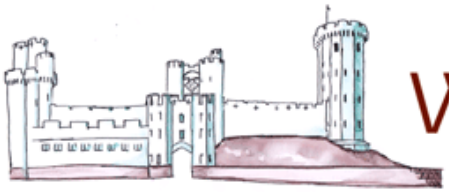

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HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE: PAST AND PRESENT TENDENCIES

1. Introduction

The purpose of this paper is to consider the ECJ's jurisprudence as a specific story in the complex web of human rights in the European Union. I aim to do this in two parts. In the first, I analyse the principles that have guided the ECJ in its development of fundamental rights. These consist of largely jurisdictional issues: when and over which fundamental rights matters, and over whom can the Court exercise judgment? They encompass questions of the sources of inspiration the Court uses for interpreting human rights.

The second part then assesses how particular human rights have been developed in the ECJ's case law with specific attention paid to recent decisions. My approach here is to examine the jurisprudence in terms of the rights expressed in the EU Charter of Fundamental Rights. Although this is a fairly recent document (and I have some doubts over its reflection of rights protected over the history of the Union) it is represented by the EU as the most apt compilation of those rights it aims to promote if not respect.[1] Its lack of legal enforceability until the Lisbon Treaty came into force at the end of 2009 has not prevented it shadowing the Court's appreciation of fundamental rights.

As a point of departure however it should be noted that the ECJ only has jurisdiction over the interpretation of EU law and its application (or derogation) by Member States or the EU institutions, a matter I will explore in greater depth when considering the jurisdictional principles forged by the Court. It, therefore, has to consider rights from a number of perspectives.

First, it has to respect the common constitutional traditions of the Member States. Thus, in theory at least, it is supposed to ensure that EU legislation adheres to some kind of overlapping consensus across the EU.

[1] A distinction is made here only to register the fact that not all of the issues raised in the substantive articles of the Charter can be said to amount to 'rights'. Some are described as 'principles' which at present only provide some sort of guidance for the EU institutions to follow. Prime examples are the rights of the elderly, the protection of the environment, the rights of the child, where the relevant articles do not expressly provide for individual rights. More will be said on these matters.

Secondly, it has to respect those rights that have been the subject of agreement through Member States entering into international rights instruments. In particular, the ECHR is perceived as the 'gold standard', with the ECtHR jurisprudence providing a necessary precedent to follow where appropriate. However, this clearly does not supply the totality of applicable norms. Other international instruments, such as those emanating from the UN system, have also been drawn on. Indeed, with its own Charter of Fundamental Rights the breadth of rights has been significantly and specifically increased.

Thirdly, it has to consider the scope of rights as they may have been enhanced by specific EU legislation, albeit in the light of those standards above. As I will show, it is in this latter context that fundamental rights have been developed so as to recognise EU wide agreement (advanced through the legislation) to extend the depth of protection the ECJ must ensure.

2. Governing Principles

Much of the story of fundamental rights in the EU has been concerned with matters of jurisdiction: over what and over which acts of the EU institutions and the Member States could the ECJ reach a judgment in terms of their human rights impact. This jurisdictional question has become increasingly complex. When the ECJ can exercise its voice on human rights matters is certainly less restricted than it used to be. Nonetheless, it is still constrained. Understanding the limits provides the foundation for understanding the ECJ's jurisprudence as a whole.

The best place to start is with a quick review of the landmark cases that established the initial role of the ECJ. The formative cases of *Stauder*, and *Internationale Handelsgesellschaft* determined that the ECJ was obliged to consider the fundamental

rights of individuals allegedly adversely affected by an EU measure.[2] Of course, this does not mean that if an infringement of rights is found this would render a decision invalid. Indeed, examining the relevant case law one can see that the predominant position is *not* to overturn EU measures even if it is shown that an individual's rights have been infringed.

Why is this? The main reason I suggest is that there is an underlying assumption that legislation produced through long-drawn out negotiation and agreement between Member States provides these measures with a basic quality of legitimacy. Provided they relate to an authorised aim of the Union, as set out in the Treaties, and have been instituted in accordance with powers granted, the ECJ should not intervene. It is only in exceptional circumstances that a person's individual rights will be protected. This has been enshrined in the last two articles (51 and 52) of the EU charter.

Of course, the way in which the ECJ reaches any particular decision is presented in a more sophisticated fashion. However, the result is the same. Let us in any event look at the sequence of analysis that can be interpreted as forming the Court's approach. This will help identify the key principles that have been developed in the case law to help frame the ECJ's treatment of alleged rights infringements.

The Existence of a Recognised Right

When faced by an alleged breach, the first question to be answered is whether there is a recognised right involved at all. This often posed something of a problem before the EU Charter. Given the scope of human rights texts available, from those contained in national constitutional law to the ever-increasing international instruments produced by the United Nations or the Council of Europe, it was never self-evident which rights should be treated as fundamental and which should be aspirational only. So, the approach was a little haphazard. The reasons for adopting respect for fundamental rights as a general principle of EU law (avoiding direct conflict with those Constitutional Courts of Member States who were intent on safeguarding their constitutional law against interference from EU legislation) meant that the first source

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accepted was the constitutional traditions common to the Member States.[3] Recognising that this did not necessarily encompass all those rights deemed worthy of protection the ECJ went further to accept that international human rights treaties should also be accepted, at least those signed by the Member States.[4] Chief amongst these was and remains the ECHR.[5] Other international instruments have been mentioned favourably (for instance the UN International Covenants on Civil and Political Rights, on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child) but the ECHR has particular purchase.

The acknowledged rights have not been restricted by the ECHR however. The EU Charter is replete with additional rights that have found favour. Economic and social rights in particular have frequently been found apt by the ECJ. The Social Charter of the Council of Europe has been an inspiration in matters of employment and welfare. And the Treaties have provided rights-related protection on matters associated with the internal market and discrimination. The adoption of citizenship as a way of winning hearts and minds of the European populace has also produced a number of political and civil rights. But the EU Charter now encompasses most if not all these within one text. Since the Treaty of Lisbon this is the document which is intended to provide the Court with the primary source of reference. It will not complete the picture, at least in theory. The principle that international instruments entered into by the Member States should be a source of law allows for some latitude now and in the future. But such instruments are more likely to provide clarification of EU Charter rights already agreed rather than create wholly new ones. In this respect the ECJ is often faced with an issue that requires an interpretation of a right. Invariably this means that the Court will have to rely on academic and judicial as well as Treaty sources to understand how that right might be interpreted. Specifically Article 52(3) EU Charter provides:

> Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental

[3] See *Internationale Handelsgesellschaft*
[4] *Nold*
[5] The privilege granted to the ECHR rights is understandable given its supposed relevance to Europe. Its iconic status as *the* European human rights statement could never be ignored once the principle of respect for fundamental rights had been accepted.

> Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Clearly this will necessitate following the jurisprudence of the ECtHR as a means of determining a minimum standard.

Determining whether a right has been infringed

Once the Court is satisfied that a particular right is recognised it can then turn to its second question: has that right been infringed? There is no evident lack of will to make such a determination by the Court despite some historical critique.[6] Many decisions have been reached whereby a violation is declared as a result of some EU related measure. The matter is evidential. Thus where cases reach the ECJ as a result of a reference for a preliminary ruling, where an opinion is sought as to the application of EU law in a domestic matter, then the final decision on evidence is referred back to the national court for determination. That forum is considered best placed to weigh up the evidence and make a final ruling on whether a breach has in fact occurred. However, in those cases which arise from a direct challenge under the judicial review provisions of the Treaties then of course the ECJ has to reach its own conclusions.

Establishing Responsibility for a Rights Violation

If a finding of infringement in the abstract is made, the Court will then proceed to consider a third question: is the violation the result of an EU law measure or failure to carry out such a measure? Who perpetrated a rights-abusing act or omission is a preliminary question. But it is also a vital one. Initially the ECJ was content to scrutinise the behaviour of the EU institutions given the determination of the general principle that the EU must respect fundamental human rights. So in early cases, the Commission's actions were particularly susceptible to review given its powers to initiate enforcement measures against private concerns. Similarly, if an individual's

[6] Coppell and O'Neill presented the first notable critique that the Court was not interested in protecting human rights in its work. Rather its priority was to assist in the integration of the EU. See …

interests were adversely affected by a legal provision that emanated from an EU measure (often related to the control of markets and competition) the ECJ would consider questions referred to them by courts in those States where the measure was actually implemented. Actions would therefore be testing the compatibility of EU legal regimes even if operated by national authorities. So in *Internationale* for instance, the applicant sued the German authority which was administering an aspect of the Common Agricultural Policy.

This direct attribution of infringement to an EU measure established the base for review on human rights grounds. Complications arose, however, when the ECJ was faced by claims that related to Member State actions which attempted to *disapply* EU law, what is called derogation. Member States are entitled to avoid the requirements of certain free movement provisions of the Treaties on specific grounds. Like many of the ECHR provisions these relate to decisions prompted by exceptional concerns of public policy, public health, public security and the like. The particular exceptions vary according to the provision. Nonetheless, the premise is that Member States can breach these EU legal commitments where it is able to establish an authorised reason for doing so.

Such a position was the very subject of challenge in the 1975 case of *Rutili.*[7] There the French government had attempted to prevent an Italian national from moving freely within France on the grounds of his political actions. It justified this by reference to the public policy exception then contained in Article 39 EC Treaty dealing with the free movement of workers in the EU. The ECJ made it clear that it drew inspiration directly from the ECtHR jurisprudence in assessing the rightfulness of the French action. This provided that any restriction of a human right had to be shown to be 'necessary for the protection of the interests [of national security or public safety] in a democratic society'. Otherwise it was unlawful. The matter was returned to the French courts for final determination.

The case of *ERT* established the rule more firmly by holding that any national rules avoiding EC provisions as allowed in the relevant EC Treaty article had nonetheless

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to be compatible with fundamental rights.[8] Consequently, the ECJ was entitled to give guidance on such rights matters to national courts.

The scope of review for the ECJ was thus extended from EU institutions to Member States where action was taken or avoided in the field of EU law.

The Final Test

The ECJ will still need to consider a final question even if an infringement of a right is found and either a Member State or EU institution is found responsible. Is the infringement justifiable? In *Wachauf v. Germany* the ECJ accepted that any fundamental right was never 'absolute'. [9] Rather it had to be interpreted in terms of its 'social function'. In other words, the Court believed that restrictions on rights may still be accepted, particularly when trying to construct and enforce the single market. It held that restrictions may be allowed where they 'correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.'[10]

This is the crux of the matter and the territory within which the ECJ can decide to prioritise fundamental rights or render them secondary. Establishing a general interest objective is not difficult. One need only refer to the Treaties. But the crucial constraint is the proportionality test that has been developed. In determining how this might be applied the words '*intolerable* interference' reflect the severity of the exception necessary for the Court to feel it can interfere. For what amounts to 'intolerable' is subjective but conditioned by reference to the objectives set down for the EU. The tendency has therefore been for the Court to require considerable persuasion before it can reach that threshold of intolerability. We will see in many cases discussed in our review below that this is the exceptional condition that determines the true depth (or lack of it) of fundamental rights promotion by the Court.

[8] Judgment of 18 June 1991, ERT [1991] ECR I-2925
[9] Case 5/88 *Wachauf* [1989] ECR 2609.
[10] Ibid para 18.

The overarching critique has persisted therefore that although the ECJ appears to labour to protect fundamental rights its own developed principles operate as inherent restrictions. The maintenance of the continuing development of the EU legal order underpins the Court's traditional approach. This is the primary consideration. Only if fundamental rights have been affected unduly, to an intolerable level, will intervention occur.

Undoubtedly, other interpretations to the jurisprudence are possible. But the reality is that the case law has done little to further human rights in any dramatic fashion. This will become more evident as I explore the case law in more detail in the following section.

3. The Case Law on Human Rights

I intend here to examine the main issues that have arisen regarding particular rights in the ECJ's case law. Given the preference enshrined for the ECHR, I will first examine the case law of the ECJ which offers some perspective on the rights that are supposed to have the same meaning and scope under both the ECHR and the EU Charter.[11] I will then turn to those other rights expressed in the Charter to see how they have been applied and developed, if at all, in the ECJ. In this way I can assess the depth of judicial recognition of the Charter's complete range of stated rights.

1. The European Convention Rights

The Right to Life

The possibilities for direct judicial pronouncement on the right to life have been limited. Not because the EU is disengaged with relevant issues but because the

[11] The relevant articles of the ECHR that come under this equivalence of meaning and scope are: 2, 3, 4, 5, 6(2) and (3), 7, 8, 9, 10, article 1 of Additional Protocol 1, and article 4 of Protocol No.4.

limitations on the ECJ's jurisdiction coupled with a tendency to avoid involvement in difficult moral questions of life and death have been the norm for the ECJ.

This tendency was demonstrated through the infamous *Society for the Protection of Unborn Children v. Grogan* case.[12] On an application by the High Court of Ireland for a preliminary ruling, the ECJ was asked to consider how the matter of the state control of abortion services and their advertisement should be treated within Community law. The question was whether such control exercised through legal process by Ireland was legitimate. At no time did the ECJ consider the matter from a human rights perspective. Perhaps wisely, it focused its attention purely on the market-oriented questions; were abortion clinics offering a 'service' and if so was the prohibition of a student body advertising such services outside the Irish jurisdiction an unlawful restraint on the free movement of services. The Court concluded that termination processes were services but that it was 'not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics'.[13] Given that the student association concerned had no connection with the abortion clinics, the Court felt free to conclude that there was no restriction on the freedom to provide services to fall foul of the old Article 59 EC provisions.

There is little to commend this decision from a human rights perspective. It offers no guidance on the right to life other than to acknowledge that abortion clinics did offer a 'service' under EU law, like any other medical service, and by implication were legitimate enterprises. The fact that most Member States had them was sufficient to reach this conclusion. But it is also implied that there is no right for citizens of any Member States to access abortion services. The Irish decision to ban them and prevent their promotion elsewhere was viewed as legitimate. All of which suggests that there is a margin of appreciation in operation here as well as well as in the ECtHR.

[12] 4 October 1991 (C-159/90)
[13] Ibid para 32.

Although I can only say this tentatively in respect of abortion, there are some similarities with the *Vo* judgment in the ECtHR.[14] The rightfulness of Member States either allowing access to abortion services *or* banning such practices is, in effect, left to the national democratic process to decide. It therefore takes the debate largely outside the European human rights realm.

For the moment this remains the case for the ECJ even though EU law is developing its influence over matters that might give rise to questions in relation to the right to life. Health and safety at work, matters of internal and external security measures, and biomedicine are areas where EU policy and legislation are evolving. Article 3 EU Charter, relating to protecting the integrity of the person, would also be drawn into this development. But the ECJ has yet to be confronted by complex questions in these areas. And there is precious little sense of principles that would assist it should that become the case. The likelihood then is that the Court would adopt a similar position as the ECtHR, leaving decisions largely to the Member States.[15]

Having said this, there are some jurisprudential clues I might extract. In an opinion delivered by Advocate General Maduro in 2008 EU Directive 2004/83/EC which had set minimum standards for determining who qualifies for refugee status or for 'subsidiary protection status' was interpreted.[16] The Directive was an attempt to provide guidelines that encouraged a uniform standard of treatment across the Member States. Article 2(e) defined a person eligible for subsidiary protection as

> a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm.

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15 The only exception would be the strong prohibitive stance taken by Article 2(2) EU Charter towards the death penalty. How the Court might be engaged on a possible re-introduction of the death penalty into any Member State is probably an academic question and one best left aside for our purposes. Nonetheless, it remains the most if only certain position taken from an EU perspective on the right to life.

16 Case C-465/07. *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* Opinion of Mr Advocate General Poiares Maduro delivered on 9 September 2008.

'Serious harm' was defined by Article 15 of the Directive as

> (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Maduro grappled with the methodological question of how one should interpret the risk of serious harm in this context. He did so with specific reference to the article 3 ECHR but his reasoning is relevant for right to life questions as well. His concern was whether risk of serious harm should be determined only by reference to the probability of that harm being inflicted on the specific applicant or whether it could also be determined 'by reason of a general background of indiscriminate violence'.[17] In other words, would military conflict or lawlessness suffice? Maduro stated that, although Article 3 ECHR provided important pointers, 'Community provisions, irrespective of which provisions are concerned, are given an independent interpretation which cannot therefore vary according to and/or be dependent on developments in the case-law of the European Court of Human Rights.'[18] Article 52(3) of the EU Charter also expressly provided that 'rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention' but this 'shall not prevent Union law providing more extensive protection.' ECtHR jurisprudence would be relevant but only one source of inspiration for ECJ interpretation. Other traditions, including those developed at national level as well as legislation produced in accordance with stated Union values had also to be considered.

Maduro then first ascertained the purpose of the Directive and in particular the provisions of its Article 15. He wrote that 'the criterion established by the Directive, in order to obtain the status of refugee as well as subsidiary protection, must be understood as the instrument making it possible to evaluate whether that risk and

[17] Maduro Opinion para 18.
[18] Ibid para 19.

harm to fundamental rights are likely to arise.'[19] In doing so it would be necessary to see Article 15(c) 'as conferring subsidiary protection where the person concerned demonstrates that he runs a real risk of threats to his life or person in situations of international or internal armed conflict by reason of indiscriminate violence which is so serious that it cannot fail to represent a likely and serious threat to that person.'[20] Maduro attempted to develop the understanding of risk to justify granting asylum first, on the principles of ECtHR case law on Article 3 (and 2 although he does not state that explicitly), and second relevant EU legislation.

Another clue appears in cases where national authorities have sought to derogate from free movement provisions, using the argument that the obligation to protect the right to life superseded any internal market requirement.[21] The ECJ's response has not been to investigate what the right might mean in the abstract. Rather it has been to enquire whether national authorities have acted proportionately when purportedly seeking to protect life and to require evidence in support of these claims.[22] AG Trstenjak believed 'it is essential … that the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated'.[23]

Such an approach indicates a sense of contingency about the depth of commitment to the right to life (and other rights) possible in EU case law. This brings us back to the case of *SPUC v. Grogan*. The Opinion of Advocate General Van Gerven there referred to the scope of the concept of public policy as determined by a previous decision in *R v. Bouchereau*.[24] He quoted the judgment that such scope 'cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community'. However, 'the particular circumstances justifying recourse to the concept of public policy may vary from one country to another'

[19] Ibid para 33.
[20] Ibid para 40.
[21] Case C-265/06. Opinion of Advocate General Trstenjak delivered on 13 December 2007. *Commission v Portugal* at para 58.
[22] See for instance Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40 and Case C-42/02 Lindman [2003] ECR I13519, paragraph 25.
[23] Ibid
[24] Judgment of 27 October 1977 in Case 30/77 *R v Bouchereau* [1977] ECR 1999

making it necessary 'to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation'.[25] Given the constitutional position granted to the right to life of the unborn in Ireland, the AG was happy to accept that the Member State in that case was entitled to pursue its particular interpretation of the right to life. The principle of proportionality had still to apply, however. And it was *that* principle which provided the basis for judgment.

The right not to be tortured

The opportunities for the ECJ to reflect on the meaning of torture, inhuman or degrading treatment have been very limited as one might expect, even more so than the right to life. This is hardly surprising given that EU institutions are unlikely to impose direct physical impact on the lives of individuals. Similarly, it is unlikely in the main that EU law would give rise to such situations when implemented by Member States. However, with the development of the justice and home affairs agenda, incorporating criminal as well as asylum and refugee matters, the possibility for some kind of reflection on this right has begun to occur. The ECtHR decision in *Pretty* might in theory enable a link to be made between an EU law measure and an individual's suffering by reason of social welfare and social policy provisions.

Certainly the scope for the ECJ to develop the interpretation of Article 3 ECHR (Article 4 EU Charter) in asylum related directives has already been noted above. The case of *Elgafaji* is a good example of where the scope of the right not to be subjected to torture etc can inform and be developed through interpretation of relevant EU legislation. Of course, much depends on the way in which legislation is composed in the first place, allowing for such interpretations to evolve. But it remains the case that the decision in *Soering* in the ECtHR and the whole international legal principle of *non-refoulement* has provided the basis for developing standards further through EU law in extradition related cases. It might also provide scope for further assessment particularly given the tendency of asylum provisions to establish standards not only

[25] Ibid paras 33 and 34.

for allowing asylum but also for withdrawing such status on the basis that applicants have come from 'safe countries'.[26]

Generally speaking though, the ECJ has not delivered judgments that might otherwise extend an understanding of torture, inhuman and degrading treatment.

The rights not to be held in slavery or servitude, or to be required to perform forced or compulsory labour

As with torture, the prospects for the ECJ to have the opportunity to consider this particular right are small. It is difficult to imagine when a matter would arise to engage matters of EU law directly. Possible arguments might be raised in the context of employment relationships but if EU law is to be engaged these are most likely to occur in relation to working conditions legislation. Initiatives designed to address human trafficking at a transnational level might also conceivably result in actions under this human right.[27] As things stand however I are not aware of any ECJ judgment that interprets let alone develops judicial understanding of this human right.

The right to liberty and security

The application of this general right has significantly more potential for ECJ engagement. Two fields in particular have some bearing; asylum policy and cooperation in criminal justice. Both areas have now, since the Treaty of Lisbon, been incorporated into those justiciable policy fields, i.e. the ECJ has jurisdiction to assess EU measures and their application in Member States' laws. Previously the Court was limited in what it could review.

As far as asylum and refugee matters are concerned the development of human rights standards through judgment has, however, been unimpressive. Council Directive

[26] See for instance Directive 2005/85, 'The European safe third countries concept'.
[27] These would emerge under Article 79 TFEU (ex Article 63(3) and (4) TEC) which provides for a common immigration policy that must in part deal with trafficking issues.

2008/15, which lays down minimum standards on procedures in Member States for granting and withdrawing refugee status, and Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, have been the subject of ECJ guidance with a view to clarifying the application of very specific provisions. In such cases, time-limits, within which a person's immigration status has to be determined, are often the focus.[28] But undoubtedly greater complications will arise as EU asylum Directives begin to conflict with such measures as the European Arrest Warrant (EAW).[29] A case in which the Finnish courts referred questions to the ECJ in relation to an asylum seeker in one Member State being sought under an EAW issued by another Member State that might have addressed some of these issues has however been withdrawn at the time of writing.[30] We will nevertheless have more to say on this procedure below.

In the meantime, the Court's role has been to make sense of the relevant EU legislation with an eye on the human rights elements. As I have noted already, perhaps the most enduring issue relates to the principle of *non-refoulement* and its interpretation. The case of *Elgafaji* has helped develop the test for whether return to a particular country is considered to breach this principle or not. Given the tendency of many national immigration controls to treat asylum seekers with increasing strictness and to develop procedures which reduce the avenues for appeal against negative decisions, the basis for returning people to their country of departure will continue to be of great importance. However, the likelihood of EU human rights law being used in this context is limited. National courts will only refer questions if they are uncertain about the interpretation of EU legislation *not* because there is suspicion that national measures contravene human rights standards.

[28] For instance, see Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] and Case C-19/08 *Migrationsverket v Edgar Petrosian and Others* [2009] …

[29] The European Arrest Warrant was introduced so as to speed up extradition procedures between Member States. The basic proposition is that for certain defined offences any national court faced with a EAW from the court of another Member State will automatically accede to the request and order extradition. Originally this was introduced as a measure to help bring suspected terrorists to justice but the EAW's operation has been used in a widespread and sometimes highly dubious fashion.

[30] Case C-105/10 *Public Prosecutor v Malik Gataev, Khadizhat Gataeva* referral for a Preliminary Ruling.

The right to a fair trial or hearing

The right to a fair trial has been one of the most vigorously adjudged human rights issues in ECJ case law. Numerous actions have been brought before the ECJ. There are two ready explanations for this.

First, whenever a legal system operates so as to impose decisions on individuals which have a detrimental effect on their lives, questions of whether those decisions have been reached fairly will arise. Over time, the constituent parts of what amounts to a fair trial are likely to be developed. These are standard issues for any review tribunal, such as the ECJ, to consider when dealing with matters relating to the exercise of power. In the EU's case, adherence to the rule of law as a general principle would suggest that fairness in proceedings and in reaching decisions impacting directly on the lives and fortunes of individuals would have to be considered. Of course, the requirement that a particular individual has been affected is a prerequisite for such action. Although a principle of participation is being developed by the EU (particularly within the context of a more engaged European citizenship),[31] the ability to bring a legal action against an EU measure is limited. Nonetheless, those cases that have reached the ECJ have enabled it to develop its understanding of what amounts to a fair trial or fair decision-making process. The case law on the subject is now quite extensive. Article 47 of the EU Charter, which provides that it is not limited to the determination of civil rights and obligations or criminal charges (unlike Article 6(1) ECHR) but will apply for all aspects of EU law and its implementation, suggests that the opportunities to develop its content have increased.

Second, businesses or corporations ('legal persons') have been frequent targets for EU action in relation to anti-competition decisions and the operation of a single market. These affected corporations often have the financial and legal resources to mount challenges to decisions detrimental to their interests. The fairness of how a particular decision has been reached is frequently raised as a breach of fair trial rights. One

[31] This can be seen from the provisions on participation added to the TEU by the Lisbon Treaty. See articles….

might go so far as to say that it has become one of the standard legal objections made in the course of proceedings.

The prospects for further increase in jurisprudence on this matter are significant. The operation of European Arrest Warrants has provoked some key questions about the nature and relevance of fair trial rights across the Member States. First, those individuals who have been the subject of a warrant have argued that a breach in their fair trial rights in the country where the warrant was issued should mean that their extradition should not be approved. Cases have been brought to the ECJ to seek clarification on this. Equally, the Commission has been conscious that for a European warrant to be credible some universal standards for the treatment of suspects are necessary. The whole EAW system was based on a presumption that the approach to investigations and trials in all Member States were human rights compatible. Variations might exist that were acceptable under the ECtHR's concept of the margin of appreciation, but a clear list of minimum standards would reduce the possibilities for national courts to challenge the system by refusing to implement a warrant on the grounds that different standards applied in the State where the warrant was issued.

Whatever the causes of the developing case-law I can map out some of the key aspects of the ECJ's current approach to fair trial rights.

The underlying general principle has recently been expressed by the Court of First Instance in *Cheminova A/S and Others v Commission*:

> observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question.[32]

Various specific components of the right have also been identified. They include a number from which can be extracted a sense of general applicability.

[32] Case T-326/07 *Cheminova A/S and Others v Commission* para 244 …. See also Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39, and Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II-4665, paragraph 91.

First, there is the right to have one's matter heard within a reasonable time. *Der Grüne Punkt - Duales System Deutschland GmbH v Commission* involved a complex issue of competition law and the registration of trademarks.[33] Following a decision against the applicant, an appeal was lodged complaining about matters in the process of decision-making by the Court of First Instance. In particular, the applicant complained that the time the Court of First Instance took to reach its decision on the original case was excessive, being 5 years and ten months. The ECJ confirmed that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'[34] It held that where a case concerned

> infringement of competition rules, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant himself and his competitors but also for third parties, in view of the large number of persons concerned and the financial interests involved.[35]

The ECJ also held that 'the reasonableness of the period for delivering judgment is to be appraised in the light of the circumstances specific to each case'.[36] The case complexity and the conduct of the parties would be relevant here. The Court went on to state that

> the list of relevant criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is prima facie too long.[37]

[33] Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission*
[34] Ibid at para 177.
[35] Ibid para 186.
[36] Ibid para 181.
[37] Ibid para 182.

In the circumstances, the period of 5 years and 10 months could not be justified.[38] Given the historical delays in reaching judgment in the ECtHR this is quite an intriguing decision. It raises difficult questions regarding the review of ECtHR case law in the eyes of the ECJ if protracted delays subsist in the reaching of a judgment at Strasbourg in any particular case.

Second, the grounds for reaching any decision adversely affecting an individual directly must be communicated to that person. This was expressed in *Rutili* as necessary to enable the individual to make effective use of any legal remedies available.[39] A lack of information would clearly hamper evaluations of how and on what basis an appeal against any measure might be made. Part of this will be the essential facts upon which the decision-making institution has reached its conclusion.[40]

More recently I have seen the issue of informing individuals of the grounds for an adverse decision made repeatedly in the context of various measures taken where the fulfilment of United Nations sanctions (in respect of those associated in one capacity or another with the regimes in Iran, Iraq and Myanmar) has required the Council to make lists of those whose assets should be frozen as part of those sanctions. In the case of *Bank Melli Iran v Council*, the applicant was suspected of assisting or facilitating the state of Iran's procurement of nuclear materials.[41] The Bank was added to one of these lists of persons, legal or otherwise, affected. In the ensuing challenge, the Court of First Instance confirmed that the EU was

> bound to communicate the grounds for freezing its funds to the entity concerned, so far as possible, either when that inclusion [in the list] is decided on or, at the very least, as swiftly as possible after that decision in order to enable its addressees to exercise, within the periods prescribed, their right to

[38] Interestingly, the ECJ held that although there was deemed to be a breach of the applicant's right to an effective judicial remedy, there was nothing to indicate that the decision would have been any different if there had not been such a delay. It was noted however that the applicant could still pursue a separate action for damages caused by the delay.
[39] Case 36-75 *Roland Rutili v Ministre de l'intérieur*
[40] See for instance Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and others v Commission*
[41] Case T-390/08 *Bank Melli Iran v Council*

> bring an action. Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature, and also to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.[42]

This decision reflects a trend in recent case law. The imposition of sanctions through the freezing of assets has long concerned human rights agencies. Often the information relied upon to identify those to be put on a list has been hidden, usually for 'security reasons'. They have also been undertaken without much consultation or notice so as to avoid those affected moving assets out of the relevant jurisdiction. Nonetheless, the tension with fair trial rights has been evident in some of the judicial review of these decisions.

The case of *Kadi* brought these tensions to the fore and demonstrated that the EU judiciary were by no means united in how to resolve any conflict between human rights norms and political exigencies. *Kadi* resulted in a sort of judicial peace breaking out, whereby the content of the right to fair trial will be reiterated in every judgment but some means will be found to show either that the right has not be infringed or an opportunity has been given to rectify the breach and still keep the sanction in place. These have been technical in nature or the result of a recognition of the need to strike a balance between the policy (or for some the collective) interests reflected in the sanctions and the particular interests of the individuals affected. The latter necessarily engages the application of a proportionality test, the standard means by which the tensions are addressed by the ECJ.

So, for instance, in *Bank Melli* the CFI, as I have seen, restated the components of the right to fair trial and then held that the applicant's failure to request documents from the Council or to raise an admissible plea challenging the validity of the finding (that it lent support to nuclear proliferation) meant that it could not argue failure by the

[42] Ibid para 105.

Council to provide evidence for its original decision.[43] In *Kadi* too, the ECJ held that although individuals' rights had been infringed in the process of adding their names to lists leading to the freezing of assets, the Council should be given a period of grace to rectify its procedural errors. The freezing continued in the meantime.

More recently in *Pye Phyo Tay Za v Council* the ECJ was faced with a challenge by the applicant to his renewed inclusion on a list of persons whose assets were frozen as part of the EU's sanctions imposed on Myanmar in response to gross and persistent human rights violations. The applicant is the son of a leading business figure in Myanmar. No legal challenge had been made when he had first been included on the list but when the Council measure came up for renewal, a few years later, he protested on the basis, in part, that his rights to property, a fair hearing and defence had been infringed. The ECJ noted that it was not the activities of the applicant which justified the restrictive measures but his 'membership of a certain general category of persons and entities having a function or a position in the State which is the subject of sanctions.'[44] The applicant was covered by the sanctions regime because he fell within the category of family members of leading business figures in Myanmar. The Court then held that a

> regulation which contains sanctions against a third country applying to certain categories of its nationals is a general legislative act even if the persons concerned are identified by name. It is true that such a regulation adversely affects them directly and individually and they are entitled to bring an action to challenge it. However, in a legislative procedure culminating in the adoption of sanctions against a third country which apply to certain categories of its nationals, the rights of the defence are not applicable to them. For the establishment of such a regulation, individuals do not have rights of participation, even if they are ultimately individually concerned.[45]

Given also the Court's belief that the applicant already knew the basis of the legal measure against him and the facts relevant to him (essentially his family relationship

[43] The case is subject to appeal to the ECJ but no decision has yet been reached.
[44] Para 122
[45] para 123

with the business figure) no reason to overturn the renewal of the regulation had been presented. His challenge therefore failed.

These 'list' cases represent a direct challenge to the idea of the right to fair trial. Though they maintain the underlying human rights principle they also accept the importance of the broader political purpose and value of the political decision originally made. Whether this would apply should an applicant lose his/her liberty rather than simply access to wealth, is unclear.

The third component also relates to providing suitable information. The ECJ has accepted the principle that reasons for an adverse decision or judgment have to be provided. For instance in another case where restrictive measures were to be applied to listed organisations, the Court of First Instance decided in *People's Mojahedin Organization of Iran v. Council* that where an EU institution exercises a broad discretion it must 'examine carefully and impartially all the relevant elements of the individual case and … give an adequate statement of the reasons for its decision'.[46]

A fourth element is the right to be heard. This will only apply in restricted circumstances. *FNCBV and Others v Commission* confirmed that '[o]bservance of the rights of the defence is, in all proceedings in which sanctions, in particular fines, may be imposed, a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings'.[47] The Court of First Instance went on to confirm that

> where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it

[46] Case T-256/07*People's Mojahedin Organization of Iran v. Council* para 139.
[47] Joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission* para217.

> provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines.[48]

A fifth, associated, element of the right to a fair trial (and the right of defence) is the right to an appeal. *Walter Tögel v Niederösterreichische Gebietskrankenkasse* affirmed that national courts must determine whether the relevant provisions of domestic law allow recognition of a right for individuals to bring an appeal in relation to, in that case, the awards of public service contracts.[49]

Further components can be adduced from the way in which the ECJ has considered challenges to decisions and actions of the Commission with regard to anti-competitive behaviour. There is considerable overlap here with the notion of the 'right of defence' enshrined now in Article 48 EU Charter. The latter is expressly related to Article 6 ECHR so such a connection is understandable. Indeed, the ECJ has long accepted that the right of defence is crucial to maintaining the integrity of EU law and its role in reviewing the decisions of EU institutions directly impacting on a person. There are various aspects of this right worth identifying as contributing greater substance to the right to fair trial.

Hoechst AG v Commission of the European Communities provides a good example of the scope of these elements.[50] In this case, the Commission had grounds for suspecting that certain producers and suppliers of PVC and polyethylene had entered into agreements or concerted practices concerning the fixing of prices and delivery quotas. It decided to carry out an investigation. This included an attempt to search the premises of the applicant, who refused to allow access to their premsies on the grounds that this was unlawful. On review, the ECJ confirmed that respect for the rights of the defence constitutes a fundamental principle of EU law. They applied both to administrative procedures, which might lead to the imposition of penalties, and to associated preliminary inquiries. The Court stated that 'although certain rights of the defence relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation and the

[48] Ibid para 218.
[49] Case 76/97 *Walter Tögel v Niederösterreichische Gebietskrankenkasse*
[50] Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities*

privileged nature of correspondence between lawyer and client … must be respected as from the preliminary-inquiry stage'.[51]

This extension of rights is hardly revolutionary when I look at breadth of protections offered to individuals in different legal systems where some criminal sanction is being threatened. ECtHR case law has also established guidance for pre-charge treatment. Nonetheless, the ECJ recognises the principled need to protect persons from undue interference in their lives. As it suggested in *Hoecsht* the exercise of wide powers of investigation conferred on the Commission must be subject to conditions. These benefit undertakings as well as individuals.[52] So, the Commission is obliged to specify the subject-matter, the presumed facts and the purpose of any investigation not merely to show that the investigation is justified. In doing so, it must enable undertakings to assess the scope of their duty to cooperate. These requirements constitute a fundamental guarantee of the rights of the defence.

In *AM & S Europe Limited v Commission* the ECJ went further, looking at the legal privilege that would attach to correspondence between a corporation under investigation by the Commission and its legal advisors.[53] As it was common ground across national laws that written correspondence between independent (not employed) lawyer and client was subject to the protection of confidentiality then that was deemed to be an inherent right of defence. Various cases have considered this matter. On the whole they have assessed the limits of the Commission's powers to interfere with corporate affairs. But is this particularly relevant when it comes to assessing the depth and breadth of human rights in the EU? A cynical view might say this is another example of the corporate world using whatever legal arguments it needs to protect its interests. However, the principles that are being established may become relevant when (not if) EU institutional action impacts on the lives of individuals.

We can see some of this in the rights of defence cases that do *not* relate to business. These have mostly concerned EU staff matters. But increasingly those defence

[51] Ibid para 16.
[52] Interestingly, the Court did not accept that the right to the inviolability of the home, under Article 7 EU Charter, could be applied to undertakings. Business premises were treated differently across the Member States and therefore there was no consensus upon which to build a specific European right for similar protection to corporate premises.
[53] Case 155/79 *AM & S Europe Limited v Commission*

principles that relate to the rights to be assisted by a lawyer, to have full knowledge of the information used to reach a decision adverse to one's interests, to having the opportunity to appeal decisions, to a fair trial, and so forth, are going to have relevance for European Arrest Warrant cases and more generally the removal of immigrants from a Member State's jurisdiction in line with EU legislation. These areas are already attracting considerable critique by highlighting differences in procedural standards which impact on how fair trial rights are conceived and applied.

The case of Gary Mann is an example of the problems afoot. Mr Mann was convicted by a Portuguese court during Euro 2004 tournament under a procedure introduced to deal with suspected football hooligans. The details of the case matter less than the processes undertaken. An EAW was issued by the Portuguese authorities to extradite Mr Mann from the UK to Portugal some four years following his conviction. The High Court of England and Wales heard the appeal by Mr Mann against this warrant but concluded that it had no jurisdiction to intervene.[54] In reaching this judgment Lord Justice Moses recognised some serious failings in the original proceedings (lack of suitable translators, undue speed of the proceedings which were concluded within 48 hours of the alleged offence) and relied on a British police officer's description of that trial as a 'farce'. Despite this he ruled that he was compelled to allow the extradition to proceed. Mr Mann was returned to Portugal in May 2010 to serve the remainder of his four year prison sentence.

At the end of his judgment Moses LJ noted the 'serious injustice' that had been done to Mr Mann, although stressed he was referring to the wholly inadequate legal representation received both during the original trial and when Mr Mann was served the warrant in the UK. Nonetheless, the whole tenor of the judgment is condemnatory of the nature and quality of the procedure experienced by Mr Mann and the powerlessness of the Court to do anything about it. This can only develop tensions between national courts and processes which appear to subvert national

[54] *R. (on the application of Gary Mann) v City of Westminster Magistrates' Court and Others* [2010] EWHC 48 (Admin).

understandings of those fair trial rights. The increasing use of EAWs can only make such concerns more prevalent.[55]

Our conclusion therefore is that the core of this right in EU law is uncertain. Even though ECtHR case law may provide a bedrock of quality which the ECJ should follow, the complexities engaged through cross-border harmonisation will undoubtedly require a sophisticated judicial analysis that has yet to be seen at any European level.

The right to respect for private and family life

Article 7 EU Charter was deliberately phrased to reflect Article 8 ECHR. This is one of those rights where the broadening application of EU law measures means that the ECJ has had to search for underlying principles to resolve disputes.

As with the rights of defence, corporations have looked to respect for private and family life for arguments to resist investigative or other action by EU institutions (particularly the Commission). It is one of those rights that was considered fundamental by the ECJ prior to the EU Charter and therefore available for persons (natural or legal) to draw on. However, as EU law has developed, particularly in the old Third Pillar matters of justice and home affairs (incorporating immigration matters) the right has greater relevance.

Taking the corporate dimension first, businesses have often sought to rely on notions of privacy to prevent adverse interference in their affairs. *National Panasonic* determined that Commission action investigating anti-competitive practices had to accord with Article 8 ECHR but acknowledged that the exceptions in that provision would also apply.[56] So interference in private affairs was permissible to the extent to which it 'is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for

[55] The NGO Fair Trials International records various cases where problems exist within the EU system. See ….
[56] Case 136/79 *National Panasonic (UK) v Commission*

the protection of the rights and freedom of others'.[57] As the interference in question *was* allowed in law (through the Regulation) and was deemed necessary, the Commission did have the right to invasive investigation.

Interestingly though the scope of the more specific right to inviolability of the home was excluded for businesses. In *Dow Chemical* the ECJ decided that

> although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.[58]

The ECJ said that the right was 'concerned with the development of man's personal freedom and may not therefore be extended to business premises'.[59] Undoubtedly this will not stop corporations from arguing that this is too restrictive a reading.

Turning to the private individual, the ECJ has found on various occasions that respect for family or private life should be protected. The general principle was re-stated in *Chakroun* when the ECJ confirmed EU law recognised 'the obligation to protect the family and respect family life enshrined in many instruments of international law'.[60] *X v Commission* applied this obligation in the context of medical tests required in the selection of employees for EU institutions.[61] In that case the applicant was refused a temporary post with the Commission after various pieces of medical information were obtained from the candidate, who rejected an HIV test suggested by the Commission's medical officer. Blood tests had nonetheless been performed unbeknownst to the applicant. The Court was, it is fair to say, outraged by the doctor's

[57] Ibid para 19.
[58] Joined cases 97/87, 98/87 and 99/87 *Dow Chemical Ibérica, SA, and others v Commission* para 14.
[59] Ibid para 15.
[60] Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* at para 44, a case which concerned Council Directive 2003/86/EC laying down the conditions for the exercise of the right to family reunification by third-country nationals who are lawfully resident in the territory of Member States. See also Case C-540/03 *Parliament v Council*
[61] Case C-404/92 P *X v Commission*

behaviour and affirmed that the 'right to respect for private life requires that a person's refusal [of a medical test] be respected in its entirety.'[62]

The right has also been used to support claims associated with the functioning of the internal market. In *Baumbast* the importance of respecting family life was emphasised so that in cases where children had rights to remain in a territory, their primary carers (who did not have that right) should be allowed to stay with them.[63] Similarly, the free movement provisions have been interpreted so as to protect this right, but as part of the logic of a single market. This was exemplified in the case of *Carpenter*.[64] The ECJ noted that 'the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty'.[65] It believed in that case that the separation of Mr and Mrs Carpenter, which was to arise if the UK was to deny residence to Mrs Carpenter (a Philippine national) 'would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom.'[66] That freedom was to carry out his peripatetic business selling goods around EU countries. The removal of his wife from the UK was deemed to be a major interference in his work. The Court concluded that the 'decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.'[67]

The right to freedom of thought, conscience and religion

The ECJ has had little opportunity to engage in deep analysis of the impact of this right in EU law. Some cases have arisen which have been connected with religion to

[62] Ibid para 23.
[63] See Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*
[64] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*
[65] Ibid para 38.
[66] Ibid para 39.
[67] Ibid para 43.

some degree but this is not the same thing.[68] In *Vivien Prais v Council* however there was a more direct question to consider. But as I will see this was ducked.[69]

The applicant in that case had applied for a post with the Council as a translator, the process of selection for which included taking an examination. When told the date for this exam, the applicant wrote to the selection body to say that this coincided with a Jewish religious feast. Being Jewish the applicant requested a different date for the test to take place. This was refused. The ECJ ruled that the decision was justified. It decided that as the Council had not been informed of dates to avoid on religious grounds until after the date of the examination had been fixed, it was not therefore bound to rearrange the test. This appears to be based on an assessment of practicability or 'necessity' in the ECJ's language. As the test was supposed to be taken simultaneously by candidates in various locations throughout EU countries and everyone had already been informed of the date, it would have been impracticable to make alternative arrangements merely because one person could not attend. The ECJ noted that if the Council had been told in advance that there were dates which would make it impossible for a person of a particular religious persuasion to undergo the test then it would have been obliged to take reasonable steps to avoid those dates.[70]

This reasoning is hardly 'human rights friendly'. The onus was placed firmly on the individual to make representations. This could, of course, be justified on the basis that an institution should not have to second guess the sensitivities of all potential candidates and make arrangements accordingly. An obligation only arose once the institution was informed of that sensibility. Such reasoning might echo that often applied to disability discrimination, for instance, in that an employer might not be expected to cater for all hypothetical physical or mental disabilities. But such reasoning is inherently flawed when applied at least to the major religions. It would not have taken much administrative imagination to fix dates that did not conflict with the main festivals of the Jewish calendar as a matter of course. Certainly, it would be ridiculous to suggest that the Council would have considered holding the test on

[68] Some cases have had a religious component but have been treated as single market not rights issues. See for example Case C-54/99 *Association Église de Scientologie de Paris v. The Prime Minister* [2000] ECR I-1335 where restrictions on the Scientology Church was addressed without any reference to religious freedom.
[69] Case 130-75 *Vivien Prais v Council of the European Communities* 27 October 1976.
[70] Ibid para 19.

Christmas Day or indeed on a Sunday. This might be explained in relation to 'normal working days' but given that these are generally related to the Christian calendar an inherent discrimination appears to have taken hold. By arguing that 'necessity' superseded the need to respect freedom of religion the Court indicated the balance of power with regard to this particular human right.

It should be appreciated that *Prais* was decided in 1976 when the Court was only just beginning its jurisprudence in human rights and discrimination matters. Nonetheless, it recognised the existence and importance of the right in the abstract before appearing to favour administrative convenience over rights based appreciations. Few if any cases have arisen since to challenge this interpretation as regards the freedom of religion.

Freedom of expression and information

With the development of new media and information storage and delivery methods, the relevance of the right to freedom of expression has expanded exponentially. It is no surprise therefore that the ECJ has been called upon to explore the effect of this right in the context of EU law. The issue of 'data', its retention and transfer has confused the picture but for our purposes I will leave that matter for specific attention later.[71]

The most frequent concern has arisen in the conflict between the organisation of markets or economic activity through EU legislation and the right for enterprises or individuals to express themselves without undue restriction. Naturally, businesses engaged in the dissemination of information in one form or another have been adept at using the argument that the conflict should be resolved in favour of the right where some kind of economic impact has resulted from EU legislation. Although these have rarely managed to overturn acts prompted to realise an EU policy, the ECJ has applied its balancing approach and its principles of proportionality and necessity. Its starting

[71] It will be covered under Article 8 of the EU Charter which makes specific reference to the protection of personal data.

position was summed up in *Germany v. Parliament and Council.*[72] Asked to assess the compatibility of a directive banning tobacco advertising with the right to freedom of expression under the ECHR, the Court declared

> whilst the principle of freedom of expression is expressly recognised by Article 10 of the ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from Article 10(2) that freedom of expression may also be subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.[73]

The ECJ concluded that 'even assuming that the measures laid down in Articles 3 and 4 of the Directive prohibiting advertising and sponsorship have the effect of weakening freedom of expression indirectly, journalistic freedom of expression, as such, remains unimpaired and the editorial contributions of journalists are therefore not affected.'[74] The inference is that the interference in this particular right has to be fairly significant and direct for the ECJ to intervene. The availability of exceptions to the ECHR freedom therefore ensures that its strength against EU legislation is likely to be limited.

However, when direct interferences with an *individual's* freedom of expression occur a slightly different attitude is apparent. Certain staff cases, in particular, demonstrate this, the most notorious of which was *Connolly.*[75] In that case, Mr Connolly was an employee of the Commission. Without permission he published a book called 'The Rotten Heart of Europe' which criticised aspects of economic policy with which he was familiar as part of his job. The Commission dismissed him as a result of doing this without permission. Mr Connolly claimed the penalty was a breach of his freedom of expression.

[72] C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union*.
[73] Ibid para 154.
[74] Ibid para 158.
[75] Case C-274/99 P *Bernard Connolly v Commission of the European Communities*

In the course of its judgment the ECJ recognised again the possibility of limiting the exercise of the right to freedom of expression. It acknowledged that it may be 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'[76] It nonetheless confirmed that these limitations must be interpreted restrictively and pointed out that ECtHR case law interpreted the adjective 'necessary' as requiring 'a pressing social need'. Although the doctrine of the margin of appreciation should apply, any intreference with the right 'must be proportionate to the legitimate aim pursued and the reasons adduced by the national authorities to justify it must be relevant and sufficient'.[77]

This is the familiar refrain. However, having reviewed the case the Court concluded that it was 'legitimate in a democratic society to subject public servants, on account of their status, to obligations' involving confidentiality so as to 'preserve the relationship of trust which must exist between the institution and its officials or other employees.'[78] It held that although an individual's fundamental right to freedom of expression should be preserved, and permission to publish should not be refused other than in exceptional cases, it was perfectly proper for the EU institution to refuse permission 'where publication is liable to cause serious harm to the Communities' interests.'[79] That was deemed to be so in Mr Connolly's case.

However, in *Oyowe and Traore* the ECJ made explicit the exceptional nature of restrictions to be legitimately placed on any individual's freedom of expression.[80] It held that 'it must be borne in mind that … the duty of allegiance to the Communities imposed on officials in the Staff Regulations cannot be interpreted in such a way as to conflict with freedom of expression, a fundamental right which the

[76] Ibid para 40.
[77] Ibid para 41.
[78] Ibid para 44.
[79] Ibid para 53.
[80] C-100/88 *Augustin Oyowe and Amadou Traore v Commission of the European Communities*

Court must ensure is respected in Community law'.[81] The EU institution would have to provide objective justification for refusing any request to express oneself as desired despite being an EU employee. Hence in *Cwik* the right of an employee to publish was seen as immensely important.[82] The Court gave robust indications as to how any interferences would be considered an attack on 'one of the fundamental pillars of a democratic society'. Consequently, any restrictions would be interpreted restrictively. The ECJ advised that the relevant authority

> must balance the various interests at stake, taking account, first, of the freedom that an official has to express, orally or in writing, opinions that dissent from or conflict with those held by the employing institution - that freedom arising from the fundamental right of the individual to express himself freely - and, second, of the gravity of the potential prejudice to the interests of the Communities to which publication of the relevant text might give rise … In that connection, only where there is a real risk of serious prejudice to the interests of the Communities, established on the basis of specific, objective evidence, may the risk be taken into consideration.[83]

Apart from these specific staff cases, the bulk of legal concern has somewhat transferred to the thorny issue of data protection, as I have said.

Freedom of Assembly and Association

Few opportunities have arisen for the ECJ to either apply or indeed clarify this freedom if one discounts the formation and operation of labour unions. It is, yet again, one of those rights that although self-evidently applicable never seems to provoke challenges to EU actions or laws. Nonetheless there are exceptions where aspects of the rights of association and assembly have been engaged with EU law.

[81] para 16
[82] C-340/00 P *Commission of the European Communities v Michael Cwik*
[83] Ibid para 19.

The case of *Martinez, de Gaulle, Front National and Bonino and Others v European Parliament,* for instance, considered the interpretation and application of the European Parliament's Rules of Procedure.[84] In July 1999, a number of Members of the Parliament from various political factions had notified the President of the Parliament of the formation of a 'Technical Group of Independent Members'. The Parliament decided that the Group should be dissolved with retroactive effect for failing to comply with the Rules of Procedure. Although the application by Martinez and others was dismissed, the Court of First Instance confirmed that '[r]estrictions may be imposed, for legitimate reasons, on the exercise of freedom of association, provided that those restrictions do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of that right'.[85] It went on to conclude that the principle of freedom of association did not preclude the Parliament from making such an order provided it was 'based on legitimate grounds' and did not 'affect the right of Members [of the European Parliament] concerned to organise themselves into a group' in comformity with the Parliament's Rules.[86]

Another claim based on freedom of association was raised in *FNCBV*.[87] This was concerned with an anti-competition action brought by the Commission against French farmers' and slaughterers' organisations. The CFI held that although the freedom of association was a legitimate aim to be protected and agreements between employers and those representing employees were excluded from competition rules (on the basis that otherwise 'the social policy objectives pursued by such agreements would be seriously undermined') this did not mean that competition law did not apply to trades union at all. In the present case, the agreement did not relate to measures for improving conditions of work and employment, but to the suspension of beef imports and the fixing of minimum prices.[88] The Commission could therefore legitimately take action against such an association even though this would affect the freedom to associate.

[84] Joined cases T-222/99, T-327/99 and T-329/99 *Jean-Claude Martinez, Charles de Gaulle, Front national and Emma Bonino and Others v European Parliament*
[85] Ibid para 232.
[86] Ibid para 233.
[87] Joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v Commission*
[88] Ibid para 98.

However, the most high-profile intervention for the protection of the freedom of association and assembly occurred in *Schmidberger*.[89] Questions were raised there by the Austrian court in proceedings concerning the permission implicitly granted by the Austrian authorities to an environmental group to organise a demonstration on the Brenner motorway, the effect of which was to close that motorway to traffic for almost 30 hours. The applicant, a commercial haulier, complained that allowing the demonstration to proceed interfered with the free movement of goods provisions of the EC Treaty. The application was dismissed on the basis that although there was an obligation on the authorities of Member States to ensure the free movement of goods in its territory, by taking necessary and appropriate measures to prevent any restriction due to the acts of individuals, the protection of the fundamental rights to expression and assembly could outweigh that obligation. The national courts were declared to have a wide margin of appreciation in determining whether a fair balance has been struck between those competing interests. It is, however, for the ECJ to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, which in *Schmidberger*, was the protection of fundamental rights.

The Court confirmed, therefore, that pubic demonstration and protest by individuals, recognised in the fundamental rights to freedom of expression and assembly, can in certain circumstances interfere with market freedoms. Such action usually leads to some public inconvenience but this 'may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.'[90] However, the ECJ noted that

> unlike other fundamental rights enshrined in [the ECHR], such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the

[89] C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*
[90] Ibid para 91.

> aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.[91]

It is a matter for the national courts to determine whether any balance is fairly struck but for the ECJ to determine whether there has been proportionate interference in intra-Community trade. This is the division of responsibility that the ECJ set out.

It is quite possible to interpret this case as a victory for human rights. It could also be hailed as a sea-change in approach by the ECJ. The critique that fundamental rights were only tools for achieving the construction of a single market could be interpreted as challenged by this judgment.[92] There is certainly an argument to be made along these lines and some have done so. But one might also see it as a classic balancing of 'interests', where human rights may be weighed against the demands of the single market. That has always been possible. But is the Court too easily persuaded to prefer the interests of the market over those associated with human rights? *Schmidberger* does little to suggest that the Court will take a hard line for human rights from now on. Nor does it suggest that anything more than 'inconvenience' resulting from protecting rights will be tolerated. The ECJ did not consider what might be the response where there was a significant interference with intra-Community trade. What indeed would have been the decision if the protest had gone on for not 30 hours but 30 days without the Austrian authorities intervening? It is difficult to be confident that the ECJ would have continued to uphold the freedom of assembly in such circumstances.

The right to property

This particular right is contained in Additional Protocol 1 to the ECHR and replicated in Article 17 EU Charter. It has proven to be a constant reference for legal challenge

[91] Ibid para 80.

[92] The Coppell and O'Neill classic interpretation continues to haunt the ECJ at least from an academic perspective. This is a little surprising given that the critique was delivered in the early 1990s when the Court's approach was still essentially in its infancy. Even so their article remains frequently cited perhaps because its message continues to chime with many preconceptions that the EU is fundamentally a bureaucratic enterprise designed to deliver economic benefit not social justice. The ECJ is seen as a tool in this work not as a constraining body. Whether this is really still accurate is something I consider at the end of this chapter.

where economic interests have been affected by EU legislation or Member States failing, arguably, to implement EU law. It has been used as a defence in the 'sanctions' cases (which I have already reviewed above) to support arguments that the freezing of assets in the exercise of 'high policy' infringed this basic right of individuals. It has also surfaced when the Commission has attempted to apply its powers of seizure of documentary evidence in anti-competition investigations.

As with many other ECHR rights the right to property allows for exceptions. Restrictions or interferences are permissible 'in the public interest' where provided for in law. The ECJ judgment in *Hauer* referred to this in almost reverential terms.[93] It stated that Protocol 1 'accepts in principle the legality of restrictions upon the use of property, whilst at the same time limiting those restrictions to the extent to which they are deemed "necessary" by a state for the protection of the "general interest".'[94] The Court therefore recognised the need for a state, and by extension the EU operating as a community of States, to interfere with a person's property. It then set out its method for assessing the legality of such interference. Its test was whether 'with the regard to the aim pursued, [the restrictions] constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property.'[95] The question then seems to be whether action by EU regulation is for the common welfare, assessed according to a European rather than national or local perspective.

This opens the way for considerable latitude for EU institutional interference. If an EU measure is designed for the general interest, which is presumed to be the case given that it would be the product of a European legislative process that was ultimately approved by Member States, then any restriction of a property right would be prima facie justified. Only if the measure was applied in a discriminatory way or its impact was considered to be 'intolerable' (a term that suggests a pretty severe obstacle for an individual to overcome) would the ECJ intervene. The European common good would remain the prime concern, something that was almost unquestionably proven by any measure having been through the EU legislative route.

[93] 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*
[94] Ibid para 19.
[95] Ibid para 30 [check]

Of course this is a dangerous position to take. Although it might respect the common constitutional traditions test it would take little account of the particular individual impact, unless perhaps it was so grave that it ruined a person's livelihood. So, for instance in *Bosphorous* the seizure of aircraft by the EU in compliance with UN sanctions was deemed acceptable even though the impact on property was clearly significant. The aim sought through the sanctions, however, was deemed of far greater importance, thus demonstrating that the 'intolerable' test was hard to pass when matters of high policy were concerned. Whether such a case demonstrated action in the European general interest is difficult to say. The argument was rather made in terms of the international community interest and the necessary link with a European common welfare accordingly. The approach has been repeated with the 'sanctions' cases considered earlier. Even *Kadi* otherwise applauded by many as the ECJ almost coming of age as a guardian of human rights, essentially accepted the ability of the European institutions breaching an individual's fundamental rights where global security interests, evidenced by UN Security Council resolutions, were apparent. Anyone caught up in the web of high international politics, hardly guaranteed to be in the 'global interest' as opposed to certain powerful states' perceived interests, would find little protection ultimately from the ECJ. What price then the right to property?

The Right to Education

Article 14 EU Charter and Article 2 of Protocol 1 ECHR promote a right to education. Again the ECJ has rarely been required to apply its collective mind to this context. However, in the 1985 decision in *Gravier* the matter did arise.[96] Francoise Gravier, a student at the Academie Royale des Beaux-arts in Liege, and a French national, claimed that the city of Liege should be prohibited from requiring her to pay a fee called the *'minerval*' or enrolment fee which students of Belgian nationality were not required to pay. In the course of its judgment the ECJ held that 'although educational organization and policy are not as such included in the spheres which the treaty has entrusted to the community institutions, access to and participation in courses of

[96] C- 293/83 *Françoise Gravier v City of Liège*

instruction and apprenticeship, in particular vocational training, are not unconnected with community law.'[97] It stated that common vocational training policy 'constitutes … an indispensable element of the activities of the community, whose objectives include inter alia the free movement of persons, the mobility of labour and the improvement of the living standards of workers.'[98] It followed therefore that conditions regarding access to vocational training were covered by EU law. In particular, if it appeared that discrimination on the grounds of nationality had been exercised then this was in breach of one of the fundamental principles. This was the case in *Gravier* rendering the fee unlawful. But whether this promoted a right to education as such is difficult to deduce.

Two recent cases in 2010 have done little to treat the right to education more seriously. The ECJ still relies on associated rights, in relation to discrimination or residence. In *Maria Teixeira v London Borough of Lambeth et Secretary of State for the Home Department* the applicant's claim was based on an alleged right of residence resulting from her need to stay in the UK to look after her child who was over 18 but still in full time education.[99] The ECJ provided guidance on the scope of the right to education by holding that

> [a]lthough children who have reached the age of majority are in principle assumed to be capable of meeting their own needs, the right of residence of a parent who cares for a child exercising the right to education in the host Member State may nevertheless extend beyond that age, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education.[100]

Similarly in *Bressol* the Court confirmed that 'whilst European Union law does not detract from the power of the Member States as regards the organisation of their education systems and of vocational training – pursuant to Articles 165(1) and 166(1) TFEU – the fact remains that, when exercising that power, Member States must

[97] Ibid para 19
[98] Ibid para 23
[99] C-480/08 *Maria Teixeira v London Borough of Lambeth et Secretary of State for the Home Department*
[100] Ibid para 86

comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States'.[101] The Court said that Member States are free 'to opt for an education system based on free access – without restriction on the number of students who may register – or for a system based on controlled access in which the students are selected. However, where they opt for one of those systems or for a combination of them, the rules of the chosen system must comply with European Union law and, in particular, the principle of non-discrimination on grounds of nationality.'[102]

The Court went so far as to note that the international obligation regarding education in Article 13 of the UN International Covenant on Economic, Social and Cultural Rights, is subject to EU law provisions regarding the rights of EU citizens not to be discriminated against on the grounds of nationality and to be able to move freely within the EU. This does not necessarily mean that the right to education is in some way undermined. Indeed, *Bressol* suggests that national authorities cannot use the exceptions otherwise available under international human rights covenants to justify breaching EU protection for individuals. But still the implication that the right only gains form through its relationship with EU Treaty concerns (fundamentally market freedoms) seems to enhance the conditionality of the Court's approach to human rights in general. They are recognised but frequently only if connected with core principles relating to the maintenance of the single market.

2. Human Rights beyond the ECHR

So far I have reviewed the key rights that the ECHR and EU Charter have most directly in common. This is not to say that all other rights I am about to mention are ignored in ECtHR's jurisprudence. However, simply in terms of textual identification the Charter steps well beyond the mandate of the ECHR. Indeed, the ECJ has never felt constrained by the ECHR as a source of inspiration for human rights. It has always seen it as one important document but by no means the only one. Common

[101] C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* para 28.
[102] Ibid para 29.

constitutional traditions are to be respected but so too international human rights instruments that Member States have signed.

For this reason I can say that the ECJ jurisprudence might have a richer content at least from the perspective of scope. It is by no means easy, however, to identify the full extent of the field. When one looks at the range of rights covered by the Charter and considered, in one form or another, by the ECJ I find that there is little clarity about when economic management of the internal market ends and the promotion of human rights begins. Of course there will always a great deal of overlap between the two given the history of EU law and its economic focus. Nonetheless, after 40 years of ECJ jurisprudence the depth of appreciation of and for human rights (within and outside the Charter) remains far from clear.

Whilst recognising that I cannot provide a comprehensive review of all possible human rights issues I will now examine the key areas of rights-jurisprudence beyond the strict definitions of the ECHR. I will do this thematically in accordance with the six chapters of the EU Charter.

Dignity

The notion of human dignity has developed greater significance for the EU institutions over recent years. It has been embraced on various occasions to bolster the general rights of certain categories of persons or to provide a justification for defending particular interests. So the welfare of asylum seekers, children, and the elderly has all been promoted by reference to the requirement of respect for human dignity. Similarly, in trying to justify combating poverty, restricting audio-visual output, controlling organ donation, commenting on prison conditions and many other issues, various EU institutions have called on the concept of human dignity to define obligations. Whether this reflects the rather open and uncertain understanding of human dignity is a key question. It might suggest that the concept either means too much or nothing at all. Perhaps its usefulness lies in its malleability. It can be brought into play whenever an injustice appears but no existing right seems appropriate or applicable in the circumstances.

The potential value of human dignity has not been lost on the ECJ. The concept has been used to set out the limits of the principle that fundamental rights must be respected in EU law. AG Jacobs was the first to use it in such a positive fashion. In *Christos Konstantinidis v Stadt Altensteig* a preliminary ruling had been requested with regard to certain provisions of German law which required Greek names to be transliterated into Roman characters on official documents according to a system that was phonetically inaccurate.[103] The applicant wished his names to be transcribed in Roman characters as 'Christos Konstantinidis' on the ground that such a spelling indicated as accurately as possible to German speakers the correct pronunciation of his name in Greek. The German authorities considered that, as a matter of German law, the applicant's name had to be recorded in the marriage register as Hréstos Kónstantinidés. In fairly intense language AG Jacobs advised that it was possible to infer from 'the constitutional traditions of the Member States in general, the existence of a principle according to which the State must respect not only the physical well-being of the individual but also his dignity, moral integrity and sense of personal identity.' He argued that there there could not 'be any doubt that those "moral rights" are violated if a State compels someone to abandon or modify his name, unless at any rate it does so for a very good reason.'[104] He went on to claim that a 'person's right to his name is fundamental in every sense of the word … It is our name that distinguishes each of us from the rest of humanity. It is our name that gives us a sense of identity, dignity and self-esteem. To strip a person of his rightful name is the ultimate degradation'.[105]

Perhaps unsurprisingly the ECJ did not find it necessary to repeat Jacobs' words when it reached its judgment. But nor did it follow his reasoning. The Court managed to find for the applicant but on the basis of his economic position, suggesting that his right to his own name was inextricably linked to his right of establishment and his business generally. The matter of human dignity was not entertained, presumably because it saw no reason to be drawn into Jacobs' attempt to provide some kind of moral basis for fundamental rights.

[103] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig*
[104] Ibid para 39.
[105] Ibid para 40.

Nonetheless, Jacobs' sensibilities have provided inspiration for a legal interpretation of human dignity as a human right. Certainly the identification of human dignity as the primary right in the EU Charter has given the concept a sense of importance. However, the lack of judicial assessment of the term has meant that there is significant danger it could collapse into meaninglessness. It might be argued that it could also provide a means of addressing certain 'wrongs' which otherwise did not fall full-square within one of the other Charter rights. However, this could be detrimental *and* liberating for the judiciary. If the ECJ relied upon the right too frequently it would surely be criticised for entering too deeply into political territory. The Charter after all is supposed to represent the range of fundamental rights recognised by all Member States. Expanding that range through the vehicle of 'human dignity' would subvert the need for political rather than legal agreement.

The ECJ has dealt with this dilemma in two ways. First, it has not truly engaged with any attempt to give dignity a specific definition. Second, when used, dignity has reinforced a decision in relation to the application of fundamental rights to a particular situation.

The first of these approaches was apparent in *Omega*. The question considered initially by the AG was raised by a company which challenged the compatibility with Community law of a prohibition order by the Bonn police authority forbidding it from 'facilitating or allowing in its […] establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, "playing at killing" people'. The Bonn Authority took the view that the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity. The AG's Opinion attempted to present a sort of vague definition of human dignity in terms of EU fundamental rights; 'All in all, human dignity has its roots deep in the origins of a conception of mankind in European culture that regards man as an entity capable of spontaneity and self-determination. Because of his ability to forge his own free will,

he is a person (subject) and must not be downgraded to a thing or object.'[106] She continued: '[P]rotection of human dignity is afforded recognition as a general legal principle – and therefore forms part of primary legislation. It would therefore follow that, as far as possible, the Court should not allow any interpretation of fundamental freedoms that compels a Member State to permit acts or activities that are an affront to human dignity; in other words, it must be possible to admit under the public policy exception those considerations that relate to a right the protection and observance of which Community law itself demands.'[107]

The ECJ did not see the matter quite in the same terms. As the Community legal order was held by the Court 'to ensure respect for human dignity as a general principle of law' then 'the objective of protecting human dignity' was compatible with Community law regardless that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.[108] The Court declared that since 'both the Community and its Member States are required to respect fundamental rights, the protection of those 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 freedom to provide services'.[109] Human dignity was therefore afforded a recognised status as a fundamental right.

But for both the AG and the Court, dignity is not provided with a clearly separate definition in rights terms. Rather, it is recognised as a value, expressed in human rights language but chiefly in so far as it can be presented as a reason for a Member State sometimes to restrict economic freedoms. Did the Court express a view about whether simulated killing was an affront to human dignity? No. It merely accepted that the national authority *did* honestly and reasonably hold such a view. It is doubtful the Court would have been so enthusiastic if the national authority had banned all video games that involved simulated killing.

[106] C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* Opinion of Advocate General Stix-Hackl para 78.
[107] Ibid para 93.
[108] Ibid para 34.
[109] Ibid para 35.

In an earlier case, *Netherlands v. Parliament* the AG's Opinion looked at human dignity in relation to patenting biotechnological advances relating to the human body. Interestingly the AG relied on human dignity to reflect moral consensus rather than possess a specific non-contextual understanding. The AG stated that '[a] case-by-case evaluation of patent applications in the light of moral consensus is the surest guarantee that the right to human dignity will be respected, and that is the framework established by the Directive'. In other words, there is no fixed coordinates for dignity as a separate human right.[110]

The second approach, where dignity *supports* rather than contains an assessment of a wrong, has been evident in cases such as *Elgafaji*.[111] There the ECJ referred to human dignity as being worthy of protection in terms of the treatment of asylum seekers and refugees. However, there was nothing to separate this particularly from the protection against inhuman and degrading treatment under Article 4 of the EU Charter.

None of the above is to downplay the value of respecting human dignity as a core component of human rights. But that is a long way from affording such a right individual and particular application. How the Court develops its understanding if at all will represent a litmus test of how much it wishes to engage in and contribute to human rights development.

Freedoms

A large *tranche* of rights under this Chapter have already been discussed. But freedom for the EU in terms of its legislative practice has never been constrained by the ECHR. Within EU law it has had more to do with economic freedoms associated with a single market and a common border than developing deeper philosophical interpretations. It is no surprise therefore that other rights have appeared in this Chapter which are not directly replicated in the ECHR. In particular, the freedoms to choose an occupation (Article 15) and to conduct a business (Article 16) the right to

[110] See C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* para 201.
[111] C-465/07 *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*.

asylum (Article 18) and protection against expulsion or extradition (Article 19). All these have occasionally been considered in ECJ case law but rarely from the perspective of enforcing the EU Charter.

Nonetheless, the relevant decisions give clues about how the ECJ might respond in future to Charter inspired claims. In relation to the freedom to conduct a business the Court has for some time kept a strict interpretation of the power of such a right although recognising its importance when developing competition rules. *Nold* made it clear that the right 'can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.' The AG has advised that in 'adopting competition decisions the Commission is required to take account of the principle of contractual freedom and the freedom to conduct a business.'[112] Nonetheless, the overall position of the Court is that this right and the right to choose an occupation are not absolute but rather 'must be considered in relation to their social function.'[113] This leaves open the ability for the EU institutions to restrict these rights provided the reasons are good and authorised.

When it comes to asylum and extradition type rights, there has been little jurisprudence from the ECJ which might shed some light on their scope. The introduction of the European Arrest Warrant has somewhat deflected attention from any attempt to build a right to asylum that has any meaning outside what the Member States say should apply to those ending up in their territories. The ECJ is not the arbiter of these matters unless some common rules are agreed, which is the legislative intention. The Court thus awaits EU agreement.

Equality

The notion of equality has been at the forefront of EU jurisprudence since its inception. As with 'freedom' the concept of equality has been developed in terms of providing a level playing field for the market. Of course, other dimensions have arisen but the key concern is market related.

[112] C-441/07 P *Commission v Alrosa* para 226.
[113] Joined cases C-184/02 and C-223/02 *Kingdom of Spain (C-184/02) and Republic of Finland (C-223/02) v European Parliament and Council of the European Union*.

Even in this restricted field, the original provisions of the EEC Treaty and subsequent amending Treaties placed their emphasis on non-discrimination on grounds of nationality. This was the foremost concern at the time: ensuring that national preference did not undermine the construction of the common market. From this provision and the equal pay article (now Article 8 TFEU) the anti-discrimination movement in case law was established. There is no need to review this history here. The existing literature is particularly rich and accessible. It is sufficient to say that through the market gateway the ECJ has enabled the principle of non-discrimination to flourish. From the case of *Defrenne* in the mid-1970s onwards, the Court made the link between sex discrimination and unequal pay an expanding one for the benefit of individuals. This has been a unique judicial interpretation allowing the notion of rights to infiltrate into what was originally conceived as a market-organisational matter. By enabling individuals to see these market rules as protection against discriminatory practices was a great invention.

However, the EU Charter on equality draws in a wider range of possible issues. The inclusion of rights of the child, of the elderly and the disabled in particular (Articles 24-26), would suggest that the scope for equality related rights has been broadened. And in all these additional categories one could construct an optimist view of the role for the ECJ. The difficulty is how the ECJ can ever direct its gaze to such issues. The cases before it have to be in connection with EU law. National practices which discriminate against children, the disabled etc, are not within the jurisdiction of the Court unless some EU law dimension can be established. The danger therefore is that in the absence of relevant EU legislation the opportunities for the ECJ to build a valuable jurisprudence here will be limited. Article 19 TFEU reinforces this by retaining the general obligation on the EU 'to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' In the absence of that action the scope for interference is limited.

With such a restriction, few judgments and Advocate General opinions have arisen. There is even a hint of desperation to claims. For instance, in *Chatzi* a reference for a

preliminary ruling was made asking whether Council Directive 96/34/EC on the framework agreement on parental leave could be interpreted in conjunction with Article 24 of the Charter relating to the rights of the child so as to create 'a right to parental leave for the child'.[114] This was in the context of asking 'if twins have been born, [whether] the grant of one period of parental leave constitutes an infringement of Article 21 of the Charter of Fundamental Rights of the European Union on the grounds of discrimination on the basis of birth and a restriction on the right of twins that is not permitted by the principle of proportionality?' The Court of First Instance held that the Article 24 requirement that children 'are to have the right to such protection and care as is necessary for their well-being' did not mean 'that children have to be acknowledged as having an individual right to see their parents obtain parental leave.' The Court decided that it

> is sufficient for such a right to be conferred on the parents themselves. It is they who have both the right and the duty to bring up their children and who, for that purpose, can decide on how best to perform their parental responsibilities, in choosing whether or not to have recourse to parental leave.[115]

By contrast, in *Detiček* the ECJ was more willing to develop an understanding of the rights of the child.[116] There it considered how to interpret Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. It noted that Article 24(3) of the Charter, provided for the right 'to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child.' It then concluded that the Regulation could not 'be interpreted in such a way that it disregards that fundamental right.'[117] In the circumstances it decided that 'the wrongful removal of a child, following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and

[114] C-149/10 Zoe Chatzi v Ipourgos Ikonomikon
[115] Ibid para 39
[116] C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia*
[117] Ibid para 55.

direct contact with the other parent.'[118] Undoubtedly the Court was conscious of the questions of justice placed before it. And faced with an action by an individual that clearly prejudiced the interests of a child the judges were more comfortable proclaiming the priority accorded to the rights of the child rather than the parents. Whatever the merits of this decision the ECJ appears not wholly unwilling to develop this area of rights.

We also see reluctance to develop a particular understanding of the rights of the elderly. References are sporadic. One of the few examples was *Petersen*. This sought to interpret Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Ms Petersen sued the Westphalia and Lippe Appeals board for dentists after it refused to authorise her to practise as a panel dentist after the age of 68 years. She argued that this was discriminatory and in breach of the Directive. The ECJ was ambiguous in its response. The key matter was the aim of the national legislation. If it was to protect the public on the basis that older dentists were more likely to make mistakes then that was unjustified. If it was to spread the work opportunities between younger and older members of the profession then this would be more readily acceptable. The referring national court was left with establishing the real aim and therefore whether an unacceptable discrimination had taken place. Yet again I see the Court allowing considerable scope for a violation of a right to be excused provided the measure was 'appropriate and necessary for achieving that aim'. By contemplating discrimination on the grounds of age on the basis that younger people should be afforded more opportunities would seem to completely undermine a sense that the elderly should be protected. But of course this is the problem of political and economic exigencies overriding absolute interpretations of rights regardless of context.

Solidarity

Given the EU's predilection to build a single market that addressed most aspects of working and trading life it is unsurprising that the ECJ has had to consider many

[118] Ibid para 56.

rights-related issues in this area. The EU Charter has attempted to bring some order to these whilst at the same time introducing others which perhaps have less to do with rights and more to do with aspiration.

These pseudo-rights (in the sense that they do not really amount to rights) have only tangentially if at all troubled the ECJ. They do not really feature as rights in the Court's consciousness. In particular Articles 37 and 38 on environmental and consumer protection respectively are treated more as EU objectives rather than individually enforceable rights.[119] Both only talk in the Charter about a 'high level of protection' for each as part of EU policy. Indeed, rather than establish rights these articles may actually operate as a reason for adversely affecting other individual rights. Given the Court's recognition that fundamental rights are not 'absolute' but can be adversely affected where a general interest is being pursued, I could see the protection of the environment and the consumer entitling the Court to treat many other rights as secondary.[120] An individual may still seek review of a decision which has been made regarding the general interest in protecting the environment but the balance of power rests with policy.[121]

The same could be said for most of the other rights in this chapter of the EU Charter. Many of the employment related rights are recognised as such by the ECJ but generally they only gain recognition through EU legislation. They do not have much of an existence in the abstract.

Citizenship

The rights included in this section have provoked some judicial interpretation and application but on the whole they have not required in-depth assessment by the ECJ. Nonetheless, the rights here are those which most directly link individuals with EU institutions. So the right to petition EU institutions (Article 44) and reference to the

[119] On environment see C-176/03 *Commission v. Council*
[120] See *Wachauf*
[121] See C-24/09 *Djurgården-Lilla Värtans Miljöskyddsförening v AB Fortum Värme samägt med Stockholms stad*

European Ombudsman (Article 43) are protected through practice. They rarely feature in case law.

There has been some jurisprudence in relation to electoral rights and issues of transparency. In the former the Court has said that it is up to each Member State to determine who has the right to vote in any national context.[122] On matters of transparency there has also been a slight reluctance to do more than accept that a right to access to documents should apply. The details of that right remains uncertain however. In *van der Wal v Commission* the ECJ applied Decision 94/90/ECSC, EC, Euratom on public access to Commission documents although it accepted the need to restrict such access in exceptional circumstances. It was the exception that had to be policed so as to ensure that any refusal was justified as being in the public interest. The exception remains the key area of contention in practice. It is not something the ECJ has or perhaps can solve.

Finally under this Chapter I should refer to the right to free movement and residence (Article 45). This has considerable presence in case law mainly because it reflects the internal market designation as one of the original EC Treaty's four freedoms. Its presence therefore has more to do with constructing the single market than it does with establishing a fundamental right. Nonetheless, here it stands as an individual right that the Court has sought to protect in EU law.

Justice

Many of the rights identified in the Chapter on Justice are related to issues otherwise contained in the ECtHR's understanding of what amounts to a fair trial. In that sense I have already looked at a range of matters that the ECJ has confronted in this respect. It is unfortunate, however, that the epithet 'Justice' should be so constrained particularly given that criminal justice hardly captures people's thinking on such a theme. Justice for the ECJ has inevitably been associated with criminal process and procedure rather than anything more substantial in terms of the organisation of society

[122] C-145/04 *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*

and the distribution of resources. Civil legal action is also included but this hardly extends the remit of this body of rights to encompass wider notions of justice.

Nonetheless, with the development of the European Arrest Warrant even these rights may become threatened. The idea that this system should mean less review by national courts of other member State courts' demands for EU internal extradition has pointed some to note the different standards applied to trial rights across the EU Member States. Notorious cases have highlighted the fundamental rights implications of the system as I have already seen.[123]

Despite this, the ECJ does have a rich tradition of acknowledging the rights of individuals to protection from interference in their affairs by EU institutions. Many cases have been heard that relate in particular to the powers of the Commission concerned with the investigation and enforcement of competition legislation. Stating reasons for a decision, protecting lawyer-client confidentiality, providing for proper representation and judicial review of decisions, all figure prominently in the ECJ's understanding of fundamental protections for the individual person (legal or natural). Of all the rights mentioned in the EU Charter this is an area where the Court has been able to develop some jurisprudence that has had some regular airing. But of course it only rarely applies to the general public. Businesses on the whole are the interested parties.

4. Conclusion

The ECJ's future challenges are both administrative and philosophical in nature. The constitutional reform in the Lisbon Treaty of December 2009 has changed the legal environment but at this early stage there is precious little evidence to show what the effects of these changes will be. Nonetheless, some challenges will persist despite the reforms; other new ones can also be predicted. The ECJ will need to confront these at a fundamental level. Until now, the philosophy it has practised has focused on giving

[123] See discussion on fair trial rights above.

effect to the Treaties. In particular this has involved priority for the completion and maintenance of the internal market. With the advent of the Lisbon Treaty (which has amended the Treaty of European Union (TEU) and introduced a Treaty on the Functioning of the EU (TFEU))[124] the Court may no longer consider itself so constrained. Deciding how it will develop its approach is therefore largely a question of a philosophy of EU law. How will it approach promoting human rights as the new TEU requires? How will it oversee an improvement in the access to its judicial review function in relation to EU charter matters? And how can it manage its role if accession takes place?

[124] This represents a revised EC Treaty with aspects of the old TEU incorporated as well.