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THE EUROPEAN COURT OF JUSTICE: AN ACTIVE ENFORCER OF FREEDOM, OR A PASSIVE PLAYER IN THE EC GAME?

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In an ordered society of mankind, there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom . . . is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty.¹

I. INTRODUCTION

Despite the European Community's (EC) efforts in moving towards a more united Europe through its fusion of several economic and political institutions and policies, the EC has failed to implement any structure to protect the fundamental freedoms accorded to each individual, thereby raising concerns about continued European unity, national sovereignty, and jurisdiction.² One of the main foundations of international law, the UN Charter (the Charter), "contains two basic axioms which may sometimes come into conflict."³ First, the Charter ensures each State its sovereign equality as well as its territorial integrity. At the same time, however, "there is the aim of promoting and encouraging respect for human rights and fundamental freedoms for all."⁴ In most

* J.D. candidate, University of Denver Law School, 2000. I would like to thank my family for their unconditional love and support in every challenge I undertake. I would also like to thank Martha Keister, without whom, this paper would never have taken shape.

1. E. Barrett Prettyman, retired Chief Judge, U.S. Court of Appeals, in a speech at Law Day Observances, 1962, at the Pentagon, *quoted in Case and Comment*, March-April, 1963, 26.

2. See Tara C. Stever, *Protecting Human Rights in the European Union: An Argument for Treaty Reform*, 20 *FORDHAM INT'L L. J.* 919 (1997).

3. S. D. Bailey, *The Security Council*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 304 (P.H. Alston ed., 1992), *quoted in* Peter R. Baehr, *The Security Council and Human Rights*, in *THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE* 15 (Rick Lawson ed., 1994).

4. *Id.*

instances however, States will refer to Article 2, section 7 of the Charter, which supports the first axiom, to "prevent the effective implementation of the latter."⁵

Because the EC Member States are also members of the UN, each State has a right to assert its sovereignty.⁶ However, all Member States are signatories to the European Community Treaty (EC Treaty) and most States are signatories to the International Covenant on Civil and Political Rights.⁷ Both of these documents, as well as European case law, explicitly refer to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) "by which all Member States have consented to be bound."⁸ However, because there is no formal written Bill of Rights for the Community incorporating the Convention into Community law, some States adhere to the Convention and other States do not.⁹ Although the European Court of Justice (ECJ) has taken to regularly referring to the Convention in its decisions, States continue to dispute the Court's jurisdiction.

Unlike most national constitutions, the EC Treaty explicitly fails to catalog the "fundamental rights and freedoms upon which citizens can rely against the governmental authorities."¹⁰ The ECJ attempts to protect these fundamental rights by "classifying them as general principles of Community law, referring to the common constitutional traditions of the Member States and to international instruments, in particular the Convention."¹¹ Since the Court has held that Member States are to consider fundamental rights as a part of Community "law" as suggested by Article 164 of the EC Treaty,¹² the ECJ must attempt to ensure that the individual Member States as well as the Community as a whole, honor fundamental rights.¹³

This case-note will demonstrate that by denying itself the jurisdiction to guide individual Member States in interpreting the conformity of national laws to Community laws, the ECJ is failing to protect the fundamental freedoms of the EC citizens. This paper is divided into three

5. *Id.*

6. *See generally* U.N. CHARTER, art. 73.

7. *See generally* TREATY OF ROME, Mar. 25, 1957, [1957] 298 U.N.T.S. 11 (1957) [hereinafter EC TREATY]; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (1976).

8. *See also* G.C. Rodriguez Iglesias, *The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities*, 1 COLUM. J. EUR. L. 169, 175 (1995).

9. *See Stever, supra* note 2, at 957.

10. Inge Bernaerts, *Opinion 2/94*, 2 COLUM. J. EUR. L. 372, 372 (1996).

11. *See id.*

12. Article 164 of the EC Treaty states, "The Court of Justice shall ensure that in the interpretation and application of this Treaty, the law is observed." EC TREATY, *supra* note 7, art. 164.

13. Bernaerts, *supra* note 10, at 372.

sections. First, an examination of the case of *Kremzow v. Republik Osterreich*. Next, an in-depth analysis of the prior legal authority the ECJ incorporated into its decision. Finally, a discussion regarding the implications of the ECJ's decision.

II. FRIEDRICH KREMZOW V. REPUBLIK OSTERREICH—A HISTORICAL OVERVIEW

In December of 1982, Friedrich Kremzow, a retired Austrian judge, confessed to the murder of an Austrian lawyer, a statement he later retracted.¹⁴ In December of 1984, the District Court found Kremzow guilty of murder and the unlawful possession of a firearm and sentenced him to twenty years in a mental institution.¹⁵ Kremzow appealed to the Supreme Court of Austria regarding the lower court's sentence. The Supreme Court, in a hearing during which Kremzow was absent, upheld the lower court's finding of Kremzow's guilt, however, the Court changed the twenty-year sentence in a mental institution to life imprisonment in a civilian prison.¹⁶

At his appeals hearing, Kremzow argued that his fundamental right to freedom of movement was at stake.¹⁷ Historically, scholars have regarded freedom of movement only in the context of economics, and not as a fundamental human right within the realms of the European Community. However, in this case, the European Court of Human Rights (ECHR) and the European Commission (the Commission) considering the "nature" of the freedom at risk reviewed Kremzow's case stating that Kremzow should have been allowed to defend himself pursuant to Article 6(3)(c) of the Convention.¹⁸ The ECHR held that "Article 6 of the Convention had been violated," and Kremzow was entitled to monetary damages for legal fees and expenses.¹⁹

Following the ECHR judgment, Kremzow again found himself in the Austrian civil courts. This time in his appeal he requested the resolution of three issues: (1) a reduction in his sentence pursuant to paragraph 410 of the Austrian Code of Criminal Procedure; (2) the payment of damages pursuant to Article 5(5) of the Convention for his

14. Case C-299/95 *Kremzow v. Republik Osterreich*, [1997] 3 C.M.L.R. 1289, at para. 3 (1997) [hereinafter *Kremzow*].

15. *Id.*, 3 C.M.L.R. at 2640, at para. 4.

16. *Id.* at para. 5.

17. *Id.* at 2642, para. 11-12.

18. *Id.* at 2640-42, para. 6. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(3)(c), 312 U.N.T.S. 221 (1950) [hereinafter the Convention]. *Kremzow v. Austria*, Eur. Ct. H.R. (ser A), no. 268 B (1993).

19. *Kremzow*, 3 C.M.L.R. at 2640-42, at para. 6.

unlawful detention; and (3) the Court's recognition of the fact that the Articles of the Convention are directly applicable under Austrian law and give rise to a legitimate claim for infringement on his right to liberty of person.²⁰ The Austrian court rejected Kremzow's claims pursuant to paragraph 2(3) of the Austrian Law on State Liability, which contradicted the articles of the Convention,²¹ thereby holding Austrian law above Community law.

Kremzow next appealed to the Austrian Supreme Court. He argued that although the ECHR had determined that the State had violated Kremzow's rights under the Convention, the Courts had failed to rectify these violations.²² Kremzow beseeched the Court to reference the ECJ for a preliminary ruling on two main questions: (1) are all or at least the substantive law provisions of the Convention, including the provisions of Articles 5, 6, and 53 of the Convention which are relevant to the proceeding before the Supreme Court, part of Community law (Article 164 of the EC Treaty), with the result that the ECJ may give a preliminary ruling on their interpretation pursuant to the first paragraph of Article 177 of the EC Treaty;²³ and (2) if the first question was answered in the affirmative, there was an inquiry as to whether national courts are bound by ECHR decisions under particular circumstances pursuant to Articles 5 and 6.²⁴

Kremzow justified ECJ jurisdiction over this case based on the argument that because he is a citizen of the European Community, he is entitled to the right to freedom of movement for persons, as articulated in Article 8, section (a) of the EC Treaty.²⁵ Further, he stated that because any citizen is entitled to move freely between the Member States without any specific intention to reside, "a State which infringes that fundamental right, guaranteed by Community law, by executing an unlawful penalty of imprisonment must be held liable in damages by virtue of Community law."²⁶

The ECJ ultimately held that it did not have jurisdiction because the legislation in question was outside the scope of Community law. The Court said:

[w]here national legislation is concerned with a situation which, as in the case at issue in the main proceedings, does

20. *Id.* at 2641, at para. 7.

21. *Id.* at 2641-42, at para. 9.

22. *Id.* at 2642, at para. 11.

23. *Id.* at 2642-43, at para. 12(1)-(2).

24. *Id.*

25. *Id.* at 2644, para. 13. Article 8(a) of the EC Treaty states: "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." EC TREATY, *supra* note 7, art. 8a.

26. *Kremzow*, 3 C.M.L.R. at 2644, at para. 13.

not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling, give the interpretive guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the Convention.²⁷

The ECJ based its holding on the fact that its interpretation of the provision, regarding the freedom of movement of persons found in the EC Treaty, was not consistent with Kremzow's interpretation.²⁸ Thus, although the deprivation of liberty prevents a person from exercising freedom of movement, the Court did not find a sufficient connection with Community law to justify the application of Community provisions.²⁹ The ECJ reiterated that the Austrian Court had sentenced Kremzow for murder and the illegal possession of a firearm under Austrian national law.³⁰ The ECJ went on to establish that Austria had never intended Community law to address the national law in question.³¹ Therefore, according to the Court, the national legislation in this case dealt with a situation outside the scope of Community law.³²

Although several European States agreed to membership in the EC, the States wanted to ensure the preservation of individual sovereignty. The unification process, which commenced after World War II, was the result of European State's "desire for economic and political unity and stability."³³ However, in order to progress without a loss of rights, Member States agreed to institutions such as the ECJ to maintain the framework of the Community.³⁴ The States continued to restrict the power of the Community through limitations on Community law. Thus, although Community law was supreme over national law, "the European Community [was] a system of limited competences. Member States approve the transfer of competences to a central institution," thereby creating an internal limitation on the Community.³⁵

In effect, the Member States attempted to secure their sovereignty through the guarantee that the Community would never have too much power, since the individual States were the ones supplying the Community with its power. Thus, States left many laws, including criminal laws under national legislation, thereby creating an area of law under

27. *Id.* at 2645, at para 15.

28. *Id.* at para. 16.

29. *Id.* at para. 13.

30. *Id.* at 2646, at para. 17.

31. *Id.*

32. *Id.* at para. 18.

33. *See Stever, supra* note 2, at 931.

34. *See id.* at 935.

35. *Id.* at 941-42.

which the ECJ was not meant to accept jurisdiction. In the case at hand, Kremzow's violations were ones that the Member States never intended the Community to deal with, and thus fell out of the scope of ECJ jurisdiction. What the Member States failed to realize was that although many laws would fall under national law, there was an entire body of human rights violations, which (1) protected citizens of the Community as a whole, (2) superseded national law, and (3) gave the ECJ the necessary jurisdiction to hear the case. Thus, Kremzow's unlawful detention justified the request to the ECJ to hear his case, and the ECJ legitimately had jurisdiction over the case.

III. ANALYSIS OF PRIOR LEGAL AUTHORITY

In *Kremzow*, the ECJ stated it has consistently held that "fundamental rights form an integral part of the general principle of Community law whose observance the Court ensures."³⁶ This principle was first espoused in 1969, through *Stauder* in which the Court considered the regulation of butter within the Community.³⁷ Council Regulation 804/68 allowed Member States to provide cheap butter to those who required governmental assistance.³⁸ In order to control the amount of butter the Member States could provide to its residents, the regulation required that "[t]he Member States shall adopt all the measures necessary to ensure that . . . the beneficiaries of the measures only obtain butter in return for a coupon issued in their name."³⁹ *Stauder*, a resident of Ulm, felt that it was "discriminatory to require the beneficiaries to reveal their name and address to the retailer."⁴⁰ *Stauder* argued that requiring an individual's name on a coupon breached the basic rights laid down in the German Constitution.⁴¹ The *Stauder* case led the Court to explore the role of the individual within the Community for the first time. The ECJ established that it must ensure the observance of "the fundamental rights of the individual contained in the general principles of the law of the Community."⁴² The Court based this determination "on the very general provision of Article 164 of the EC Treaty, which requires the Court to 'ensure that in the interpretation and application of [the] Treaty the law is observed.'"⁴³ *Stauder* was the first

36. *Kremzow*, 3 C.M.L.R. 2644, at para. 14.

37. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 415, [1969] 9 C.M.L.R. 112, 113 (1970) [hereinafter *Stauder*].

38. *Id.*

39. *Id.* at 113.

40. *Id.*

41. *Id.*

42. *Id.* at 119.

43. Jean-Marie Henckaerts, *The Protection of Human Rights in the European Union: Overview and Bibliography*, 22 INT'L J. LEGAL INFO. 228, 231 (1994). See also EC

case to emphasize that "the law" did not focus merely on the economic and political aspects of the Community; it also included the "fundamental rights of the individual."⁴⁴ Since *Stauder*, the Court has incorporated this reasoning in several cases, exhibiting an apparent commitment to protecting individual fundamental freedoms.⁴⁵

The problem with the *Stauder* decision is that it is not explicit in defining what rights were considered fundamental rights. In *Internationale Handelsgesellschaft mbH v. Einfuhrund Vorratstelle fr. Getreide und Futtermittel*,⁴⁶ the Court attempted to create a more succinct description of what the term "fundamental freedoms" included. The Court stated that the "protection of basic rights is inspired by the common constitutional traditions of the Member States, but must, nevertheless, be ensured within the framework of the structure and objectives of the Community."⁴⁷ In *Internationale Handelsgesellschaft*, a German Administrative Court wanted to override Community regulations because they were inconsistent with the German basic law.⁴⁸ Although the Court emphasized the supremacy of Community law, it went on to say, that "respect for basic rights forms an integral part of that law."⁴⁹

In order to ensure these basic rights, the Court in *Nold v. Commission* stated that along with common constitutional traditions among the Member States, it drew inspiration from international treaties for the protection of human rights on which the Member States had collaborated or of which they were signatories.⁵⁰ As Jean-Marie Henckaerts observes, after the *Nold* decision, there was an "increasing reliance on international treaties, more specifically the Convention. Rather than to commence with a comparative constitutional study on each case, the Court made use of an existing catalogue of human rights that all Member States had already agreed upon, namely the Convention."⁵¹

The most significant aspect of the *Nold* decision was the standard it set for future ECJ decisions regarding the role of human rights within the Community setting. *Nold* suggested that the Community's position

TREATY, *supra* note 7, art. 164.

44. *Id.*

45. See generally Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhrund Vorratstelle fr. Getreide und Futtermittel*, 1970 E.C.R. 1125, [1970] 11 C.M.L.R. 255, (1972) (emphasizing the supremacy of Community law); Case 4/73, *J. Nold, Kohlen-und BaustoffgroBhandlung v. Commission of the European Communities*, 1974 E.C.R. 491, [1974] 14 C.M.L.R. 338 (1974) [hereinafter *Nold*] (discussing the rights of the individual within the Community).

⁴⁶ *Internationale Handelsgesellschaft*, 11 C.M.L.R. at 283, para. 4.

47. *Id.* at 257-58.

48. *Id.*

49. Henckaertes, *supra* note 43, at 232-33.

50. *Nold*, 14 C.M.L.R. at 354.

51. Henckaertes, *supra* note 43, at 232.

on human rights issues was actually grounded in individual Member States.⁵² Member States created the basis for the Community's position on human rights issues through adherence to treaties and constitutions as well as numerous Member States' recognition of the Convention. Because 'human rights' was now a "Community" issue, *Nold* laid the foundation for future decisions, despite the lack of *stare decisis* in ECJ decisions.

One such case, relying on *Nold*, was *Elliniki Radiophonia Tileorassi v. Dimotiki Etairia*.⁵³ In this case, the Thessaloniki Regional Court asked the ECJ for a preliminary ruling on the interpretation of several provisions of the EEC Treaty and the Convention "in order to determine the compatibility with these provisions of a national system of exclusive television rights."⁵⁴ The Court, referring to one of its past decisions,⁵⁵ held that the Convention, which was created to "promote greater cooperation and understanding of common human rights between European States",⁵⁶ "has special significance."⁵⁷ For this reason, "the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed."⁵⁸ Although the Court in *Elliniki* advocated Community concord through a general acceptance of Community law, the Court's position in *Kremzow* still gives a great deal of deference to the national laws of individual Member States.

The ECJ's deference to individual Member States' laws is very clear in *Kremzow's* holding. The *Kremzow* court stated that it had no jurisdiction concerning "national legislation lying outside the scope of Community law."⁵⁹ In making this determination, the Court referred to *Society for the Protection of Unborn Children Ireland (Society)*, in which the Court determined that the question of abortion fell within the parameters of the health, welfare and safety of State citizens, protected by State law.⁶⁰ In *Society*, the ECJ stated the circumstances giving rise to ECJ jurisdiction. The Court held that "where the [national] rules do fall within the scope of Community law, the Court must provide guidance through a preliminary ruling, in making interpretations to whether the

52. See generally, *Nold*, 14 C.M.L.R. 338.

53. Case C-260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikouv. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avedellas and others*, 1991 E.C.R. I-2925, [hereinafter *Elliniki*].

54. *Id.* at para. 1.

55. See Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] E.C.R. 1651, 1986 3 C.M.L.R. 240 (1986).

56. Stever, *supra* note 2, at 949.

57. *Elliniki*, 1991 E.C.R. at para. 41.

58. *Id.*

59. *Kremzow*, 3 C.M.L.R. at 2645, at para. 15.

60. See Case C-159/90, *The Society for the Protection of Unborn Children*, 1990 E.C.R. I-4685, [1991] 3 C.M.L.R. 849 (1991).

rules are compatible with the fundamental rights ensured by the Court's interpretation of the Convention."⁶¹ In *Kremzow*, the national law in question regarded Kremzow's sentence for murder and the illegal possession of a firearm which the Court concluded were "provisions of national law which were not designed to secure compliance with rules of Community law."⁶² The Court justified its lack of jurisdiction on the premise that the national legislation in the *Kremzow* case related "to a situation, which [did] not fall within the field of application of Community law."⁶³ The Court also failed to recognize Kremzow's absence from the sentencing as a deprivation of his liberty.⁶⁴

The Court, referring to *Moser* stated that "[w]hilst any deprivation of liberty may impede the person concerned from exercising his right to free movement . . . a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions."⁶⁵ The case to which the Court analogized was one in which Moser, a German national was denied the right to "undertake the post-graduate training necessary to secure entry . . . to the post of a teacher . . ."⁶⁶ The National Court asked the ECJ for a preliminary ruling as to whether the defendant's "legislation was compatible with the principle of free movement of workers contained in Article 48 of the Treaty."⁶⁷ The Court's reference to the *Moser* holding was inaccurate. The distinction between the two cases was that in *Moser*, the fact that Moser had not attempted to find a job in another Member State, but was merely raising the issue, created the "hypothetical situation." In *Moser*, the Court actually refers to "[a] purely hypothetical prospect of employment in another Member State . . ."⁶⁸

On the other hand, in *Kremzow*, the ECJ did not have to create a hypothetical situation to "justify the application of Community provisions."⁶⁹ Article 6 section 3(c) of the Convention explicitly states "[e]veryone charged with a criminal offense has the following minimum rights: to defend himself in person or through legal assistance of his own choosing . . ."⁷⁰ When the Supreme Court altered Kremzow's sen-

61. *Id.* at 892, at para. 31.

62. *Kremzow*, 3 C.M.L.R. at 2646, at para. 17.

63. *Id.* at para. 18.

64. *Id.* at para. 19.

65. *Id.* at 2645, at para. 16, citing Case 180/83, *Hans Moser V. Land Baden Wurttemberg*, 1984 E.C.R. 2539, [1984] 3 C.M.L.R. 720 (1984) [hereinafter *Moser*].

66. *Id.* at para. 2.

67. *Id.* at 725, para. 4. See also EC TREATY, *supra* note 7, art. 48.

68. *Moser*, 3 C.M.L.R. at 728, at para. 18.

69. *Kremzow*, 3 C.M.L.R. at 2645, at para. 16.

70. Article 6(3)(c) states: "Everyone charged with a criminal offence has the following minimum rights:...(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free

tence, he was not present at the hearing. This lack of representation was a blatant violation of the Convention. Article 5 of the Convention states that "[e]very person has the right to liberty and security of person."⁷¹ However, where one "has been the victim of arrest and detention in contravention of provisions of this Article shall have an enforceable right to compensation."⁷²

Although the national legislation in question dealt with murder, a crime not covered under Community law, the procedures regarding detention within individual Member States must comply with the Community law. Again, in *Kremzow*, the Court erroneously referred to past case law in the *Maurin* decision.⁷³ In this case, Mr. Maurin, a French national charged with selling food products after their expiry date, argued a violation of the Convention "concerning observance of the rights of the defence and of the adversarial nature of proceedings."⁷⁴ The French government, the United Kingdom, and the Commission argued that the ECJ lacked jurisdiction because "the national legislation falls outside the scope of Community law . . . [and] the national court has not cited any provision of Community law and therefore does not raise any issue concerning the interpretation or validity of Community law."⁷⁵ The ECJ held that "[t]he Court does not have jurisdiction to determine whether procedural rules applicable to offenses under national legislation which falls outside the scope of Community law may be in breach of the principles concerning observance of the rights of the defense and of the adversarial nature of proceedings."⁷⁶

Again, the distinction between *Maurin* and *Kremzow* is that Community law makes no explicit provisions regarding procedural issues dealing with the "defense and adversarial nature of proceedings."⁷⁷ However, the Community law *does* make express provisions for procedural issues regarding detention. Thus, the sentencing of *Kremzow*, while a purely procedural issue, clearly falls under the provisions of Community law and should have provided the ECJ with the necessary justification for jurisdiction.

IV. IMPLICATIONS OF THE *KREMZOW* DECISION

For the past thirty years, the ECJ has claimed to put fundamental rights at the forefront of its decision-making—"an integral part of the

when the interests of justice so require" The Convention, *supra* note 18, art. 6(3)(c).

71. The Convention, *supra* note 18, art. 5.

72. *Id.*

73. See generally Case C-144/95, *Criminal Proceedings Against Jean-Louis Maurin*, 1996 E.C.R. I-2909.

74. *Id.* at para. 12.

75. *Id.*

76. *Id.*

77. *Id.*

general principle of Community law whose observance the Court ensures."⁷⁸ Yet, the very foundation of the EC was purely economic, to create a stronger and more unified Europe to compete in a global economy.⁷⁹ As Linda Hantrais points out, "only twelve of the 248 articles of the EC Treaty were devoted explicitly to social policy."⁸⁰ At what point did human rights become a central issue within a "community" created for economic stability? This is a very important question for it helps one to determine the efficacy of current human rights regimes in the EC.

In order for human rights laws to have any effect within the Community, each Member State must ensure uniform enforcement of the laws. As the ECJ has stated in the past, every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights, which the latter confers on individuals.⁸¹ Accordingly, the national courts must set aside any provision of national law, which may conflict with Community law, whether prior, or subsequent to the Community rule.⁸² However, when the issue is one of fundamental rights, an area where States do not always agree, often they will turn to the ECJ and the ECHR for guidance.

The EC Treaty established the ECJ, which from the beginning had very limited international jurisdiction over cases dealing with disputes between Member States of the EC.⁸³ Since its inception, the number of cases over which the ECJ presided has increased steadily, providing the Court with the "domestic enforcement mechanisms for its judgments."⁸⁴ Scholars consider the ECJ's effectiveness in regards to its adjudication of Article 177 cases.⁸⁵ However, compliance with ECJ decisions has been inconsistent and has forced the ECJ to turn to private parties and domestic courts and hold that "a [S]tate that fail[s] to implement a Community directive could be required to pay compensation to injured private parties."⁸⁶

The ECHR interprets the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁷ Although originally only a few countries outside of Western Europe ratified the Convention, "as of 1997 forty nations from Iceland to Russia have signed on to the

78. *Stauder*, 9 C.M.L.R. at 119.

79. Linda Hantrais, *Social Policy in the European Union 2* (1995).

80. *Id.* at 2.

81. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, [1978] 23 C.M.L.R. 263, 283-84 (1978).

82. *Id.*

83. See Laurence Helfer, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 290 (1997).

84. *Id.*

85. See *id.* at 292.

86. *Id.* at 293.

87. *Id.*

treaty and one or more of its various protocols.”⁸⁸ The problem here, similar to the problem with the ECJ, deals with enforcement of the rulings. Despite the fact that all of the parties to the EC Treaty “undertake to abide by the decision of the Court in any case to which they are parties,”⁸⁹ the adherence to the judgment varies a great deal.⁹⁰ Only half of the signatories to the Convention have incorporated the EC Treaty into domestic law.⁹¹ While this allows these particular Member States’ nationals to invoke the EC Treaty and partake of its benefits, the other half of the countries have not made the treaty a part of domestic law, and thus, once again citizens are left to deal with the Member States’ inconsistencies in enforcing the Court’s rulings.

Both of these courts have many similarities and differences. On the one hand, both are “supranational courts with no direct means of enforcing their judgments and thus are apparently dependent on the goodwill of national governmental institutions.”⁹² On the other hand, however, whereas the ECJ “interacts with national courts in a kind of partnership based on distinct but complementary spheres of jurisdiction . . . the ECHR is more likely to be in the position of reviewing the handiwork of national courts in a more traditional hierarchical relationship.”⁹³ Thus, although the ECHR is more narrowly tailored to human rights issues, it seems that ECJ’s direct interaction with individual Member States might be more successful at attaining a uniform means of dealing with these issues within the Community.

One should recognize that over the years the ECJ has had an immense influence over the formulation of European human rights law. As discussed earlier in the note, ECJ cases such as *Nold* and *Stauder*, have assisted in the development of Community human rights law. As Vincent Power asserts, ECJ decisions have done more to aid the progression of Community law “than the actions of the Council of Ministers and the Commission or the aspirations of the European Parliament.”⁹⁴ Although the creation of the ECHR was for the purpose of protecting the fundamental rights of EC members, one must consider the lack of enforceability on the part of the ECHR. Without any mechanism for enforcing its decisions, it seems that the judgments of the ECHR are valueless, unless Member States voluntarily adhere to the decisions. One should think of the ECHR as a “work in progress.” The concept of a court, which deals primarily with human rights issues, is admirable;

88. *Id.* at 294.

89. The Convention, *supra* note 18, art. 53.

90. *Helper*, *supra* note 83, at 295.

91. *Id.*

92. *Id.* at 297.

93. *Id.*

94. Vincent Power, *Human Rights and the EEC*, in HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 82 (1994).

however, unless and until the Community takes a different approach to implementing and enforcing decisions, the ECHR continues to encounter many obstacles.

In such progressive times, one must consider whether the ECHR is up to the task of meeting the needs of all its citizens. For example, consider the fact that the Preamble to the Convention refers to "countries with a similar tradition."⁹⁵ At the inception of the Convention, countries with "similar traditions" referred exclusively to Western European Countries.⁹⁶ How will Eastern European countries fare under this system? Brian Walsh argues that many scholars believe that "Eastern European countries will liberally interpret human rights, and that these countries desire to conform to what they believe is the requirement of natural law."⁹⁷ It is true that if a country wants to become a Member State, it is likely to agree to any terms the Community sets forth. However, as history has demonstrated with other human rights institutions, agreeing to adhere to the law and actual adherence, are two completely different issues.

Proponents of the ECHR would probably argue that whether it is the ECHR or the ECJ, both have to interpret the Convention. Thus, why not allow an institution which focuses primarily on human rights to interpret a document pertaining to human rights? The answer is simple. While the ECJ would interpret the same laws as the ECHR, the ECJ, central to the functioning of the Community as a whole, would have a more direct influence upon the individual Member States. One must accept that although social policy is gaining momentum within the Community, "there is little concrete evidence that European social policy is perceived by the Council as other than a handmaiden to economic objectives."⁹⁸ Whereas Member States have recognized a reciprocal relationship between economic and social policy, the concurrence seems to support the notion that "[a] good economic policy may be a major requisite for an efficient and adequate social policy, but a good social policy can be a powerful support for a good economic policy."⁹⁹ This type of thinking clearly indicates that despite the Community's progress in areas of social policy, and more specifically human rights, the underlying foundation continues to focus on economic policy.

Another aspect of the argument focuses on the premise that because the Member States created the ECJ for the purpose of promoting the Community's goals, the ECJ is more likely than the ECHR to gain compliance from the Member States. Additionally, because the law as

95. Brian Walsh, *International Human Rights Before a Domestic Court*, 70 ST. JOHN'S L. REV. 77, 92 (1996). The Convention, *supra* note 18, at preamble.

96. *Id.* at 92.

97. *Id.*

98. HANTRAIS, *supra* note 79, at 15.

99. *Id.*

the Member States set forth and agree upon limits the ECJ, it can never have any real power. Thus, if it oversteps its boundaries, the Member States will systematically withdraw from the Community and its laws. This is not the case. One must keep in mind the economic purpose of the EC. This being the case, Member States want to see the Community prosper as a whole, as this would allow each individual State to flourish as well. The desire of individual Member States to achieve the most stable and prosperous economic setting is enough of an incentive for the States to ensure the prosperity of the Community as a whole. It is important to note that the ECJ is willing to respect the Constitutions of individual Member States, declaring in the *Nold* decision that "it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States."¹⁰⁰ Although the ECJ accepts State sovereignty to an extent, it also recognizes that too much deference could be detrimental to the Community as a whole. For this reason the Court has stated that "special criteria for assessment stemming from the legislation or constitutional law of a particular member State would, by damaging the substantive unity and efficacy of Community law, inevitably lead to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community."¹⁰¹

Member States have not put as much time and effort to create a stronger and more unified Europe, only to see it fall as a result of individual States failing to comply with Community law. It is this prevailing attitude that Member States have demonstrated that gives the ECJ the capability to enforce its decisions. The situation in the EC is much like that of the United States. The power of Member States to restrict the ECJ is comparable to the system of checks and balances in the United States. Unlike the United States Supreme Court, which has an express bill of rights, some scholars argue that it is impossible for the ECJ to uphold fundamental rights as the EC does not contain a bill of rights at all.¹⁰² However, although the United States Constitution contains a bill of rights, there is still disagreement as to what constitutes a fundamental right.¹⁰³ Whereas fundamental rights in the United States often appear abstract and difficult to uphold, the ECJ through the *Stauder* decision "confirmed that human rights were enshrined in the

100. Iglesias, *supra* note 8, at 169.

101. *Id.*

102. See Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1105 (1986).

103. See generally, *Lochner v. New York*, 198 U.S. 45 (1905); *Griswald v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973) (although all of these cases discuss the concept of fundamental rights, none of these decisions explicitly define what constitutes a fundamental right).

general principles of EEC law and were enforceable by the ECJ.¹⁰⁴ As one scholar notes,

[t]he ECJ is now using human rights not only to defend the supremacy of Community law but also to extend the jurisdiction of the ECJ. In finding that Community law was superior to national law, the ECJ had to fill the gap of national protection of human rights by finding some means of Community based protection.¹⁰⁵

V. CONCLUSION

The implication of the *Kremzow* decision is crucial to the sustenance of the Community. It is unlikely that the current regimes are sufficient for the simple reason that the underlying foundation of the Community is economic—that is to say that there are many inconsistencies among the States when it comes to human rights laws. Thus, individual fundamental rights are not the unifying force of the Community. For this reason, it would seem that until all of the individual Member States consistently adhere to the human rights regimes, most notably the ECHR, the ECJ must assume jurisdiction over cases dealing with individual fundamental rights. In taking on such cases, the ECJ would not be usurping the ECHR's authority, but rather it would be fulfilling its obligation of ensuring that these rights are enforced for the individuals of the Community until more consistency is created among the Member States. By failing to assume jurisdiction to guide individual Member States in interpreting the conformity of national laws to Community laws in the *Kremzow* case, the ECJ failed to ensure the fundamental freedoms of European Union citizens that it guaranteed to protect.

Despite the fact that the Community chose to narrowly tailor the ECHR to deal with human rights issues, its lack of enforcement ability is a significant hindrance. Although proponents of the ECHR argue that it has had an impact on Community laws, one must keep in mind that the decisions are not binding on any State, and thus, aside from the goodwill of each State, there is little incentive to comply. On the other hand, the ECJ is more central to the actual functioning of the EC. The underlying principles in the creation of the EC were primarily economic, and the ECJ was supposed to promote the goals that Member States had set forth for the Community as a whole. This being the case, individual States, while wanting to preserve their sovereignty, recognize that if the Community as a whole is to prosper, compliance with the ECJ's decisions is necessary.

104. Power, *supra* note 94, at 82.

105. *Id.*

The ECJ is willing to respect the Constitutions of individual States, however, it is in the position to give limited deference to the States for the simple reason that States want to maintain Community cohesion. Much like the system of checks and balances in the United States, each institution has the ability to ensure the prosperity of the Community, while protecting the individual rights of its citizens. As Jeremy Bentham once stated, "[r]ights are the fruits of the law and of the law alone; there are no rights without the law—no rights contrary to law—no rights anterior to law."¹⁰⁶ If the EC wants to protect the rights of its people, it is imperative that it allows the ECJ to assume jurisdiction until the Community attains more uniformity regarding the observance of human rights laws. If not, individuals and States will continue to violate fundamental rights without fear of consequences or castigation.

106 Walsh, *supra* note 95, at 79.