Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union

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ABSTRACT  The institutionalization of human rights in the EU started when the ECJ began to make references to fundamental rights in its jurisprudence in the late 1960s. In this article, I explain this development as rhetorical action among constitutional courts – the ECJ, national constitutional courts, and the European Court of Human Rights – which are engaged in a competition over jurisdictions in the liberal international community. Because human rights are the highest-order constitutional norms in this community, successful claims for legal autonomy and supremacy must be based on the ability of courts to protect human rights at least as effectively as their competitors. In order to defend its autonomy vis-à-vis national constitutional courts, the ECJ incorporated human rights into its case law. However, by basing its jurisprudence on the European Convention on Human Rights, it has become increasingly entrapped in acknowledging the supremacy of the Strasbourg Court.

KEY WORDS  Constitutional courts; European Court of Human Rights; European Court of Justice; human rights; rhetorical action.

INTRODUCTION

The institutionalization of human rights in the European Union (EU) is a remarkable process. The founding treaties designed the European Communities as a project of economic regional integration. They neither contained a reference to general human rights – let alone a ‘bill of human rights’ – nor did they accord the supranational organs any competencies in this area.1 Today the EU Treaty lists human rights as one of the founding principles of the Union and provides for procedures to review breaches of fundamental human rights by the EU’s supranational organizations and its member states (Art. 6, 7, and 46 Treaty on the European Union (TEU)). In addition, the EU has a Charter of Fundamental Rights, which was adopted by the European Council in 2000 and incorporated into the Constitutional Treaty in 2004. Finally, the Constitutional Treaty stipulates the accession of the EU to the (Council of Europe’s) Convention for the Protection of Human Rights and Fundamental
 Freedoms (ECHR). The initial steps of this process were taken by the European Court of Justice (ECJ) in the early 1970s when it established human rights as general principles of Community law, referred to the ECHR and the constitutional traditions of the member states, and claimed the competence to review the conformity of Community and member state acts with these human rights norms.

In this article, I analyse these developments as rhetorical action between constitutional courts. Major European constitutional courts – the ECJ, national constitutional courts, and the European Court of Human Rights (ECourtHR) – are engaged in a competition over jurisdictions, in which they seek to protect their spheres of jurisdiction from the encroachments of other legal orders and courts. At the same time, however, they are part of a legal and liberal international community. In this community, human rights are the highest-order constitutional norms and their protection is the most important goal of constitutional review. Competition therefore takes the form of legal reasoning, and successful claims for autonomy and supremacy must be based on the ability of courts to protect human rights at least as effectively as their competitors.

On the basis of these assumptions, I seek to show that in order to defend its autonomy vis-à-vis national constitutional courts, the ECJ needed to incorporate human rights into its case law and bind its jurisdiction to existing European human rights provisions, and in order to uphold its autonomy vis-à-vis the ECourtHR, it sought to avoid being legally bound by the Convention. Yet the ECJ became entangled in a dilemma. Binding its jurisdiction firmly to the human rights norms of the ECHR helped to placate national constitutional courts but made it difficult to refuse the formal adherence of the European Community (EC) to the ECHR. As much as it could entrap national constitutional courts to accept the supremacy of the ECJ with regard to Community law, the ECJ was entrapped itself to acknowledge the supremacy of the ECourtHR with regard to human rights. The most important but initially unintended outcome of this strategic interaction was the progressive institutionalization of human rights in the EU.

The competitors of the ECJ predominantly used salience arguments to counter the ECJ’s efficiency arguments. Against the ECJ’s claim that integration could not be achieved without the supremacy of EC law and ECJ jurisdiction, they asserted that supremacy undermined existing standards of human rights protection. The ECJ, in turn, drew predominantly on the human rights codified in the ECHR to establish coherence between its practices and established community norms and to bolster its legitimacy. Thus, because the conditions of salience and coherence can be observed at the level of argumentative process and shown to be effective, the case study confirms the findings of the comparative analysis of constitutionalization in the EU (Schimmelfennig et al. 2006).

The remainder of the paper is organized as follows. In the next section, I will briefly describe the assumptions and expectations for European inter-court interactions that follow from the approach of rhetorical action. The empirical core of the paper then traces the argumentation process between the ECJ and
the German Federal Constitutional Court (as a prominent national constitutional court), on the one hand, and the ECJ and the ECourtHR, on the other. The analysis uses a corpus of those court decisions that directly or indirectly refer to the courts’ (relative) human rights competencies arranged in temporal order. From this corpus of case law, I reconstruct the debate between courts, which is often implicit in decisions that concern a variety of other legal conflicts, trace the frames and arguments used over time, and analyse the results of the debate.

The development of the ECJ’s human rights jurisdiction has been the subject of an extensive literature. In addition, Laurent Scheeck recently presented a comprehensive analysis of ECJ–ECourtHR relations (2005; see also Canor 2000). Against this background, it is the main goal of this paper to show that the institutionalization of human rights in the EU has followed the general pattern of EU constitutionalization and is best understood as rhetorical action between courts.

**RHETORICAL ACTION BETWEEN EUROPEAN COURTS**

Constitutional courts are defined by their ‘authority . . . to invalidate the acts of government – such as legislation, administrative decisions, and judicial rulings – on the grounds that these acts have violated constitutional rules, including rights’ (Stone Sweet 2000: 21). It is thus in their fundamental organizational interest – their raison de cour, as it were – to preserve and, if possible, to expand this authority. On the other hand, their efforts are directed against other political actors such as executives and parliaments that may want to control the courts politically or undermine the authority of their rulings.

However, courts also compete against each other. In the well-established hierarchy of national legal systems, this competition may be muted but it is the more pronounced in the ‘neo-medieval’ European system where legal orders are partly coexisting and partly overlapping and in which hierarchy is neither clearly defined nor uncontested (Ruggie 1993). In this situation, constitutional courts are interested in defending the autonomy of their ‘home’ order, in which they are the ultimate authorities of constitutional review, against encroachments by other legal orders and the jurisdiction of other courts. In addition, they may seek to expand the scope of their own legal order to other jurisdictions and, if possible, to establish the supremacy of their legal system and constitutional decisions.

National constitutional courts started from the strong position of being the ultimate authorities of constitutional review on their national territory. In countries like Germany and Italy, in which the rule of law had been perverted by fascist regimes, the post-war constitutions established constitutional courts and granted them ‘exclusive and final constitutional jurisdiction’ within the state territory (Stone Sweet 2000: 33). The newly democratic countries of Southern and Eastern Europe widely emulated this model in the 1970s and the 1990s. The national monopolies of the constitutional courts were challenged, however, by two European developments.
First, the member states of the Council of Europe signed the ECHR in 1950 and, in 1959, established the ECourtHR in Strasbourg. Thereby they not only created a legally binding international human rights catalogue alongside those human rights codified in, or incorporated into, national constitutions. They also established a judicial enforcement mechanism beyond the nation-state. Second, the founding states of the EC set up the ECJ in order to enforce compliance with the EC Treaties and to resolve legal disputes within the EC system.

These European developments posed two questions and challenges to the national constitutional courts. First, how would the European legal orders relate to national legal orders? Would they be of equal, inferior or superior status to domestic law? Second, how would the constitutional courts relate to each other? Would national constitutional courts be able to annul European court decisions? Could European court decisions override decisions by national constitutional courts if found ‘unconstitutional’ in the European legal orders?

Assuming autonomy-seeking behaviour, national constitutional courts obviously had an interest in the superiority of domestic law. By contrast, the European constitutional courts would seek to ‘constitutionalize’ the ECHR and the EC Treaty, that is, establish the supremacy of international law and of their own jurisdiction in all matters pertaining to the ECHR and to EC law respectively.

Yet the set-up of two European courts also contained the seeds of conflict between them. Would the ECHR and the jurisdiction of the Convention-based organs pertain to the organs and acts of the Community? Assuming autonomy-seeking behaviour again, one would expect the ECourtHR to prevent the EC from escaping from its jurisdiction, and the ECJ to defend its autonomy against ECHR constitutional review.

To promote their organizational interests, courts engage in rhetorical action – in this case, the strategic use of legal reasoning. Legal reasoning is the accepted method of decision-making for constitutional courts. The fact that they have the competence and the authority to interpret and apply the fundamental rules of the polity, and that they are perceived as the guardians of the constitution, accounts for their strong political position in the absence of direct command over physical or material power resources. Courts therefore need to use legal arguments to promote their political interest in autonomy and supremacy (cf. Stone Sweet 2000: 143–4), and the success of their claims depends on the logic and persuasiveness of their legal reasoning.

At the same time, courts cannot escape the logic of legal argument. Both their own argumentative credibility and the authority of the law they represent depend on impartiality and consistency (Elster 1992). To protect their legitimacy and influence, constitutional courts must present ‘the law’ as a unified and unambiguous set of norms and their interpretation of the law as a quasi-objective process of deductive logic. Although these constraints narrow down the scope of permissible arguments and create numerous openings for rhetorical entrapment, there is still ample room for disagreement and rhetorical manipulation. On the one hand, courts may interpret and apply the law differently and
thus come to different conclusions based on the same constitutional principles and rules. On the other hand, they may even disagree on the pertinent constitutional principles and rules or on the right balance between rival principles and rules. What then are the common principles and grounds that are so hard to reject and circumvent for constitutional courts that they will be compelled to reach the same conclusions?

First, as constitutional courts, the competitors obviously share the principles of constitutionalism and constitutional review. Moreover, as constitutional courts in a liberal international community, they accept the constitutive status of human rights. The protection and promotion of human rights is the most fundamental political goal, standard of legitimacy, and prerequisite of membership in this community. Correspondingly, the constitutionalization of human rights has been a general development within the member states of the Community and in its international organizations in the post-World War II period (Shapiro 2005). For constitutional courts in particular, the protection and promotion of constitutional human rights against executive (and legislative) encroachments has become the most important activity, the most relevant justification for their eminent position in the political system, and the basis for their high public esteem.

In order to be persuasive, a court’s arguments must therefore be based ultimately on the principle of constitutional protection of human rights. Moreover, it must be able to claim (convincingly) that it is entitled to and capable of protecting fundamental rights (at least as well as the competing courts). Otherwise the competing courts can legitimately challenge its jurisdiction.5

In sum, the membership of all courts in a liberal as well as a legal community limits the range of acceptable rhetorical arguments considerably. To make a persuasive case for autonomy and supremacy, constitutional courts need to adduce convincing legal grounds for the equivalence and/or superiority of their system of constitutional rights protection.

More specific expectations about the rhetorical strategy of the constitutional courts need to be based on an analysis of their fundamental argumentative strengths and weaknesses. The ECJ has initially been the weakest of the three courts because the EC legal order possessed neither an explicit human rights catalogue nor an explicit competence or obligation to review the human rights conformance of the Community’s or its member states’ governmental acts. This deficit severely limited the acceptability of the ECJ’s claims for autonomy let alone supremacy and could be exploited by its competitors. In order to strengthen its claims for the autonomy and supremacy of Community law and ECJ jurisdiction, the ECJ thus needed to establish a working system of human rights protection in European integration.

How this occurred will be the subject of the empirical analysis. In the first part, I will analyse the argumentative interactions between the ECJ and the German Federal Constitutional Court (FCC). I take the FCC as a representative case of national constitutional courts. Given its strong institutional position in the German political system and its strong role identity as guarantor of
fundamental rights, the FCC even constituted a ‘hard case’ for the ECJ’s quest for supremacy. In addition, the ECJ’s human rights doctrines were developed mainly in response to challenges by German courts. In the second part, I will focus on the interactions between the ECJ and the ECourtHR as a further argumentative arena, in which the ECJ has had to assert itself more recently in the intra-European constitutional competition.

In each part, I follow the course of court decisions over time. I am not interested in the judgments as such but read them as statements in the inter-court debate. In addition, I am exclusively concerned with general human rights competencies, not with the courts’ interpretation and application of specific human rights. In each part, I will reconstruct the core arguments and explain the course of the debate in a rhetorical action perspective.

THE EUROPEAN COURT OF JUSTICE AND THE GERMAN FEDERAL CONSTITUTIONAL COURT

The ECJ did not act as a champion of individual constitutional rights from the beginning. In its judgment on the Stork case (4 February 1959), in which a German coal trading company applied for the annulment of a decision by the High Authority on the grounds that it infringed its rights under the German Basic Law, the Court refused explicitly to ‘rule on provisions of national law’ and maintained that the High Authority was ‘not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of national constitutional law’.6 In the Geitling case (15 July 1960), it reiterated that ‘it is not the function of the Court to ensure respect for national law in force in a member state, and this is true even of constitutional laws.’7 The ECJ only changed its stance in its Stauder and Internationale Handelsgesellschaft decisions when its supremacy was challenged by German courts (Craig and De Bu´rca 2003: 319).

In its two landmark decisions Van Gend en Loos (5 February 1963) and Costa (15 July 1964), the ECJ claimed that EC law neither required a formal transposition into national law by national political institutions (direct effect of EC law), nor could it be overridden by subsequent domestic law (supremacy of EC law). According to the ECJ, the EC would not be able to attain its central goal of creating a common market otherwise. The claim for supremacy was thus based on efficiency:

The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures lest the functioning of the community system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the community and national rules must be resolved in applying the principle that community law takes precedence.8

Supremacy not only applied to ordinary domestic law but also to national constitutional law and the individual rights and freedoms protected under
this law. National constitutional review was effectively suspended for issues regulated by EC law. At the same time, there was no EC system of human rights protection. As a result, the ECJ’s doctrines of direct effect and supremacy threatened to reduce the level of human rights protection in the Community (salience). This gap could be used by national courts to challenge the supremacy of EC law and, by extension, of ECJ jurisdiction.

This challenge came when, in the Stauder case, the Verwaltungsgericht Stuttgart asked the ECJ about the compatibility ‘with the general principles of community law in force’ of a decision by the European Commission that required recipients of surplus butter under welfare schemes to reveal their identity to the seller. If the ECJ was to counter this challenge, it needed to close the legitimacy gap and demonstrate that it was able to protect human rights at least as well as national constitutional courts. In its judgment of 12 November 1969, the ECJ offered a liberal interpretation of the Commission decision and concluded that ‘interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of community law and protected by the Court.’ In other words, the ECJ used this preliminary ruling to assert two things: that human rights were indeed, however implicitly, part of the EC legal system and that they were judicially protected within this system. Stauder thus marked the Court’s first attempt to establish itself as a rights-protecting constitutional court on a par with national constitutional courts, thereby countering the salience arguments of national courts, protecting the autonomy of the Community legal system from national constitutional review, and adding legitimacy to the efficiency-based claim for the supremacy of EC law.

In subsequent judgments, the ECJ pursued this argumentative strategy further and refined the doctrine. The Internationale Handelsgesellschaft case originated from another referral by a German administrative court. The Verwaltungsgericht Frankfurt argued the case for salience much more strongly than the Stuttgart court by putting forward that EC provisions were ‘contrary to certain structural principles of national constitutional law which must be protected within the framework of community law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law.’

In its decision of 17 December 1970, the Court first upheld a strict interpretation of the supremacy doctrine stating boldly that ‘the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of its constitutional structure.’ Second, it conceded that such community measures needed to be subject to constitutional human rights review in principle (thus accepting human rights as higher-order norms). Third, however, it rejected the argument for national constitutional review and insisted that this review must be conducted within the legal system of the Community:

an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. In fact, respect for
fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community.\textsuperscript{12}

The ECJ then went on to find that no such rights were infringed in the case. In this ruling, for the first time, the ECJ introduced the ‘constitutional traditions common to the member states’, a general \textit{resonance} argument, as a second legal basis besides the ‘general principles of community law’ invoked in Stauder. This was another attempt to silence national courts by showing that the ECJ used equal standards of human rights protection so that there was no salient human rights deficit and claims for the supremacy of national constitutional law were unfounded. At the same time, however, the ECJ was cautious enough not to tie itself formally to any national human rights catalogue or system of human rights protection. It only declared to be ‘inspired by the constitutional \textit{traditions}'. This wording allowed the ECJ to remain autonomous in its interpretation and application of national constitutional rules and rights.

The Frankfurt administrative court did not accept this preliminary ruling and referred the case to the FCC. In the meantime, the ECJ added another ‘source of inspiration’ to its human rights jurisdiction in its \textit{Nold} decision of 14 May 1974. The Nold company asserted that trading rules authorized by the Commission constituted an infringement of its fundamental right to property ‘as well as its right to the free pursuit of business activity, as protected by the Grundgesetz of the Federal Republic of Germany and by the constitutions of the other member states and various international treaties’, including the ECHR.\textsuperscript{13} The ECJ countered this move by including ‘international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories’ among the ‘guidelines’ which it would follow ‘within the framework of community law’.\textsuperscript{14} It thus sought to establish \textit{external coherence} for its human rights protection and thereby to enhance its legitimacy. The general strategy of the ECJ was to argue that all human rights otherwise observed by the member states and enforced by national and international systems of human rights protection would also be protected in the EC legal system. Hence, the supremacy of EC law and ECJ decisions could not be challenged on the grounds of salience.

For the time being, however, the FCC did not accept this conclusion. Two weeks after \textit{Nold}, on 29 May 1974, it issued its ruling on the referral of the \textit{Internationale Handelsgesellschaft} case by the Frankfurt administrative court. Although it found no violation of German constitutional rights in this particular case, it used the occasion to make the general statement that ‘as long as the integration process has not progressed so far that Community law also contains an explicit catalogue of fundamental rights, passed by a Parliament, valid and equivalent to the catalogue of fundamental rights of the Basic Law’, national courts would have the right and, indeed, the obligation to refer the case to
the FCC for constitutional review if they deemed the preliminary ruling of the ECJ to collide with fundamental rights as protected by the Basic Law. In the explanation of its ruling, the FCC rejected the ‘supremacy’ of EC law as a general principle and limited the direct effect of EC law to those provisions that did not encroach upon essential elements of constitutional structure – in particular the Basic Law’s catalogue of fundamental rights.

Yet the FCC’s claim of supremacy for national constitutional rights and review was conditional, not categorical. Its reservations were based on the provisional state of the integration process at the time and on higher thresholds of legitimacy than those proposed by the ECJ. In the opinion of the FCC, the ‘admittedly rights-friendly jurisdiction’ of the ECJ was insufficient but an institutionalization of human rights and democracy similar to that at the national level – including a democratically elected parliament with full legislative powers and a codified human rights catalogue – would eliminate the Court’s reservations and invalidate the primacy of national constitutional review.

The FCC thus remained within the community-based argumentative framework and shared the effective protection of constitutional human rights as the community’s standard of legitimacy. However, it contested the ECJ’s argument that the level of human rights protection in the EC legal system was sufficient to justify the autonomy let alone the supremacy of EC law. At the same time, the FCC’s decision partially transformed the controversy about supremacy into a positive competition for human rights standards and gave the supranational institutionalization of human rights further impetus.

First of all, the ECJ continued to defend the supremacy of Community law on the grounds that this law included human rights protection. Starting with Nold, the ECJ also made increasingly detailed use of the European Convention to imbue its case law with legitimacy. In the absence of any internal EC norms it could draw upon, it had to opt for external coherence. External coherence with the ECHR had two strategic advantages for the ECJ. First, it was a single human rights catalogue that was signed and ratified by all member states of the EC. It was thus not only highly legitimate but also easier to use than the constitutional traditions of the member states, which required a comparative analysis of national constitutional provisions. In addition, it was beyond the purview of national constitutional courts. However, the Court could not do anything on its own to meet the higher thresholds of constitutionalization required by the FCC in 1974. For that, it needed the assistance of other Community actors.

On 5 April 1977, the European Parliament, the Council, and the Commission published a Joint Declaration ‘concerning the protection of fundamental rights’, in which they ‘stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms’ and vowed to respect these rights ‘in the exercise of their power and in pursuance of the aims of the European Communities’. In the preamble to the Declaration, the three Community organs explicitly mention the Court’s recognition that the law of the Community
‘comprises, over and above the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based’. In their 1978 ‘Declaration on Democracy’, the heads of state and government joined in the European Council aligned themselves with the interinstitutional Declaration. In the Preamble to the Single European Act of 1986, the member states proclaimed their determination ‘to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice’. The transfer of case law to treaty law via political declarations further legalized the ECJ’s rulings and strengthened their democratic legitimacy.

How did the Bundesverfassungsgericht react to these developments? Already in 1979, it had to decide on another case referred by the Verwaltungsgericht Frankfurt, in which the administrative court cast doubt on the compatibility of an ECJ preliminary ruling with the fundamental rights guaranteed by the Basic Law. The FCC ruled that the referral was not admissible but, in a short paragraph at the end of the decision, it ‘leaves open, if and possibly to what extent – in view of political and legal developments that took place in the meantime at the European level – the principles of the decision of 29 May 1974 . . . are still valid without restrictions’. The decision did not mention what developments the judges had in mind but it most likely referred to the 1977 Declaration and the ECJ’s increasingly elaborate human rights jurisdiction.

In its Solange II decision of 22 October 1986, the FCC then ruled that ‘as long as the European Communities, in particular the jurisdiction of the Court of Justice of the Communities, generally guarantee an effective protection of fundamental rights . . . which is equivalent in principle to the protection of fundamental rights required as indispensable by the Basic Law . . . the Federal Constitutional Court will cease to exercise its jurisdiction on the applicability of secondary Community law . . . and to review the compatibility of this law with the fundamental rights of the Basic Law’. This decision was still far from an unconditional acceptance of the ECJ’s supremacy but, for all practical purposes, the FCC waived its right to review ECJ decisions for their compatibility with the national constitution. Seven years after its ‘Maybe’ decision, the FCC now conceded that the institutionalization of human rights in the EU had progressed far enough for the Court to withdraw its reservations.

In the explanation of its decision, the FCC accepted the ECJ’s functional, efficiency-based reasoning that the ECJ’s interpretation of Community law had to be binding for national law and national courts in the interest of a unified application of the law that was indispensable in a common market. However, it reiterated its position that Community law must not undermine the constitutive structures of the national constitutional order including the fundamental rights it guarantees. Consistent with Solange I, the FCC did not claim that these fundamental rights had to be protected by national courts – if an
equivalent and effective protection was guaranteed elsewhere. In contrast with its 1974 decision, however, in 1986 it came to the conclusion that, 'in the meantime, there has emerged a degree of fundamental rights protection in the jurisdiction of the European Communities that is, in principle, equivalent to the fundamental rights standard of the Basic Law with regard to its conception, content, and effectiveness.' According to the FCC, 'all major organs of the Community . . . have committed themselves in a legally relevant way to the respect for human rights in the exercise of their competences and in the pursuit of the goals of the Community.' In addition to a detailed analysis of the ECJ’s jurisdiction over the past fifteen years, the Court referred to the 1977 and 1978 Declarations as evidence. There were 'no relevant indications that the achieved Community standard of fundamental rights was not sufficiently consolidated or of merely provisional nature'.  

The interaction can be plausibly reconstructed as the competition of two courts claiming adequate (ECJ) and inadequate (FCC) human rights protection in the EC in order to support their respective claims of supremacy. On the one hand, the ECJ needed to adopt human rights in order to legitimate its claim for supremacy. Without the rights-based challenge of the German administrative and constitutional courts, the ECJ would not have been pressed to introduce, and increasingly strengthen its commitment to, human rights review. On the other hand, the legal and political commitments of the EC institutions to human rights made it difficult for the FCC not to accept human rights protection in the EC as adequate and equivalent.

THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS

By establishing coherence with the ECHR to protect the autonomy and supremacy of its jurisdiction from the constitutional review of the FCC, the ECJ became entangled in the legal order of the ECHR. Initially, claiming coherence with the ECHR proved an efficient way of repairing the ECJ’s legitimacy deficit at a small autonomy cost. The system of the Convention represented a highly legalized system of human rights protection with a codified human rights catalogue, accepted as legally binding by all member states, and protected by a judicial enforcement system. At the same time, the EC was not party to the ECHR so it was not formally bound by its norms and the jurisdiction of the ECourtHR. Finally, the jurisdiction of the ECourtHR was not recognized by all EC member states until 1985, and it took until November 1998 (the entry into force of Protocol 11 to the Convention) before the ECourtHR was reorganized as a permanent court to which individuals could apply directly.

Since the Hoechst case (21 September 1989), the ECJ has regularly attributed ‘particular significance’ to the ECHR among the international treaties it used as sources of human rights norms. It also began to refer to the case law of the ECHR – although only in a negative way by mentioning that there was no ECHR case law relevant to the subject of Hoechst.  

The first positive reference
came in *P v S* and *Cornwall County Council* almost seven years later (30 April 1996), and such references have been a regular feature of ECJ decisions ever since.24

To be sure, in order to protect its autonomy, the ECJ was careful not to tie its jurisdiction in any legally binding way to the ECHR. According to the formulae most often used by the Court, it 'draws inspiration from' external legal codes, which 'can supply guidelines' for the ECJ's interpretation and application of human rights 'within the framework of community law'25 and 'must be taken into consideration in community law'.26 When it made use of the case law of the European Commission of Human Rights (ECommHR) or ECourtHR to support its own decisions, it did so merely 'by analogy'. Finally, when there was no such case law, it did not refrain from interpreting the ECHR itself (Scheeck 2005: 21–3).

Yet, benefiting from the Convention’s legitimacy without accepting its supremacy meant walking a very fine line and planting the seeds of rhetorical self-entrapment. Once the Convention-based organs became more legalized, active and self-assertive, they could exploit the ECJ’s reliance on the ECHR in order to expand their authority, and to limit the ECJ’s autonomy, in an incremental way.

First, the increasing case load of the Convention-based organs entailed a growing body of case law and, consequently, decreasing leeway for the ECJ to interpret the ECHR autonomously. Since the ECommHR and the ECourtHR had the treaty-based authority to interpret and apply the ECHR, the ECJ was legally compelled to adopt these interpretations in its own references to the ECHR. Indeed, according to Scheeck, ‘there are no cases where Luxembourg did not respect Strasbourg’s case law’ (2005: 21). In addition, the ECJ adjusted its interpretations of the ECHR if necessary once the ECourtHR had developed its own interpretation of the Convention (Scheeck 2005: 22). In recent ECJ decisions, the formula that the case law of the ECourtHR would be taken into consideration ‘by analogy’ cannot be found any more.

Second, and in addition to this indirect entrapment, the Convention-based organs also sought to expand their jurisdiction to EC matters. In the beginning, these attempts were still hampered by their legal weakness. Thus, in the case of *CFDT v the European Communities*, in which the applicant directed its request against the EC as well as against the member states collectively and individually, and thus created an opening for extending the Convention-based human rights protection to the Community, the ECommHR, in its decision of 10 July 1978, declared itself not to have jurisdiction because neither the EC nor the Council of Ministers were parties to the Convention. Nor had all individual member states recognized individual applications to the Commission at the time. This last obstacle was removed at the beginning of the 1980s, however.

As a consequence, in the *M. & Co. v Germany* case (9 February 1990), the ECommHR recalled that ‘it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities’ and that ‘the Convention does not prohibit a Member State from
transferring powers to international organisations’. It insisted, however, that ‘a transfer of powers does not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character.’ In a typical salience argument, the ECommHR thus pointed to the potential legitimacy gap resulting from European integration in order to forestall a loss of relevance of the Convention order. Since, however, it could not attempt to close the gap at the level of the EC institutions for legal reasons, it turned to the member states.

In addition, the ECommHR claimed, just as the FCC in 1974, the competence to evaluate the conformity of the Community with the human rights standards of the Convention-based legal order and to authorize the ‘transfer of powers to an international organisation . . . provided that within that organisation fundamental rights will receive an equivalent protection’. Moreover, just as the FCC in 1986, and based on similar legal and political grounds, the Commission noted ‘that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance’. It therefore accepted the earlier judgment of the ECJ in this case and decided that the application was inadmissible. 27

In sum, by 1990, both the FCC and the ECommHR had converged on a conditional acceptance of the autonomy of Community law and ECJ jurisdiction based on the assessment that human rights protection in the EC was equivalent in principle to their own. However, they came from different directions. Whereas the FCC had consented to limit its own original powers as a result of the ECJ’s and the EC’s embracing of human rights, the ECommHR had begun to increase its powers vis-à-vis the EC by claiming the competence to evaluate the EC’s protection of human rights. Given the similarity in reasoning and assessment, it is plausible to suggest that the FCC’s earlier argumentation had set a precedent that the ECommHR could use to claim the same ‘suspended supremacy’ as the FCC. After all, the situation was the same: Community law and jurisdiction had encroached upon the domain of another legal order and eaten away the jurisdiction of other constitutional courts. Whereas the competing courts had to accept the will of the governments to partly integrate their political competencies and the argument of the ECJ that effective integration required the direct effect and supremacy of EC law, both could still use their more elaborate systems of human rights protection to rein in the ECJ and claim the ultimate constitutional say. The ECJ’s supremacy was accepted for all practical purposes but, by the power of legal argument, it was made derivative of the other courts’ higher legitimacy and their consent.

The ECJ continued to cling to its autonomy, however. This became most obvious when the Council asked the Court in 1994 for an Opinion on whether the EC could accede to the ECHR. To this effect, the Commission had already put a formal proposal to the Council in 1979, which was renewed in 1990. The member state governments were split both on the issue itself and on the admissibility of the request to the Court. In the event, the ECJ
decided on 28 March 1996 that the request was admissible but found that ‘as Community law now stands, the Community has no competence to accede.’ In particular, ‘no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.’ Whereas the Court conceded that respect for human rights constituted a precondition for the legality of Community acts, accession to the Convention ‘would entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as the integration of all the provisions of the Convention into the Community legal order.’ In the Opinion of the Court, such a fundamental change of regime could only be introduced by a revision of the Treaty. In other words, by precluding any formal changes to the EC’s system of human rights protection, the ECJ reserved itself the discretion to use human rights informally and according to its own preferences.

This self-serving Opinion was binding and set up high institutional hurdles. It ruled out an accession to the Convention without a treaty revision explicitly empowering the Community to do so. The treaty revision, in turn, required the consent and domestic ratification of all member states. Given that the member state governments disagreed on the issue, the ECJ could feel ‘safe’ from formal intrusion by the Convention’s legal order and instruments for some time to come.

In the meantime, the Convention-based organs continued to use, and elaborated, their previous doctrine that EC law was not exempt from constitutional review on the basis of the Convention and that EC member states could be held responsible for applying EC law that infringed on Convention rules. A few months after the ECJ Opinion, the ECourtHR argued in the Cantoni case (15 November 1996) that even though a national law was ‘based almost word for word on’ an EC directive, this did ‘not remove it from the ambit of Article 7 of the Convention.’ However, it did not find any violation in this particular case. By contrast, in the case of Matthews (18 February 1999), the ECourtHR held the UK responsible for the absence of European parliamentary elections in Gibraltar and decided that the exclusion of the inhabitants of Gibraltar violated the Convention.

Although it resulted in the first sanctioning of a member state for applying an EU rule (Scheeck 2005: 27), Matthews confirmed the two key arguments of M. & Co.: that member states were responsible for violations of the Convention by the EC in principle but that the ECJ could normally be relied on to provide sufficient protection of Convention norms. In contrast to M. & Co., however, the Court held that Convention-based rights were not secured in this special case precisely because the act that excluded the territory of Gibraltar from elections to the EP could not be legally challenged before the ECJ. Indeed, as ‘a treaty within the Community legal order’, it was ‘freely entered into by the United Kingdom’. Because the member state could exercise discretion and the ECJ could not protect fundamental rights within the Community legal order, the ECourtHR had to step in.
In principle, this doctrine holds to this day. In the recent *Bosphorus* case (30 June 2005), the ECourtHR reviewed the institutionalization of human rights in the EU, the competences and the jurisdiction of the ECJ, and its own earlier judgments involving EC law at length. It repeated its doctrine that human rights protection in the EC was equivalent and could therefore be accepted conditionally. There is, however, a new and more assertive element:

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights.

Although this claim to ultimate constitutional review has always been implicit in the argumentation of the Convention-based organs since *M. & Co.*, it is the first time that the ECourtHR explicitly stated that it would not refrain from reviewing the ECJ’s jurisdiction in any specific case even under the general presumption that the EC had an equivalent system of human rights provision. Indeed, in the *Bosphorus* case it went on to examine whether or not the presumption was rebutted. (It was not.)

In sum, although the EC has not formally acceded to the ECHR – and the failure to ratify the Constitutional Treaty is likely to further delay formal accession – it has been annexed informally and deprived of its autonomy *de facto* through the case law of the ECourtHR (Canor 2000: 4; Scheeck 2005: 27–9). Entrapment has become so profound that, according to interviews conducted by Scheeck in Luxembourg, ECJ judges appear to have given up their reticence towards accession: ‘accession would merely confirm existing practices’ (2005: 46).

**CONCLUSIONS: RHETORICAL ACTION AND HUMAN RIGHTS IN THE EU**

The case study on European constitutional courts and the institutionalization of human rights in the EU generally corroborates the framework of constitutionalization as ‘strategic action in a community environment’ and the findings of the comparative analysis on the conditions of constitutionalization in the EU. First, the constitutionalization process that embedded the EC in a multi-level system of human rights protection can indeed be reconstructed as a rhetorical argumentation process – a process of legal reasoning, in this case – in which the courts used arguments based on the fundamental norms of their international community in order to promote their organizational interests.

In addition, there is ample evidence for the relevance of the conditions of salience and coherence (as well as resonance). We can observe how these conditions are represented in the main arguments of the courts and how they affected the course of the debate. Whereas the ECJ initially used efficiency arguments to make its case for the direct effect and supremacy of Community law,
its competitors pointed to the legitimacy deficit of legal integration without constitutional rights review (salience). Because the ECJ could not reject this fundamental community principle, it was compelled to act to reduce salience if it was to uphold its supremacy. Initially, it could not draw on any norms and procedures of human rights protection in the Community itself (no internal coherence) but had to take recourse to the common constitutional traditions of the member states (resonance) and, above all, to the ECHR-based system of human rights protection (external coherence). Internal coherence played a role when the other EC organs took up the court’s doctrines of human rights protection and turned them into political declarations and, later in the process, treaty law.

From two sides, the ECJ was pressurized into accepting human rights and constitutional review as standards of legitimacy for the EC. In the 1970s, pressures from national courts compelled the ECJ to bind its jurisdiction to the protection of human rights but, once it had done so, the national courts were increasingly entrapped (or enabled) to concede conditional supremacy to the ECJ in the mid-1980s. By then, however, the ECJ had rhetorically tied its system of human rights protection so firmly to the ECHR that it became increasingly entrapped to concede supremacy (with regard to human rights matters) to the Strasbourg human rights court. Faced with an only conditional acceptance of its constitutional legitimacy by the competing constitutional courts, and under constant observation as to whether it meets the standards of legitimacy of the liberal community, the ECJ could not escape.

In sum, the institutionalization of human rights in the EU was the unintended outcome of judicial competition in the liberal international community of Europe rather than the result of a conscious and planned ‘federalist’ process of constitution-making. Multiple processes of rhetorical entrapment entangled European constitutional courts in a system of human rights protection that does not know any tidy demarcations of authority. They not only prevented the general erosion of human rights as a ‘collateral damage’ of European integration but increased the venues open to individuals to secure their rights.

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NOTES

1 The only exceptions are the provisions on non-discrimination on the grounds of nationality and gender in Art. 69 ECSC Treaty and Art. 7 and 119 EEC Treaty. These provisions, however, are very much connected with market integration (equal pay and working conditions, non-discrimination of foreign competitors).
Special thanks to Lutz Krebs, a PhD student at ETH Zurich, for compiling the corpus.

See, for example, Cassese et al. (1991); Craig and De Búrca (2003: 317–70).

On rhetorical action, see Schimmelfennig (2003: 199–228) and Rittberger and Schimmelfennig (2006).

Whether or not the ECJ takes human rights seriously has been a matter of some debate between legal scholars (see Coppeil and O’Neill 1992, on the one hand, and Weiler and Lockhart 1995, on the other). The argument here is that constitutional courts in competition over jurisdictions had to take human rights seriously, regardless of whether they were intrinsically motivated to do so.

ECJ, Stork v High Authority, Case 1/58.

ECJ, Präsident, Geitling, Mausegatt, and Nold v High Authority, Joined Cases 36–38/59 and 40/59.

ECJ, Wilhelm v Bundeskartellamt, Case 14/68.

ECJ, Stauder v City of Ulm, Case 29/69; my italics.

ECJ, Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide- und Futtermittel, Case 11/70.

Ibid.

Ibid.

ECJ, Nold v Commission, Case 4/73.

Ibid.

Bundesverfassungsgericht, Solange I, BVerfGE 37, 271; my translation.

See, for example, ECJ, Hauer v Rheinland-Pfalz, Case 44/79.

France was the last member state to ratify the Convention in May 1974.


Ibid.

Ibid.

Bundesverfassungsgericht, ‘Vielleicht’-Beschluss, BVerfGE 52, 187; my translation.

Bundesverfassungsgericht, Solange II, BVerfGE 73, 339; my translation.

Ibid.


See, for example, ECJ, Familiapress v Bauer Verlag, Case C-368/95; SCK v Commission, Joined Cases T-213/95 and 18/96; Grant v Trains, Case C-249/96.

This language can already be found in the Nold, Hauer and has become standard usage thereafter. For a recent example, see ECJ, Karner v Troostwijk, Case C-71/02 (judgment of 25 April 2004).

ECJ, Johnston v Chief Constable of the Royal Ulster Constabulary, Case 222/84. See also Scheeck (2005: 20–1).


ECJ, Opinion 2/94 on Accession by the Community to the ECHR, ECR I-1759.

ECourtHR, Cantoni v France, No. 17862/91.

ECourtHR, Matthews v The United Kingdom, No. 24833/94. For a detailed analysis, see Canor (2000).

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