CFSP and (EC) Council Regulation 2580/2001, which implements certain provisions of the Common Position (anti-terrorism measures that were adopted by the EU after 11 September 2001 and which, specifically, drew up a list of terrorist organisations - of which SEGI was one). The allegation that SEGI's rights had been infringed therefore were directly attributable to an EU instrument.

In considering SEGI's allegation of a breach of the Convention, the Strasbourg Court first conducted analysis of the nature of EC and EU law. In doing so, it referred specifically to EC jurisprudence (*Jégo-Quéré*),[84] which had just recently been decided. This practice, if it can be called that, of mutual reference to each other's cases can be seen as a positive aspect of the two courts' relationship, aiding hopefully more consistent interpretation of similar issues. The ECtHR felt it was, in this application, required to consider whether the principles of the Convention can apply to provisions emanating from an international legal order - essentially similar to the point raised in *Matthews*. The Court concluded: "The Court sees no major obstacles in applying legal principles developed by the organs of the Convention to acts emanating from an international legal

[82] (1999) 28 *EHRR* 361. The case, involving the question of the UK's denial of voting rights for the EP in Gibraltar, which, although seemingly directed against one Member State only, called into question a provision in a Treaty signed and adopted by all Member States.
[83] *SEGI and others v The 15 States of the EU*, Application no. 6422/02, 23 May 2002.
[84] Case T-177/01, *Jégo-Quéré v Commission*, [2002] ECR II-2365.

order such as that in the present case".[85] This statement is in essence similar to the decision in *Matthews*, but is much broader and more general in scope. Essentially, the Strasbourg judges are claiming the right to expose all EU acts to the direct scrutiny of the ECtHR. The key difference as compared to *Matthews* is that no reference is made to the responsibility of the EU Member States having been transferred to the EU and therefore a type of vicarious culpability arising even though the EU is not a signatory to the ECHR. In *SEGI*, the Court is suggesting that lack of accession is no impediment - the Convention shall supervise EU measures at any rate. In other words, *Opinion 2/94*[86] could be regarded as something of a wasted effort. However, *SEGI* was ultimately declared inadmissible, so the effect of this concept of "fast track" accession was not considered again by the Court. Nonetheless, the signs are there to be read: the Strasbourg Court is increasingly willing to perceive the EU as being a subject of, even if not a signatory of, the Convention.

A case that had the potential to see just how far those institutions were willing to go arose in *Senator Lines*. The case of *Senator Lines* potentially raised a direct challenge to EU institutional infringement of fundamental rights.[87] This involved the claim by a German maritime transport firm that Article 6 of the Convention had been violated when it was required by both CFI and ECJ to pay a substantial fine for competition law breaches to the European Commission before a decision had been reached on the substantive element of the case. "The outcome of this case [was] awaited with considerable interest as it represent[ed] the closest the ECtHR [had] come ... to ruling on the compatibility of EC action with the Convention".[88] It was not to be, however. The hearing was due to take place on 22 October 2003, but was cancelled after the CFI issued a judgement setting aside the fine imposed on Senator Lines.[89] The CFI decision, one of the most lengthy to issue from Luxembourg in its 233 pages, saved the EU Member States

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[85] "Toutefois, la Cour n'aperçoit pas d'obstacles majeurs s'opposant à leur [c'est à dire les principles jurisprudentiels développés par les organs de la Convention] application à des actes émanant d'un ordre juridique international comme celui de l'espèce.": *SEGI*, *supra* n.83, at p. 7.

[86] *Opinion 2/94 on Accession by the Community to the ECHR*, [1996] ECR I-1759.

[87] *Senator Lines GmbH v the 15 Member States of the European Union*, Application no. 56672/00.

[88] Craig and de Búrca, *EU Law: Text, Cases and Materials*. 3rd ed. (Oxford: Oxford University Press, 2003) at 366.

[89] Cases T-191/98 and T-212/98 to T-214/98, Court of First Instance Judgement, 30 September 2003. The case involved 16 maritime transport companies (only 6 of which were based in the EU) taking an action against the Commission (supported by the Council), challenging an allegation of an abuse of a collective dominant position contrary to (the then) Articles 85 and 86 EC Treaty. Fines were imposed on the claimant parties for their infringement of Article 86, totalling 273 million euros. A request to have the imposition of the fines annulled was rejected by the CFI in July 1999 and later on appeal by the ECJ in December 1999 (case T-191/98R, [1999] ECR II-2531 and on appeal Case C-364/99PR, [1999] ECR I-8733). In the substantive case, heard in 2003, the parties, arguing for an annulment of the Commission Decision raise arguments as to an infringement of rights of the defence. They allege, amongst other points, that the Commission conduct of the administrative proceedings were faulty in many respects. The CFI accepted some of the arguments and held that certain documents would therefore be excluded from the proceedings, which did not, however, mean that the entire Decision would be annulled (para. 188 of the Judgment). However, apart from that one point, all other points as to infringement of rights of the defence were rejected by the three CFI judges who, in a lengthy examination of the facts (over sixty pages of discussion) generally lend support to the Commission's investigation of the competition infringement. No arguments as to fundamental rights or reference to the ECHR are made either by the parties or the Court during this discussion or indeed in the entire judgement. This is a seemingly interesting tactic by the claimants, who opted instead to raise fundamental rights arguments in their Strasbourg case rather than before the CFI (though the ECHR application referred only to the fining issue and not the substantive case). Ultimately, before the CFI, the claimants are successful in having the Decision partially annulled, with the Court stating that "there is justification for not imposing a fine in the present case..." (para. 1633 of the Judgment).

from having to defend "their" system of supranational justice.[90] On a broader canvas, the cancelled hearing can be seen as a missed opportunity to have EU justice scrutinised in respect of its observance of fundamental rights. Surely it is only a matter of time before the Member States have the veil lifted and the ECtHR will probe more deeply into the recesses of EU action and require the EU to answer to an external "force" for its record on fundamental rights. It escaped lightly in *Senator Lines* but may not be so fortunate the next time. Interestingly, in *Senator Lines*, it was the action of the competition Commission and the EU courts that were accused of a rights violation. These two institutions are, ostensibly, at the forefront of the drive to increase the level of fundamental rights protection in the EU. Yet, viewed through a more cynical lens, its is precisely these two institutions, working in consort[91] or separately,[92] which give rise to concerns about the level of rights protection within the EU institutional framework. The Commission may well loudly broadcast its high ideals towards EU values[93] and the need for these to be ensured within all Member States; it would do well to view its own actions (particularly that of its Competition DG) in the light of these values. Before the ECtHR to date, the cases/applications that have been taken involving the EU Member States have largely been related to actions of EU institutions and not that of individual Member States acting within the EU law field. Cases like *Matthews*, *Senator Lines* and their ilk - where the "catch 22" nature of EU justice (that is, an alleged infringement of rights is attributed to the EU institutions, but the latter offer no source of or route to remedy)[94] is exposed before the Strasbourg Court - are likely to increase rather than decrease in the future. That Court has "acquired expertise and a moral stature which the ECJ does not share [in the field of fundamental rights]"[95] and, in the absence of accession by the EU/EC to the ECHR, it is left up to individual litigants to bring the EU before a specialised human rights tribunal.

Friction and conflict can also arise when both courts are dealing with similar types of fundamental rights breaches. Rather like two presidents of the same republic (of rights), they share the desire for similar outcomes (the protection of fundamental rights) but have different powers for and perspectives on that outcome. In practice, the clearly delimited competences of the Strasbourg and Luxembourg courts does not

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[90] Press release issued by the Registrar of the ECtHR, 16 October 2003, giving notice of the cancellation of the hearing due for 22 October. Arguably there was still a case to answer in relation to this application as the CFI decision which, admittedly resulted in the cancellation of the fine on the claimant parties, did not directly address the issue of whether such a fine (if validly imposed) would have to be paid prior to the substantive hearing. In other words, Senator Lines and the other affected parties "win" in the sense that they ultimately do not have to pay a fine to the Commission, but the question of the legitimacy of EU institutional support for interim fine payments remains unanswered.

[91] Case C-94/00, *Roquette Frères v Directeur General de la Concurrence*, [2002] ECR I-9011. For a discussion of the case see Lyons, *supra* n.13.

[92] In particular, the competition law powers of the Commission are increasingly being challenged on a fundamental rights basis. Of course, it tends to be the case that, in this area of EU justice, the potential litigants are well resourced to take proceedings and the financial element of any case is likely to be very significant. As for the Court, the *Jégo-Quéré/UPA* saga has exposed some very complex fragilities at the heart of its commitment to fundamental rights.

[93] See the discussion of the Commission's recent "Values/Article 7 TEU" report below.

[94] It would not be surprising, for example, to find Jégo-Quéré lawyers lodging an application with the ECtHR once the (inevitable) decision has been reached in the ECJ early in 2004.

[95] Craig and de Búrca, *supra* n.88, 365.

lead to the possibility of "forum shopping" for rights remedies in Europe. Nonetheless, when cases involve similar issues, arising from either the same national jurisdiction or two different jurisdictions, it is hugely undesirable in many respects that two "victims" may face different outcomes depending on whether their judicial road led to Strasbourg or Luxembourg, and also leads to the of possibility of differences in interpretation in relation to the same issues.[96] The issue of the "growing intensity of the interconnections between the Strasbourg and the Luxembourg courts"[97] is evidenced by the case of rights for transsexuals. The debate on discrimination against transsexuals has gone to and fro between the two human rights courts, from *Cossey v UK*[98] to *P v S*,[99] to *Goodwin v UK* and *I v UK*,[100] and most recently back to the ECJ in *KB*[101] (in most instances the cases arising from the UK). Certainly, not all situations involving breaches of transsexuals' rights fall within the scope of EU law and the jurisdiction of the ECJ. Hence that Court could not easily have dealt for, example, the issues raised in *Goodwin* and *I*. But perhaps it might be said there is an element of careful court choice by some litigants (if they do have a choice between the two, as in *P v S*), which emphasises the extent to which remedies for rights infringements at a European level can be fundamentally a lottery. Given the potential impact on *KB*, it is appropriate to cast a quick eye over Goodwin[102] before judgement issues in the former case. This 2002 decision issuing from a (unanimous) Grand Chamber heard the respondent claim a violation of Article 8 ECHR in that UK pension and social security systems refused to recognise the sex of post-operative transsexuals. The Court finding this situation "no longer sustainable" held that "the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant and that there was accordingly a failure to respect her right to private life in breach of Article 8 of the Convention".

This decision is also of interest in another respect, in that the ECtHR judges examined the implications of Article 9[103] of the EU Charter of Fundamental Rights as *Goodwin* also raised the question of a breach of her right to marry. They stated clearly that it "departs, no doubt deliberately, from the wording of Article 12 of

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[96] See for example on abortion: Open Door Counselling v Ireland, ((1993) 15 *EHRR* 44) and *SPUC v Grogan* (Case C-159/90, [1991] ECR I-4685); on property rights: *Hoechst v Commission* (Case 46/87, [1989] ECR 2859) and *Niemietz v Germany* ((1993) 16 *EHRR* 97); on competition law: *Orkem v Commission* (Case 374/87, [1989] ECR 3283) and *Funke v France* ((1993) 16 *EHRR* 297); or on Article 6 ECHR: *Emesa Sugar v Aruba* (Case C-17/98, [2000] ECR I-665) and *Vermeulen v Belgium* ((2001) 32 *EHRR* 313).

[97] Harmsen, "National Responsibility for EC Acts Under the ECHR: Recasting the Accession Debate" (2001) 7 *European Public Law* 624, at 640.

[98] (1991) 13 *EHRR* 622.

[99] Case C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143.

[100] *Christine Goodwin v UK*, (2002) 35 *EHRR* 447 and a similar ruling in *I v UK*, (2003) 36 *EHRR* 53. Curiously, on the same day as the Strasbourg Court issued a ruling in this case when it examined the EU Charter, Article 9, the ECJ was deciding *Carpenter*, making a more expansive use of the Convention than their colleagues in Strasbourg.

[101] Case C-117/01, *KB v NHS Pensions Agency*, Opinion of the AG Ruiz-Jarabo Colomer of 10 June 2003.

[102] See Mowbray, "European Convention on Human Rights: Developments in Tackling the Workload Crises and Recent Cases" (2003) 3 *Human Rights Law Review* 136, at 138 for a brief discussion, and Campbell and Lardy "Transsexuals - the ECHR in Transition?" (2003) 54 *Northern Ireland Legal Quarterly* 209 for more lengthy analysis of *Goodwin*.

[103] Article 9 of the EU Charter reads: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". (For text of the Charter see [2000] OJ C 364/01) It does not refer to the need for marriage to be based on a liaison between a man and woman. Article 12 ECHR on the other hand reads: "men and women of marriageable age have the right to marry and to found a family...".

the Convention" in the context of referring to major social changes in the institution of marriage (and clearly implying the potential for future clashes of interpretation in this area). The judges found in favour of *Goodwin* as having suffered a breach of Article 12 ECHR. This was a very progressive interpretation of Article 12 ECHR. Equally progressive was the fact that they, unlike their Luxembourg colleagues, were not shy of examining a non-binding yet clearly extremely significant fundamental rights instrument. They directly addressed the issue of this one example, among many, of disparate wording between the Charter and the Convention. Apart from this substantive analysis, this readiness by the Strasbourg Court to openly acknowledge the import of the Charter distinguishes it from the reticence and unnecessary reserve shown in Luxembourg. I referred above the notion of a more "mature" Court residing in France and this is a good example of where that maturity casts Luxembourg in a poor light. In this regard, the extremely cautious ECJ seems rather too concerned with EU politics rather than with developing a substantial fundamental rights regime.

The Charter

The fact that the declaration of the EU Charter on Fundamental Rights has been ever-so-discretely treated by the European Court of Justice has been widely documented and must now be a source of Eurojustice folklore. When questioned as to this silence at a public lecture, one of the ECJ judges replied that it had simply not been necessary in any judgement to refer to the Charter - which gives a rather skewed insight into the economy of judging in Luxembourg, and leads to the (false) suggestion that the Court always cites or refers to only what is "necessary" to its judgements and naught else. It is interesting that the judge did not refer to the fact that it was a non-binding document, though perhaps not too much should be read into this given the occasion in question. It is well known that the Court of First Instance and the Advocates General have not been so parsimonious in their reception of a significant contribution to the history of human rights in Europe and this pattern persisted in 2003, albeit at a much reduced rate.[104] However, the silence has persisted at the ECJ. In October 2003, the Court did acknowledge the existence of, but otherwise ignored

[104] A quick search on the ECJ's website indicates 5 Opinions that referred to the Charter and 3 CFI judgements that did so (ignoring references to the Social Charter (for example, in Case C-151/02 *Jaeger*) or to shipping charter related cases). What is of interest, however, is that this is far fewer than the same period in 2002, certainly in terms of AG Opinions. Would it be correct to have the impression that the college of Advocate Generals and, to a lesser extent, the judges of the lower court, ran an enthusiastic "Support the Charter" campaign in 2001/2002, but that they have now realised that it has largely failed? Or it could simply be the case that the wider events of 2003, with the finalising of the work of Giscard's Convention and the agreement on the Draft Constitutional Treaty incorporating the Charter signalled that the time was nigh at any rate when the Charter could legitimately be cited in the EU courts. This, of course does not answer the question as to what limbo the Charter may be in if the Constitution's acceptance is delayed or even hampered indefinitely.

the import of, the Charter.[105] In *RTL*,[106] a preliminary ruling from a German court that was concerned with the issue of television broadcasting, advertising breaks and freedom of expression, the Court quoted the arguments of RTL, which referred to Article 11 (2) of the Charter.[107] The reply of the Court, however, is limited to Article 10(1) ECHR. Clearly, the Court did not regard it as "necessary" to even make mention of the Charter when assessing the law here; on one reading, this is politic, as judgements delivered on the basis of non-binding instruments would certainly lack weight and authority and induce legal uncertainty. But to ignore the opportunity for comment, to avoid any attempt at comparison with the ECHR and to shy away from the chance to develop thoughts on EU-specific formulations of rights, reflects rather poorly on the EU's highest court. Perhaps the "best wine" is being saved until the end of the feast; the ECJ is being faced now with the real probability that it will be transformed into some form of constitutional court in the years to come with a jurisdiction covering an EU Constitutional Treatyincorporating the Charter. Only with the hindsight of years will one be able to say in the future if, in the twilight period of a status challenged Charter, whether the nascent constitutional court acted responsibly or with too much reticence when it opted to do what was merely "necessary".

And, in the background, the draft constitution ...

> "*The problem confronting the Founding Fathers was how to devise a constitution for a Union of States sharing powers with a central government*."[108]

The problems of constitutionalism are neither new nor unique to European Union, but they are particularly acute in the latter half of 2003. It has escaped no one's notice, not even the readers of *The Sun*,[109] that the work of the Convention on the Future of Europe came to a close in June 2003 and that its proposal of a Draft Treaty establishing a Constitution for Europe was adopted at both the Thessalonki and Rome European Council meetings.[110] This is no slight document. Running to a total of 333 pages in one official version, it may be said to have failed in one of its "buzz word" objectives, simplification. But a commentary on this interesting new form of international legal instrument (a Treaty Constitution or Constitutional Treaty?) is outside the scope of this review, save insofar as a few words on its impact on fundamental rights are merited. Article 2 of the Draft places "respect for human rights" amongst the values of the EU and thus signifies their

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[105] In Case C-491/01, *BAT*, [2002] ECR I-1453, the ECJ tentatively indicated its awareness of the Charter by merely quoting the arguments of one of the parties to the case.
[106] Case C-245/01, *RTL Television GmbH*. Judgment of the ECJ, 23 October 2003. Heard by a three-judge (Timmermans, Edward and Jann, and AG Jacobs) court.
[107] Para. 38 of the Judgment.
[108] Slaughter, *supra* n.70, at 38, referring obviously to the drafting of the United States constitution.
[109] See *The Sun*, October 17 2003 with its sensational front page headline about the threat posed to the British monarch by the Draft Constitution: "ER v EU".
[110] "Draft Treaty Establishing a Constitution for Europe", *supra* n.35.

importance at the very outset for the potential new framework of integration. This theme continues with the dedication of Title II (Articles 7 and 8) to Fundamental Rights and Citizenship, Title II being the first "substantive" section of the Draft. In essence, and there are no surprises here; Article 7 sees the suggestions of the Convention Working Group implemented with a recognition of the rights set out in the Charter and a recommendation that accession of the Union to the ECHR will be sought.

There is much awkwardness, however, in the wording and structure of this key provision. The solution agreed for the Charter is to have it appended and incorporated in entirety in the Constitution as Part II thereof, located before Policies and Functioning of the Union in Part III. Article 7(1) states that the Union "recognises" the provisions of the Charter. There is some scope for ambiguity here; what exactly is the extent of this "recognition"? It does not suggest or imply any obligatory or hierarchical status for the Charter. Of course, if the Draft Constitution is adopted by twenty-five Member States, the very fact of inclusion of the Charter provisions in a legally binding EU primary law document will immediately alter its status at any rate. But this then raises the question of the relationship with other "recognised" EU fundamental rights, that is, the canon of ECJ/CFI jurisprudence and the other sources of rights, the ECHR and the constitutional traditions of the Member States. Article 7(3) in fact does little to clarify the situation. Fundamental rights as guaranteed by those two latter sources are here identified as constituting "general principles" of the "Union's law". This raises the question of how the "recognised" rights in the Charter will sit with the general principles deriving from different sources. No priority or hierarchy is signalled in Article 7 except in the ordering of the sub-clauses, which might suggest that the incorporated Charter shall take precedence over general principles - but this is pure speculation. There is a good argument to be made here for the inclusion of a "definition" of some essential terminology in the Constitution, such as general principles, fundamental rights, fundamental freedoms and discrimination, phrases which are liberally scattered throughout the entire Draft, but which may have different meanings in different provisions. It may well be the case that some of the questions relating to Article 7 will be addressed before the Draft is finalised (although, given the relatively lengthy and detailed Convention process, one wonders about the bluntness and crude nature of some of the Draft's provisions). Failing that, it will be left to the Court to unravel the interpretational glitches in provisions such as Article 7. However, given the recently expressed judicial reticence to do the work of the political wing, progress may well be slow in this regard.[111]

The Court system itself is dealt with first in Part I of the Draft, in what could be termed largely as a truncated version of Articles 220 to 245 EC, in that a brief description of composition and jurisdiction is outlined in Article 28. The major innovations that are indicated here are: the renaming of the Court of First Instance as the "High Court"; the possibility of an undetermined number of Advocates General at the ECJ and judges at

[111] See the discussion of the *UPA* case above.

the High Court. More detailed provisions on the Court of Justice appear in Articles III-258 to III-289 of Part III of the Draft. One of the innovations that appears here, which may be relevant for the future of fundamental rights, is the power of the High Court to refer a case to the European Court of Justice if it "considers that the case requires a decision of principle likely to affect the unity or consistency of Union law".[112] This power shall apply in the case of preliminary ruling cases only, a jurisdiction for which is granted to the High Court under the same provision. There is some scope for arguing that this internal referral mechanism should apply to all High Court cases (though of course the overloading of the ECJ would counter this). For example, should the *UPA/Jégo-Quéré* saga be repeated in different circumstances, the potential for the lower court to immediately refer to the ECJ cases where the "unity and consistency" of EU law is at issue would mean that legal uncertainty (and costs) for the parties would be reduced. On the other hand, the picture that emerges from the Draft Constitution in relation to reform of the EU judicial system signals both a more significant role for the "lower" Court (for example, in hearing appeals from the specialised courts) and a more sophisticated relationship between the two courts themselves. It is fitting that in a complex legal system there should be as much opportunity and scope for legal opinion to be expressed, at both levels of the Court of Justice. It is particularly fitting in a system that "silences" individual judges, that the nature and meaning of Union law can potentially be explored in two courts. This is particularly the case for fundamental rights disputes.

The European Commission has, subsequent to the approval of the Draft Constitution, produced a Report on how the Inter-Governmental Conference (IGC) should deal with the Draft.[113] This concentrates largely on institutional matters, such as decision-making in the Commission and the presidency of the European Council and the like. It makes no mention of fundamental rights and devotes a half-page only to the issue of "public endorsement of the draft Constitution". Here it is acknowledged that "the general public was not well engaged about [sic] the process under way and the Constitution that was being drafted".[114] This is a truism that threatens to affect the entire future of the Constitution. This document, more than any other Treaty from the EU in recent years, is designed to change the nature of the relationship between the Union and the people who live there. In the world of art, it used to be said that the portrait painter stole a little bit of the soul of her/his subject; a Constitution drafted in our name does a similar thing. This rather precious contract that lies behind constitution building has not been mutually respected in the EU. The ratification process will reveal to what extent this "tidying up exercise" will be accepted by those for whom it was, allegedly, drafted.

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[112] Article III-263(3) of the Draft Constitution.

[113] "A Constitution for the Union, Opinion of the Commission pursuant to Article 48 of the Treaty on European Union, on the Conference of Representatives of the Member States' governments convened to revise the Treaties" COM (2003) 548, 17 September 2003. The European Parliament has also reported on the Draft: "Resolution on the Draft Treaty Establishing a Constitution for Europe and the European Parliament's Opinion on the Convening of the Intergovernmental Conference (IGC)" A5-0299/2003, 24 September 2003.

[114] Opinion of the Commission, *ibid*., at 14.

The UK Foreign and Commonwealth Office has produced a report on the "British Approach" to what is deliberately referred to as "A Constitutional Treaty" (as opposed to its official title).[115] In what is in fact a very clear and coherent paper, special attention is given to the Charter.[116] The British Government essentially signals that its position on the Charter is not one that supports incorporation into the Constitution(al Treaty): "a final decision [will be made] on incorporation of the Charter into the Draft Constitutional Treaty only in the light of the overall picture at the IGC".[117] In other words, this very British approach to fundamental rights is to use them as negotiation fodder in the dead of night, behind closed doors in Dublin.[118] The UK clearly does not give its unconditional support to enhanced human rights for the Union, at least not in the form of an incorporated Charter. The particular psychology of the British/the UK as regards fundamental rights instruments emanating from beyond its borders is a subject too large and complex for reflection here. However, the implication, in this FCO paper, that rights will be held to ransom at the IGC has little that is politically mature or citizen-orientated in it.

Moving on from a reluctance with regard to rights, Autumn 2003 also saw the publication of a paper with very different slant on and notion of rights from European Commission. In "Values of the Union",[119] the Commission has launched its own perspective on fundamental rights protection in an enlarged Union. It calls for a debate on common values and discusses its future role under Article 7 TEU. This provision will not be used for remedying individual breaches. Any potentially sanctionable breach must go beyond specific situations and concern a more systematic problem. It is remarkable that there is no mention of the EU Charter in the entire document and scant mention of the Draft Constitution. One would have to ask, what is this Commission document aimed at in respect of substantive fundamental rights? Certainly, Article 7 TEU is aimed at ensuring that certain values and standards are maintained within the EU but are they not the values of the Convention process anyway? And what of the likely effect of a Member State breach? The provision is clear as to the penalty of temporary exclusion from the EU voting system. But these are not rights related penalties and they do not provide a remedy at all for the types of breaches envisaged by the Commission in this document. Finally, given the discussion above of breaches of fundamental rights by the EC institutions themselves and particularly by the Commission, there is more than a nuance of hypocrisy in this statement of values.

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[115] "A Constitutional Treaty for the EU. The British Approach to the European Union Intergovernmental Conference 2003" Cm 5934, September 2003.
[116] *Ibid*., at 39-40.
[117] *Ibid*., at para. 103.
[118] It is likely that the IGC will reach a conclusion during the Irish Presidency of the European Council in the first half of 2004.
[119] "Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty of the European Union. Respect for and Promotion of the Values on which the Union is based" COM (2003) 606, 15 October 2003.

Conclusion

It is all well and good to be aware of what is happening in terms of fundamental rights protection in the European Union, but perhaps it is more telling to focus on what is not happening. The judgement in *Booker*, the Opinion in *Jégo-Quéré* and the decision in *Dory* all suggest very much the limits of EU human rights jurisdiction and indicate areas where the ECJ will not go. One has to probe a little more deeply and question what really is going in such cases. They all involved "ordinary" people either seeking to have their exclusion from the EU system acknowledged or seeking the assistance of the EU in the face of perceived national injustices. In one instance, it was "Europe" that caused their grievance and yet refused to allow them to effectively express it as it was lost in institutional semantics and politics. In another case, the potential of EU fundamental rights seems to be tantalisingly close to overthrowing a local lack of fairness, but it is that very injustice that the EU sanctions as being permissible within its system of rights.

What kind of human rights culture is being fashioned for the Union? The seeming harshness of *Dory* is matched by the more humane *Akrich* and *Garcia Avello* judgements, but this leads to a rather Jeckyll and Hyde view of the Union of values and rights. Richard Rorty has said, in respect of human rights, that "sentimentality may be best weapon we have"[120] and justice is or ought to be a poetic expression of humanity. That form of justice can easily disappear in the maze of Euro jargon and politics, but it is often the words of the EU Courts in human rights cases that "save" the European Union from drowning in its own alienating bureaucracy. Most of those cases mean something very real to the lives of the parties involved or participating. Perhaps the Courts of the Union are therefore performing a much more political role than they can ever acknowledge, in opening the door (at times) to a forum where an ordinary voice is actually heard. *Schmidberger*, which ostensibly did not even involve environmentally concerned citizens, none the less is a victory for them and a defeat for an older, perhaps less caring, Community. Nobody would deny that the EU courts face a difficult task in judging our rights against the background of the ebb and flow of EU affairs. Sometimes they get it right; sometimes "you keep old roads open by driving on the new ones".[121]

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[120] Rorty, *Contingency. Irony and Solidarity* (Cambridge: Cambridge University Press, 1989) at 130, as cited in Ward, *supra* n.2.
[121] "Keeping Going" by Seamus Heaney.