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Reversal of Fortune: How the German Courts Found Their Human Rights and Helped the European Courts Find Theirs

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REVERSAL OF FORTUNE: HOW THE GERMAN COURTS FOUND THEIR
HUMAN RIGHTS AND HELPED THE EUROPEAN COURTS FIND THEIRS

Henry Biggs*

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I. INTRODUCTION

The formation of the German *Grundgesetz*, or “Basic Law,” after the Second World War, was steeped in a melting pot of political and social forces dramatically different from those found in our twenty-first century landscape. Indeed, even the choice of the term *Grundgesetz* over *Verfassung* (“Constitution”) was motivated by forces unfamiliar to us today, *viz.*, a West Germany hoping for an imminent reunification with its Eastern half.¹ Of primary influence at the time

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were two political ideologies that took great stock in the human as collective: (1) Totalitarianism, particularly as realized by Hitler's Third Reich, its full dehumanizing horror searingly fresh in the minds of the *Grundgesetz* drafters;² and (2) Communism, which effaced the individual through its singly purposed celebration of the collective.³ The drafters of the *Grundgesetz* were contrarily greatly fueled by a desire to respond with an ideological exaltation of the individual and so set out to enunciate the necessary basic human rights needed to realize that vision.⁴

Over the next forty years, the resulting *Grundgesetz* text played its fair part as a beacon against the westward creeping of Communism and its success as a powerful expression of individual rights has led politicians and scholars to an increased interest in arguing for their constituents' ownership. German interests, for example, have often argued the credit belongs to visionary German drafters who astutely amended the mistakes of previous German Constitutional efforts; American interests have contended the credit belongs rather to Allied and particularly American legal and American constitutional influences.⁵

encouragement and access to materials during my time in Bochum, Germany; to Professor Matt Gabel and Dean Michael Peil of Washington University in St Louis for invaluable comments; and finally to Dean Peter Cramer for his assistance proofing German translations. All errors are my own. I would also like to thank the Saint Louis University School of Law for the Bochum fellowship which led to this research.

¹ KURT RABL, CHRISTOPH STOLL & MANFRED VASOLD, VON DER AMERIKANISCHEN VERFASSUNG ZUM GRUNDGESETZ DER BUNDESREPUBLIK DEUTSCHLAND 138 (Verlag Moos & partner eds., 1988).

² GERHART HOFFMEISTER, KURT FRANK REINHARDT, FREDERIC C. TUBACH, FROM THE NAZI ERA TO GERMAN UNIFICATION 116 (1992).

³ FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 307 (Kevin Boyle & Juliet Sheen eds., 1997). As stated "The 1949 Constitution (Basic Law or *Grundgesetz*) was formed in a context dominated by two factors: first, as a reaction against the National Socialist dictatorship and also against the liberal democratic Weimar Republic, and second by its formation in the context of the Cold War. ... The German constitutional order consequently perceives itself as not 'free of [moral or ideological] values' (*wertfrei*). Rather, the fundamental values of the new democratic order are to be actively protected against threats from outside and within, whether moral or ideological as well as military or physical." *Id.*

⁴ *Id.*

⁵ Among the Allied Forces—America, Britain and France—it is generally agreed that the Americans had the strongest influence of the three due to their relative economic

National biases likely play a part in these arguments, and the truth likely, and more prosaically, lies somewhere in between.⁶ To

health at the end of the war. For a table listing GDPs of all countries during and after the war, see MARK HARRISON, *THE ECONOMICS OF WORLD WAR II* 10 (1998). Harrison notes that in 1945 America had a GDP of \$1474 (in billions), whereas the UK had a GDP of \$331, and France \$101. *Id.* See also Tony Judt, *The Past Is Another Country: Myth and Memory in Postwar Europe*, in *THE POLITICS OF RETRIBUTION IN EUROPE: WORLD WAR II AND ITS AFTERMATH* 294 (István Deák, Jan Tomasz Gross & Tony Judt, eds., 2000). As Judt states: “Western countries ... suffered terrible material loss—during the fighting of 1944–45, France lost the use of some 75 percent of its harbors and rail yards and half a million houses were damaged beyond repair. Even unoccupied Britain is calculated to have lost some 25 percent of its entire prewar national wealth as a result of the war.” For a still further detailing of the economic, physical and psychological devastation following the Second World War, see TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* 13–240 (The New York Press ed., 2005).

⁶ For a thorough summary of those supporting the various positions of Allied vs. German involvement in the formation of the *Grundgesetz*, see EDMUND SPEVACK, *ALLIED CONTROL AND GERMAN FREEDOM: AMERICAN POLITICAL AND IDEOLOGICAL INFLUENCES ON THE FRAMING OF THE WEST GERMAN BASIC LAW (GRUNDGESETZ)* 13–29 (GESCHICHTE SER. NO. 36, 2001); see also CJ FRIEDRICH AND HJ SPIRO, *THE CONSTITUTION OF THE GERMAN FEDERAL REPUBLIC GOVERNING POSTWAR GERMANY* 150 (1953). Those who have argued that Germany was handed its Constitution effectively as a *Diktat* from the Allies have contended that the Germans involved at the time were shells or fronts, termed as *Lizenzdemokraten* (“Licensed Democrats”) or “*Erfüllungspolitiker*” (“Political Fulfillment Personnel”), puppets who presented a front for the Constitution to appear to be German-made. Those supporting this position also point to the compelling similarities between the American Constitution and the *Grundgesetz*, for example the insertion of a basic list of human rights at the outset of the document. SPEVACK, *ALLIED CONTROL AND GERMAN FREEDOM* at 26. See also GERD EHRLICH, *EINFLUSS DES ANGELSÄCHSISCHEN VERFASSUNGSDENKENS AUF DIE ENTSTEHUNG DES GRUNDGESETZES* 40 (Klaus Stern ed., *JAHRE GRUNDGESETZ*, 23–31, 1990). On the other hand, for those in support of the contrary argument for German influence, one can look at the manifest similarities of the *Grundgesetz* to previous German Constitutional documents. Striking similarities can be seen when placing the Weimar Constitution directly next to the *Grundgesetz*. The following example relates to the language concerning Property:

Weimar Constitution, Art 153:

Das Eigentum wird von der Verfassung gewährleistet. Sein Inhalt und seine Schranken ergeben sich aus den Gesetzen...Eigentum Verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste. [“Property shall be guaranteed by the Constitution. Its substance and limits arise from the laws. Property obliges. Its use should also serve the Common Good.”] [Author’s Translation]. *Grundgesetz für die Bundesrepublik Deutschland* [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. 14 (Ger.).

argue that there was no Allied influence in face of the unconditional German surrender and the extensive documentation of the close monitoring of the *Grundgesetz* formational meetings by the American General Lucius Clay is to ignore extensive documentation to the contrary.⁷ By the same token, to contend that Americans unilaterally drafted the *Grundgesetz* while the Germans looked on is to deny principles and exact language in the *Grundgesetz* that harken to former German Constitutions and bespeak a thoughtful German presence in the drafting.⁸

Regardless, the overarching desire to stand in principled contrast to the idea of the philosophies of the collective was clearly a driving force in the *Grundgesetz*' formation, and the drafters ultimately settled on the overarching principle of Human Dignity (*Menschenwürde*) to serve as the core principle. From this bedrock principle, the drafters enunciated a series of fundamental rights that would protect

14(1) *Das Eigentum wird von der Verfassung gewährleistet. Sein Inhalt und seine Schranken werden durch die Gesetze bestimmt.*

14(2) *Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.*

[“Property shall be guaranteed by the Constitution. Its substance and limits are defined through the laws. Property obliges. Its use should also serve for the well-being of the community”] [Author’s Translation].

A counter-argument to this example of German legal theory in turn might fairly be put forth that the Weimar Constitution itself does not constitute true German thinking in that it was heavily influenced by the victors of the First World War, but the parallel is nonetheless striking. For an analysis of the Allies influence upon the *Grundgesetz* and of all of the positions relating to influences on the *Grundgesetz*, see SPEVACK, ALLIED CONTROL AND GERMAN FREEDOM at 16–26.

⁷ For example, Lucius Clay’s advocacy for greater Länder (state) rights in the German federation, see DIETRICH ORLOW, COMMON DESTINY: A COMPARATIVE HISTORY OF THE DUTCH, FRENCH, AND GERMAN SOCIAL DEMOCRATIC PARTIES, 1945–1969 85 (2000); for perspectives on the genesis of the Basic Law, see also SPEVACK, *supra* note 7, at 13–26.

⁸ If indeed the drafting involved collaboration between the Allied parties and the Germans, some have suggested further that the Allied forces, and particularly the Americans, may have been more eager for this to appear to be the case than for it to actually be the case. For more on this point of view, see Edmund Spevack, *American Pressures on the German Constitutional Tradition: Basic Rights in the West German Constitution of 1949*, 10 INT’L J. POL., CULTURE, & SOC’Y 411–36 (1997).

that human dignity and provide individuals with the basic needs that would enable them to flourish as such.⁹

These enunciated rights, however, often came with something of a twist—an accompanying duty, sometimes explicit, to the individual's undergirding duty to preserve this individual right by, ironically, a commitment to his collective, i.e., the State. That duty was distinct from the American version of inalienable rights in that the purpose was not to enunciate an absolute freedom from government intrusion, but rather a relative freedom that balanced government and larger community interests in its calculus.¹⁰

Perhaps nowhere has this balance between the State and the individual been more uniquely developed in German constitutional law than in Article 14 of the *Grundgesetz* relating to Property ("Eigentum") and the accompanying Social Duty ("Sozialbindung" or "Sozialpflicht") articulated by the German Constitutional Courts ("BundesVerfassungsGericht" or "BVerfG").¹¹ As developed over the

⁹ GERT-JOACHIM GLAESSNER, GERMAN DEMOCRACY: FROM POST-WORLD WAR II TO THE PRESENT DAY 21 (2005).

¹⁰ Rainer Arnold, *A Fundamental Rights Charter for the European Union*, 15/16 TUL. EUR. & CIV. L. F. 43, 45 (2000–2001). Arnold stated specifically that "[t]he end of the Second World War opened a new era in European constitutional thinking. The general trend through various phases is a transition from state orientation towards a more anthropocentric approach: the dignity of man is conceived as the highest and most sacred value at the top of each constitutional order. On this basis an effective fundamental rights protection evolves, often institutionally backed by a constitutional court. New instruments such as recognition of the principle of proportionality as a limitation on state intervention into the individual's sphere and the guarantee of fundamental rights (starting from the German "*Wesensgehaltsgarantie*" laid down in Article 19 of the German Basic law of 1949) become common in European Constitutional Law in the second half of the twentieth century. State power as well as supranational power concentrate on the welfare of the individual."

¹¹ As noted in von Münch's *Grundgesetz Kommentar*:

Art. 14 gewährleistet Eigentum und Erbrecht. "*Als verfassungsrechtliche Aussage über die Eigentumsordnung ist die Vorschrift von zentraler Bedeutung für die Stellung des einzelnen im Staat und für die Gesellschaftsordnung insgesamt. Es ist daher nicht erstaunlich, daß dieser Artikel und seine Auslegung in der gesamten Geschichte der Bundesrepublik im Zentrum politischer Auseinandersetzungen um die Gestaltung der Wirtschafts- und Gesellschaftsordnung gestanden hat und noch steht.*" [**Art. 14: Guaranteed Property and inheritance.** As a legal constitutional statement concerning property law, the regulation is of central significance for both the position of the individual within the State and for the order of the community overall. It is therefore

years, the concept broadly described is that German property identical in nature may carry different compensatory obligations from the State, depending on that property's centrality to that owner's "Human Dignity" needs. If that property serves as a person's only means, it carries necessarily a greater compensatory obligation from the State than the same property owned by a speculative real estate developer. Furthermore, that property's monetary value may be counter-balanced by the criticality of the need enunciated by the state—the threatening of a city's water resources, for example, will weigh more against the individual property owner's degree of compensation than, say, the State's desire to build a road that may or may not absolutely need to run across one's land.¹²

While Germany's notion of *Sozialbindung* offers a unique tension between private rights and public interest in property, it was not the only effort of the time to work toward enunciating such a tension. The drafters of the European Charter of Human Rights (ECHR) also wrestled contemporaneously with the idea of property as a core human right, trying to balance the needs of the individual with differing national ideas of the role of the collective. Language that would not alienate socialist countries proved a crucial and nettlesome task. While the drafters did not want to allow for indiscriminate takings by the government, they also did not want to eliminate any possibility for governments to expropriate land if it served the common interest.¹³ The final articulation and balancing of this property

not surprising that throughout the entire history of the Federal Republic of Germany, this Article and its interpretation have been and still are at the center of political debates relating to the formation/creation/design of the Economic and Society Order.”] [Author's Translation]. GRUNDGESETZ KOMMENTAR: BAND 1 PRÄAMBEL. ART 1–19, 884 (2000).

¹² See *Nassaukiesung*, BVerfG, BVerfG 1981 58 BVerfGE 300 (F.R.G) and *infra* III, 1.

¹³ A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (3d ed. 1993). As stated by Robertson and Merrills regarding the necessary attention to socialist countries: “any clause designed to guarantee the enjoyment of possessions would not be acceptable to socialist governments unless it was made quite clear that this would not prevent the State from nationalizing private property.” *Id.*

right indeed proved enough of a challenge that it was not included among the ECHR's first Articles.¹⁴

Over the long term this effort to balance the needs of the collective and the individual in articulating property rights would *also* come to play a role for The Charter of the European Union (EU), developed soon after the Second World War as well, but initially conceived for economic recovery purposes only. In terms of defining property rights from a human rights perspective or enunciating human rights generally, the EU would entirely neglect to articulate them in its founding Charter, focusing myopically, but perhaps understandably, on its economic mission. Over the next fifty years this lacuna would cause headaches for the EU, and particularly its judicial arm, the European Court of Justice (ECJ). Addressing the issue with patchwork jurisprudential efforts, the absence of a clearly defined property right would finally be more satisfactorily addressed by a fully articulated and codified Charter of Fundamental Rights under the ECJ, ratified in 2010 by the Treaty of Lisbon. Ultimately, it is the curious, and at times counterintuitive, interplay of these three legal perspectives, each in its own way wrestling with collective and individual needs as seen through property rights, that will be the focus of this paper.

We will begin with a deeper analysis of the unique approach to property ownership as understood through Article 14 of the *Grundgesetz*, particularly the social duty (*Sozialbindung*) inherent in Article 14. In Part II, our focus will turn to how the German notion of Property, as defined through Article 14 of the *Grundgesetz*, has been articulated through case law in the German Constitutional Court ("*BundesVerfassungsGericht*" or "*BVerfG*"). In Part III, we will move to the notion of property as it has been articulated in the European Courts, specifically, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). Part IV will take a closer look at procedure of the supra-national courts and address how that procedure offers a particularly powerful opportunity for the ECJ, a court with an economic focus, to influence the ECtHR in its human rights decisions. Finally, Part V will take an applied look at that process,

¹⁴ They settled instead on including Property the following year in the Charter's First Protocol. *Id.*

analyzing the *Bosphorus* case to better understand the interplay between the two supranational courts, the ECJ and the ECtHR, as they address fundamental human rights issues.

II. *EIGENTUM* (PROPERTY): ARTICLE 14 OF THE GERMAN *GRUNDGESETZ*

As enunciated in Article 14(1) of the *Grundgesetz*, “[p]roperty is guaranteed by the Constitution.”¹⁵ As that Article articulates immediately thereafter, however, and somewhat incongruously, the limit of that property right is ultimately delineated by the government and its legislature: “Its [property’s] content and boundaries will be defined by law.”¹⁶ Furthermore, Article 14(1) follows with an explicit statement of a duty to the community of property ownership: “Its use should at the same time serve the welfare of the Community.”¹⁷

As analyzed by the German Constitutional Courts, this approach to property ownership vests property rights of individuals in relation to how central that property right is to their ability to realize their human potential—in short, in subjective rather than objective terms.¹⁸ This subjective judgment does not relate only to the individual’s property interest. As stated earlier, the importance of the *State’s* interest also enters into the German court’s compensatory calculus, as it is understood that the German Government must in turn show it has a community need or interest it is trying to meet that is truly compelling.¹⁹

This notion of a sliding scale of compensation is foreign to U.S. Constitutional understandings of property, which strive to compensate real property more objectively through the Takings Clause, without entering into any subjective questioning of the centrality of the

¹⁵ Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. 14(1) (Ger.) [Author’s translation].

¹⁶ *Id.* [Author’s translation].

¹⁷ *Id.* [Author’s translation].

¹⁸ Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 ARIZ J. INT’L & COMP. L. 389, 393 (2007). Lubens goes on to say: “The German State under the Basic Law ... is authorized to pursue a “socially just property order” by balancing individual freedom against the interests of the general welfare, and German courts regularly refer to this affirmative duty of the property owner and of the state.”

¹⁹ Grundgesetz, *supra* note 16, at art. 14(2).

property to the owner's real needs.²⁰ How this German right functions is perhaps best seen in several cases of particular notoriety, which we will focus on in the next section.

A. German Constitutional Court Cases

1. Nassauskiesung Decisions

In the *Nassauskiesung* (*Gravel Mining*) decisions, a gravel business concern claimed a recent law that had been passed constituted a Taking in that it prevented them from using the water that the gravel company had been using, which flowed under its own property.²¹ While the German Supreme Civil Court ruled in favor of the company for compensation, the *Bundesverfassungsgericht* disagreed, stating that when the issue related to "vital public resources" such as water, there was no right that had been taken and no compensation was therefore due.²² The *Bundesverfassungsgericht* held further that the challenged law had appropriately defined the limits ("*Schranken*") of individual property rights, and thus related to Article 14(1), with the consequence that no compensation to the individual, as defined under 14(3), would be required.²³

²⁰ As Lubens states: "German courts have interpreted the social obligation (*Sozialpflicht*) in Article 14, the property clause of the German Constitution, to justify more extensive land-use regulation than U.S. takings jurisprudence allows." Lubens, *supra* note 19, at 392.

²¹ *Id.* at 409.

²² "Bei einem knappen Gut, das ... für die Allgemeinheit von lebenswichtiger Bedeutung ist, wäre eine solche Regelung unverträglich." [With a scarce resource that is of vital importance to the general public, such a regulation would be unacceptable.] [Author's Translation]. BVerfGE 58, 300 – Naßauskiesung ¶201, available at <http://www.servat.unibe.ch/dfr/bv058300.html#Rn210>.

²³ Art. 14(3) states:

"Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit unter der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen." Grundgesetz, *supra* note 16, at art. 14(3). ["An expropriation is only permissible if for the welfare of the Community. It may only occur through legislation or on the basis of a law that regulates type and degree of compensation. Compensation is to be determined under a just weighing of the interests of the community and of those involved. Regarding the degree of compensation, parties can take legal action before a court of full jurisdiction in case of a dispute."] [Author's translation].

It is fair to say that this holding clarifies the German notion of Property in some respects but muddies the waters elsewhere. Specifically, for our purposes it clarifies to a degree how the *Bundesverfassungsgericht* interprets these boundaries, but it also makes clear those boundaries are fungible. This naturally leads to questions as to *how* mutable one's property rights are under German law. If the *Bundesverfassungsgericht* can hold that a new municipal law modifying those rights can be judged appropriate, then what is to stop that property right from being whittled down over time to a meaningless nub for the individual?²⁴ It is a fair question, and underscores the fact that Article 14 creates an unusual constitutional flexibility in terms of property, so that what is a property right now may not be a property right later if society's fundamental needs change.²⁵ The *Bundesverfassungsgericht's* sense of where property's constitutional limits ("*Schranken*") lie is further illustrated in the following case relating to government benefits.

The BVerfG specifically held that the "constitutional guarantee of ownership exercised by the plaintiff does not imply that a property interest, once recognized, would have to be preserved in perpetuity or that it could be taken away only by way of expropriation (*i.e.*, with compensation). [This Court] has repeatedly ruled that the legislature is not faced with the alternative of either preserving old legal positions or taking them away in exchange for compensation every time an area of law is to be regulated anew." Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 761 (2002-2003); *see also* BVerfG 58, 300 (301) (1981).

²⁴ "Ohne Eigentumsgarantie bleiben dem Bürger nur "nutzlose Freiheiten", ... Seit zwei Jahrhunderten findet um das Privateigentum, vor allem in Deutschland, die heftigsten Verfassungskämpfe der Neuzeit statt, nirgends ist der Rechtskonsens so gering wie hier—in den Einzelheiten, den Problemen des eigentlichen Eigentums." [Without a Property guarantee, the citizen is left only with "useless freedoms" ... For two centuries, the most heated constitutional fights of modern times have taken place over private property, above all in Germany; nowhere is the consensus as to this right as small as it is here—in the details, the problems of property at its core.] [Author's translation].

JOSEF ISENSEE, HANDBUCH DES STAATRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 302 (Paul Kirchhof ed., 8th vol.)

²⁵ Lubens, *supra* note 19, at 412.

2. The *Eigenleistung* Case

The *Eigenleistung* (“Individual Performance”) case shows another contour of the balancing required by Article 14. In that case, a federal statute motivated by budget concerns reduced some of the government health insurance benefits received by the elderly.²⁶ A group of those affected filed a claim that this reduction constituted a taking that “deprived them of a property interest that was essential to their personal liberty.”²⁷ The *Bundesverfassungsgericht* held that these benefits—and their reduction—did not constitute a property interest in that the interests were merely received and not earned by the singular efforts of the individual (“*die Eigenleistung*”).²⁸ The court held that the threshold of *Eigenleistung* could be reached through contribution—for example, to a 401k—but it would not apply to benefits received from the state, even if the recipients were taxpayers, contributing in effect their taxes to that benefit. Again, the *Bundesverfassungsgericht* struggled to find the limits of that property right, but it stressed that fundamental in its decision was its understanding of “the core constitutional function of property as providing the material security ... for both *human dignity* and civic self-governance.”²⁹ Ultimately, while the German courts struggled to articulate the balance between the individual and the collective, the European Courts were similarly struggling to understand and clarify property rights. This property right evolution will be addressed in the next section.

III. EUROPEAN CHARTERS

A. Formation of the European Charter of Human Rights (ECHR)

The European Charter of Human Rights (ECHR) and its appointed Court, the European Court of Human Rights (ECtHR), was established directly after the Second World War, and was viewed largely by European states as a way to give enforcement authority in Europe to the U.N.’s unanimously approved but non-binding Univer-

²⁶ Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 765 (2002–2003).

²⁷ *Id.*

²⁸ *Id.* at 766.

²⁹ *Id.* at 768 (emphasis added).

sal Declaration of Human Rights (UDHR).³⁰ European States felt strongly that without an enforcement mechanism, the enthusiasms for these rights, derived from fresh experiences of their denial, would fade and be vulnerable to marginalization over the long term.³¹

Although this Charter was in formation at roughly the same time as the German *Grundgesetz*, it is fair to presume the drafters of the ECHR Charter took few cues on human rights from the *Grundgesetz*, as the German State at that time had little credibility or moral authority on that front.³² As we will see, over time this approach by the ECHR would serve its human rights interests less than ideally, particularly in regard to the issue of Property.

The ECHR notion of Property as a human right was fraught with other political issues as well.³³ While issues such as the abolition

³⁰ ANDREA BIRDSALL, *THE INTERNATIONAL POLITICS OF JUDICIAL INTERVENTION: CREATING A MORE JUST ORDER* 45 (2009). As stated: "the Declaration [UDHR] does not constitute binding law for the states that signed it, but is merely a 'statement of aspirations' (Forsythe 2006: 39) which outlines only very general duties to promote human rights standards. There is no legal duty to comply with the UDHR's standards and no independent enforcement mechanism is attached to it. It is a declaration only, rather than a treaty or Convention, primarily aimed at raising human rights consciousness around the world." *Id.*

³¹ *Id.*

³² For a compelling analysis of the development of human rights in terms of the interplay between European State Constitutions and the broader European Treaties and Declarations, see Arnold, *supra* note 11, at 45. Specifically Arnold divides the European Constitutional Development into 3 phases and characterizes the first as the courts: "The first phase lasts from the late forties to the late sixties when post-war constitutions, such as the Italian and in particular the German, are establishing systems which embody the new orientation ... by attributing highest importance to human values and fundamental rights. In this first period one tendency that particularly advances matters is already apparent: this is the internationalization of the individual's protection which began with the universal Declaration of Human Rights in 1948 and led in 1950 to the European Convention on Human Rights (ECHR) within the Council of Europe. The second phase takes place ... in reaction to totalitarian regimes. "These Constitutions take over the progressive elements of the German Constitution as shaped by the jurisprudence of the Constitutional Court.... This is the ideological background and conceptual basis of the European Union Fundamental Rights Charter. Thus, it is an instrument built upon the continuous development of Constitutional Law described above. As a consequence, the Charter is a homogenous instrument with an updated standard." *Id.*

³³ A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 11 (1993).

of torture, freedom of religion, and freedom of assembly all made their way into the first articles of the ECHR, the right of property was a more delicate matter and did not in the end make it in to the first Articles of the Charter.³⁴ While some have argued that this absence of a property right was a signal failure, others have contended that the omission was instead nothing more than a trifle of procedure in that the Committee of Ministers involved in the decision merely needed more time to address the matter satisfactorily for all relevant parties. Instead, the Committee considered it more politically expedient to move forward with the agreed articles, without the Property Article included, while the political climate was still strongly favorable.³⁵

The primary cause for delay in articulating the Property right was the concern as to how to strike the appropriate balance between the public interest and private right—again to reframe, between the collective and the individual. As stated by Robertson and Merrill: “it was a matter of some delicacy to draft a clause which would permit a democratic government to nationalize private property ‘in accordance with the general interest,’ but which would not allow a totalitarian government to adopt policies of confiscation contrary to the rights of individuals and the values of a free society.”³⁶ In the end, this right would be included as Article 1 of Protocol 1, the following year.

Unlike Article 14 of the *Grundgesetz*, the ECHR Article on Property does not come with a guarantee but instead the promise of “entitlement to the peaceful enjoyment of one’s possessions.”³⁷ This is followed by a statement of the right for governments to take property provided it serves the public interest.³⁸ It is important to underscore the fundamental difference from the formulation of the *Grundgesetz* here: the ECHR articulation does not speak to the individual’s responsibility to the State but, rather, articulates these rights from the

³⁴ See Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> for the full list of the Articles.

³⁵ ROBERTSON & MERRILLS, *supra* note 14, at 11.

³⁶ *Id.*

³⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 33, at Protocol 1, Art. I.

³⁸ *Id.* (“No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”).

State perspective, and the State's right to expropriate, provided it can adequately articulate its need. Article 1 of the ECHR then follows with a second sentence that further affirms the State's right to expropriate land or implement taxes.³⁹ As fundamental human rights go, its articulation leans significantly more to the State's interests than the *Grundgesetz's* Article 14, and its tenor reflects the political forces—particularly the strong need to include Socialist countries—at play at the time.

Over the long term, however, time would show that the ECHR's articulation of the property right would not be the only supranational judicial effort. The ECJ, the judicial arm of the EU, would also find itself addressing human rights issues, despite its lack of addressing these issues in its initial Charter. The Germans, while initially lacking moral suasion in the human rights conversation, in this court would show a dogged commitment to the issue over time, pressuring that body steadily to establish a more codified and powerful human rights stance. It would seem their collective experience seared into their souls a particularly powerful commitment to never see the individual violated in this way again. We will therefore address, in the next section, the overall formation of the European Union along with the various German influences that helped propel the EU to create a Charter of Fundamental Human Rights—particularly in terms of the right to property.

B. Formation of the European Union

The current European Union (EU) began as the European Coal and Steel Community in 1952 to help the shattered economies of member States recover,⁴⁰ through the removal of barriers impeding a strong collective economy.⁴¹ As successful as the EU proved in

³⁹ *Id.* (“The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”).

⁴⁰ EU treaties, EUROPA.EU, http://europa.eu/eu-law/decision-making/treaties/index_en.htm (last visited Mar. 2, 2014); for a fuller analysis of the degree to which the European economies were compromised, see JUDT, *supra* note 6, at 13–40.

⁴¹ LAMMY BETTEN & NICHOLAS GRIEF, EU LAW AND HUMAN RIGHTS 53 (1998); see also JUDT, *supra* note 6, at 129–64 (Judt has persuasively argued further that this was

advancing the economic prosperity of the continent, an abiding concern developed relating to the EU's absence of a codified charter for human rights. Issues relating to property were often at the center of such disputes. This should come as no surprise, given that judicial decisions relating to property frequently can have effects on an economic as well as on a human rights level. As the ECJ's charter and documents fundamentally lacked text regarding human rights considerations, the court found itself at times ham-fistedly attempting to address these issues, unable to do so with compelling judicial authority. As will soon be seen, German influence would directly and indirectly move the ECJ to resolve this shortcoming.

How the Germans influenced the ECJ would develop in a variety of ways. For example, from a more indirect and organic perspective, the ECJ was influenced by the *Grundgesetz*' influence on other State constitutions. Because the ECJ is a European institution, it has an interest in harmonizing, as much as possible, with its constituent State Constitutions.⁴² While the German *Grundgesetz* and the holdings of the *Bundesverfassungsgericht* alone may not hold great influence in the aggregate of European States, that influence naturally increases when emerging democratic countries in Europe—such as Portugal, Spain, and Greece—look in part to the *Grundgesetz* to articulate their own State Constitutions as they emerged from their dictatorships.⁴³ As this occurred, the German *Grundgesetz* increased its supranational influence organically with these additional like-minded Constitutions.

Perhaps in somewhat of a backward fashion, the Germans would also influence the court through specific cases, most notably through its own human rights missteps in the case of *Stauder*.⁴⁴ *Stauder* dealt with an EU directive for distributing surplus butter to those in

an effort to get France and West Germany to work together and understand they were essential to the prosperity of one another. This was difficult to do in the wake of the mistrust of France following the Second World War, but understood by France particularly as crucial in light of their economy and recent political events).

⁴² Arnold, *supra* note 11, at 46.

⁴³ As Arnold states, "in the seventies ... [n]ew approaches are taken in the Greek, the Spanish and the Portuguese Constitutions as reactions to the former totalitarian regimes in these countries. These constitutions [took] over the progressive elements of the German Constitution [*Grundgesetz*] as shaped by the jurisprudence of the Constitutional Court [*Bundesverfassungsgericht*]." *Id.*

⁴⁴ *Erich Stauder v. City of Ulm-Sozialamt*, 1969 E.C.R. 29/69 p. 419.

more straitened circumstances. The European legislative directive required, however, a reliable mechanism to accurately identify those truly in need.⁴⁵ The statute, as subsequently transposed into German law, required applicants to identify themselves by name, rather than by number or card, before receiving the supplemental butter.⁴⁶ Stauder, who was qualified to receive the butter, objected, arguing that disclosure of his actual name was a violation of his human rights, in effect, a humiliating exposure of his compromised means.⁴⁷ The Court held that the EU statute required only some manner of identification and, therefore, identification by name was not necessary. Accordingly, the Court directed the German legislature to adjust its language.⁴⁸

The *Stauder* case was a landmark decision given its surprising holding—i.e. that human rights laws as established under the ECHR and under case law of the ECtHR had become General Principles of Law, and could therefore serve as binding authority for future ECJ decisions.⁴⁹ Such a holding may seem less remarkable to those familiar with common law traditions, in which judges develop the fuller texture of laws through their holdings. However, for European States that operate predominantly under civil law systems, judges holding that case law has precedential weight was a bit revolutionary. This move, however, may have been motivated in part by expedience and frustration, for the court needed some text to work from regarding human rights—and with this holding they now had it.⁵⁰ Here, however, German law advanced the European Human Rights cause by its *inappropriate* transposition of the EU butter directive, advancing the human rights mission of the ECJ effectively through its own ungainliness.

German influence on the ECJ, however, would be perhaps hardest pressed by the German courts in what are commonly termed the *Solange* (“so long as”) cases. In these cases, following standard ECJ

⁴⁵ BETTEN & GRIEF, *supra* note 40, at 56.

⁴⁶ Strauder, *supra* note 43.

⁴⁷ It is ironic that in his efforts to secure his anonymity, Stauder’s straitened circumstances ultimately became all the more bruited, at least in circles of European jurisprudence, than ever would have been the case had he not fought for greater anonymity.

⁴⁸ Strauder, *supra* note 43.

⁴⁹ BETTEN & GRIEF, *supra* note 40, at 56.

⁵⁰ *Id.* at 57.

procedure, a lower German Court referred a question to the ECJ asking whether the German courts must still deem provisions in EU statutes valid and enforceable if they violate principles of its own *Grundgesetz*.⁵¹ The ECJ responded that in the interests of uniformity, EU law must prevail and violations of German constitutional principles would need to be set aside by the German courts in such cases. Needless to say, this did not sit well with the lower German court, which duly passed the ECJ holding on to its highest court, the *Bundesverfassungsgericht*.

The *Bundesverfassungsgericht* responded, in turn, that because fundamental human rights served as a core principle for the *Grundgesetz*, as long as the EU lacked a democratic parliament and a codified catalogue of its own fundamental human rights, the EU could not hold title to legal certainty in regard to human rights, and the German Constitutional Court, not the EU, would therefore determine whether EU law was compatible with German law.⁵² The *Bundesverfassungsgericht*, in effect challenged the ECJ to move to a higher bar in securing fundamental rights, underscoring the failure of the ECJ to establish a codified text regarding human rights.⁵³ From this decision—along with similar concerns expressed over time by the Italian courts as well—it became clear to the ECJ that the use of General Principles over codified legislation would not suffice long-term, and the EU would move slowly but inexorably towards the creation of its own codified Charter of Fundamental Rights (CFR).

To address this shortcoming, a commission was ultimately put together, and here again German influence would be prominent. While

⁵¹ *Id.* at 64; see also *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratstelle für Getreide und Futtermittel* 1974 C.M.L.R. 11/70.

⁵² BETTEN & GRIEF, *supra* note 40, at 65; see also *Internationale* *supra* note 50 (“although the [German] Constitutional Court could not rule on the validity or otherwise of a rule of Community law, it could declare such a rule to be inapplicable in Germany if fundamental rights were violated.”).

⁵³ The *Bananas* case also articulated forcefully the *Bundesverfassungsgericht*’s position as it related to the ECJ. As Weatherill summarized the holding in that case, the court stated: “The *Bundesverfassungsgericht* does not concede to the European Court an exclusive jurisdiction to decide on the validity of Community law.... It maintains an ultimate review of competence vested in the German court in the event that review of EC acts against the standards of fundamental rights by the European Court is shown to be deficient judged by German constitutional standards. But it places a heavy burden on the applicant seeking to demonstrate such deficiency.” STEPHEN WEATHERILL, *CASES AND MATERIALS ON EU LAW* 667 (2007).

the members of the commission were principally representatives from the various parliaments of the member states, the entire commission was headed by Roman Herzog, the former German Federal President and the former Chief Justice of the *Bundesverfassungsgericht* (the highest position of the German Constitutional Court).⁵⁴

The German influence on the Charter through Roman Herzog would be substantial.⁵⁵ This is apparent from the title itself, the Charter of Fundamental Rights, a coining familiar to Germans through the *Grundgesetz* but less so to other State Constitutions.⁵⁶ The fundamental nature of the document as well shows a German influence in the specificity of its written guarantees rather than being a looser, less codified approach more reminiscent of France or Britain.⁵⁷ Furthermore, the very beginning bespeaks *Grundgesetz* influence: Article 1 of the Charter of Fundamental Rights for the European Union is, as in the *Grundgesetz*, Human Dignity.⁵⁸

The Charter also carries with it a fundamental property right, through Article 17, whose language follows closely that of Protocol I, Article I of the ECHR.⁵⁹ That the articulation of this right followed the ECHR's formulation of that right is somewhat unfortunate from a property rights perspective. As shown in the ECHR's original considerations in drafting the property right, it was concerned with providing sufficient state expropriation rights in order to be as inviting as possible to socialist countries. That is to say, as much as the ECHR was grounded in human rights, in terms of Property it was at the time politically expedient to insist less on that private right. The *Grundgesetz*

⁵⁴ Arnold, *supra* note 11, at 45.

⁵⁵ It is important to be clear in the final analysis that for all of the influence from the *Grundgesetz* and the *Bundesverfassungsgericht*, the Charter of Fundamental Rights received more influence from the ECHR than any other text or institution. Perhaps nowhere is that stated more explicitly than in Article 52, Paragraph 3, which states "In so far as this Charter contains 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 [ECHR] Convention." *See infra* note 60.

⁵⁶ Arnold, *supra* note 11, at 50.

⁵⁷ *Id.*

⁵⁸ *Id.* at 54.

⁵⁹ OFFICIAL JOURNAL OF THE EUROPEAN UNION (2007) (C 303/23), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:FULL:EN:PDF>; *see also* Arnold, *supra* note 11, at 56.

formulation, on the other hand, was motivated by no such political forces, and its text provided it could go so far as to *guarantee* ("gewährleisten") Property to the individual.

The lack of German influence on the articulation of property in the CFR may not at first appear overly problematic. Article 14's articulation is, after all, unorthodox and so would have been a less conventional choice. Furthermore, it is the ECHR that is officially charged with protecting human rights, and so the CFR's choice of the ECHR's text would seem reasonable from this perspective as well.⁶⁰ Finally, one might argue that even if this property right is not articulated ideally by the CFR, one need not be overly concerned because the ECJ is not the final arbiter on human rights.

However, other underlying concerns nettle. First of all, it is important to remember that while the ECHR is charged with human rights, the property right as written in its origin had political concerns that led to an articulation particularly favorable to state interests. Secondly, the ECJ has had something of a woeful track record relating to property, having not decided a single case against its own legislation in that area,⁶¹ so striking a balance that advocated more for the individual would have seemed, on the contrary, all the more urgently needed for that court. But perhaps most problematic, as we will see in the next section, is that, due to procedure, it is not entirely clear if it is indeed the ECtHR which has the final authority in adjudging whether a human right has been violated when economic interests are involved.

IV. UNDERSTANDING PROCEDURE BETWEEN THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS

While the ECJ has long toiled to find its north star as related to fundamental human rights, the ECtHR has struggled in turn to find a way to harmonize its jurisdiction with the ECJ. The fact that both

⁶⁰ Charter of Fundamental Rights of the European Union art. 52 ¶ 3; for the implications of this connection, see Thomas Von Danwitz, *The Charter of Fundamental Rights of the European Union between Political Symbolism and Legal Realism*, 29 DENV. J. INT'L L. & POL'Y 289, 301 (2000–2001).

⁶¹ Von Danwitz, *supra* note 60, at 294. As Danwitz noted: "[c]ompared to the high number of verdicts from national constitutional courts over national legislation regulating property rights and professional liberty, this practice raised doubts over the effectiveness of judicial review exercised by the ECJ."

courts are supra-national leads to the inevitable question: which court has ultimate authority? This is fairly straightforward when the issue is purely economic or human rights-related, but it becomes murkier when the two issues are entangled, something that occurs with particular frequency over issues relating to property. In such cases, a human rights advocate would rightly express concern if the ECJ were to have final authority over human rights issues, as that court's primary concern is economic. However, problems equally arise for the ECJ's judicial sovereignty in exercising its jurisdiction and authority if the ECtHR could readily overrule it on human rights grounds.

To understand how the two courts work with each other, it is of fundamental importance to understand the distinct procedure of the two courts. The ECtHR process is fairly straightforward and familiar to those in appeals systems in that the applicant appeals a decision from the lower court, generally, the relevant State's highest court. That ECtHR appeal is eligible for review if it satisfies four basic requirements: (1) all state remedies have been exhausted (generally, again, meaning appeal has failed at the State's highest court); (2) the appeal comes within six months of the exhaustion of those State remedies; (3) the appeal states a valid claim; and, more recently, (4) the appeal satisfies a *de minimis* requirement.⁶²

The ECJ, on the other hand, serves more of a consultative role in relation to the State courts. All European State courts may, and highest State courts must, consult the ECJ for advisory opinions as to issues that they deem may relate to EU legislation and the EU body.⁶³ The ECJ will return its opinion to that court, stating its opinion on that issue alone, rather than the entire case. The relevant State court will then pass along its final decision in light of the ECJ's opinion.

This naturally leads to the possibility that a plaintiff could appeal a case that has an ECJ opinion within it to the ECtHR, which would suggest that the ECtHR is hierarchically above the ECJ. However, the two judicial bodies have collaborated extensively to

⁶² For the full list of relevant eligibility requirements, see http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

⁶³ See THE EUROPEAN COURT OF JUSTICE 199 (Grainne De Burca & J. H. H. Weiler eds., 2001) (adding further clarification of this process and a comparison with the U.S. system).

prevent any such jurisdictional clashes from occurring.⁶⁴ To this end, for example, the ECtHR developed the “equivalent protection” doctrine, whereby it held that cases would be inadmissible in the ECtHR if “equivalent protection” had already been provided in other courts.⁶⁵ The argument is that such a policy allows for harmonization in that it “allows the ECtHR to accommodate the autonomy of the EU legal order, whilst encouraging, if not inducing, compliance with ECHR standards by the ECJ.”⁶⁶ The ECtHR has used this doctrine considerably to avoid coming into conflict or giving closer scrutiny to ECJ decisions, tending where possible to find applications inadmissible for other reasons.⁶⁷

While the effort at harmonization is laudable, it raises problematic possibilities in terms of human rights. As constructed, it means the ECtHR will make every effort to accommodate ECJ opinions, and yet as human rights are only a subsidiary concern of the ECJ, from a human rights perspective this would seem wrongly ordered. As has been noted, there is a compelling argument that the ECJ should receive no such deferential treatment from the ECtHR in relation to human rights because of its questionable track record on human rights issues. As Joseph Phelps argues, “[i]t has not protected these fundamental rights for their own sake [and] has not taken these rights seriously.”⁶⁸ Instead, by giving the ECJ such deferential treat-

⁶⁴ Frank Hoffmeister, *European Convention on Human Rights Reviewability of National Actions to Implement EU Law—Impounding Aircraft—Right to Property*, 100 AM. J. INT’L L. 442, 447 (April 2006) (“This question inescapably involves a delicate policy issue between the ECHR and the EC. If the ECHR were to fully review an EC act, it would, in effect, be putting itself in a hierarchically superior position over the ECJ—a court that is, by design, intended to have exclusive competence over matters of EC law. But if it accepted that human rights standards were protected by EC law in exemplary fashion so as to make an additional layer of judicial control unnecessary, the ECHR would then be reviewing only particular human rights cases from the highest courts in the member states—and not cases from the ECJ. In much the same manner as had been done by the German Constitutional Court....”).

⁶⁵ Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS. L. REV. 87, 90–91 (2006).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Joseph Phelps, *Reflections on Bosphorus and Human Rights in Europe*, 81 TUL. L. REV. 251, 276 (2006–2007).

ment, the ECtHR has elevated "free market freedoms guaranteed in the Community treaties to a status equivalent to that of fundamental human rights."⁶⁹ As a result, "because the ECJ's goal is economic integration, at times fundamental rights will have to be cast aside to achieve the community's goal, and due to the ECtHR's posture vis-à-vis the ECJ, that former body will be substantially constrained to accommodate those decisions."⁷⁰

However, deference by the ECtHR to the ECJ would occur not only by way of the "equivalent protection" doctrine. Giving still further weight to ECJ decisions in human rights, the ECtHR would articulate also the "manifestly deficient" policy through its holding in *Bosphorus*, a considerably celebrated and controversial case which we will address in the next section.

V. THE BOSPHORUS CASES

A. *BOSPHORUS* (ECJ)

In the *Bosphorus* case, Bosphorus, a Turkish airline, leased airplanes from Yugoslavia, a country that was at that time fully submerged in the ravages of civil war. To encourage the end of that civil war, the European Union issued a directive restricting all EU countries from doing business with Yugoslavia until peace had been re-established. To abide by this directive, the Turkish airline paid for their leasing of the airplanes by putting money in an account that had been frozen. However, when one of the Yugoslavian-leased airplanes landed in Ireland, the Irish Minister of Transportation had the airplane grounded, deeming the Turkish-Yugoslavian transaction a violation of the EU directive.

The Turkish airline then duly filed a complaint, claiming that Ireland's seizing and grounding of their airplanes, leased from the Former Republic of Yugoslavia, was an inappropriate interpretation of the EU's directive to suspend all commerce with the Former Republic of Yugoslavia (Serbia and Macedonia).⁷¹ The design of the directive

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General* ¶ 8, 1996

was to apply economic pressure to end that Country's civil war (and was implemented following UN Security Resolutions to the same effect).⁷² Following ECJ procedure, the complaining party filed in the allegedly offending State's Court (Ireland).

The Irish Supreme Court took the issue of how this EU directive was to be implemented to the ECJ for clarification. The ECJ in turn issued an advisory opinion that Ireland had correctly implemented the initiative,⁷³ whereupon the Irish Supreme Court ruled that Irish Department of Transportation had acted appropriately in grounding the Turkish airplane. While the ECJ was merely interpreting EU legislation, it was nonetheless dramatically affecting an individual property right.

B. BOSPHORUS (ECTHR)

The *Bosphorus* Airlines in due course then took the Irish Supreme Court decision to the ECtHR, no longer asking for whether Ireland had appropriately interpreted the EU provision, but instead now alleging that the statute, as such, constituted a violation of their basic human right to property, under Protocol 1, Article I of the European Charter of Human Rights.

The ECtHR noted that property was indeed an inalienable human right but that it did not come without obligation to the larger community, here, the European Union.⁷⁴ The ECtHR held that the fact

E.C.R., available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0084:EN:PDF>.

⁷² *Id.*

⁷³ As stated with characteristic ECJ efficiency: "Article 8 of Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the [FRY] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from [the FRY] and in which no person or undertaking based in or operating from [the FRY] has a majority or controlling interest." Case C-84/96 (reference for a preliminary ruling from the Supreme Court of Ireland): Case C-336/24, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, 1996 E.C.R.

⁷⁴ Case C-84/95 (reference for a preliminary ruling from the Supreme Court of Ireland): *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*. (96/C 336/24) 30 July 1996.

that the burden on the small Turkish Airline was unfortunate, but it was judged a burden not too onerous for an individual to bear, given the directive's larger social aim of pressuring for peace in Yugoslavia. Here, the individual sacrifice for the common good was enormous, however, devastating the business of the Turkish airline, and setting an unsettlingly high standard for what a physical or moral person must economically be burdened with before their loss may be considered compensable.

However, of more lasting concern was the Court's assertion regarding its judicial relationship with the ECJ, stating that it would not counter decisions made by that judicial body unless they were "manifestly deficient", an exceedingly high threshold for a plaintiff to meet.⁷⁵ A question in terms of this case and others naturally follows—would the ECtHR have made such a holding against the Turkish Airline if the opinion of the ECJ had not been intertwined? In short, was the ECtHR effectively no longer the *de facto* highest court for human rights when economic questions were involved?

The case itself has been considered to be one of the darker moments for the ECtHR. The fact that the Turkish company had paid their money into a frozen account that could therefore not benefit Yugoslavia in any way at the time seemed to many as offering Yugoslavia no war-time benefit, and so the denial of Bosphorus' property seemed excessive. The contrary holding struck many as heavy-handed in that it seemed to do little more than "deprive an apparently innocent party of the benefit of its property."⁷⁶ Some have gone further, arguing that "the assessment of the justification of the property rights infringement was so deferential to the foreign policy objective being pursued that it entailed 'no serious balancing test' and 'expressed an almost total indifference to the way the Community organs exercised their discretion in the political-foreign affairs sphere when implementing the Resolution'."⁷⁷

⁷⁵ App. No. 45036/98, *Bosphorus Hava Yollari Turizm v. Ireland* ¶156, 2005 Eur. Ct. H.R. available at: [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["Bosphorus"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-69564"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{).

⁷⁶ Costello, *supra* note 65, at 98.

⁷⁷ *Id.*

Ultimately, however, the failure here to balance public interests and private rights relating to property brings to the foreground the magnitude of the lost opportunity of importing the special German conceit of property to the CFR. To have wholly adopted instead the ECHR's Article on property, an article that was written as more of a political calculation with State interests in mind, than a careful balancing of rights, is unfortunate. For all of Germany's documented success in influencing the European courts on their human rights issues, and for all of the German influence present at that crucial textual decision point, the absence of a more balanced property right, such as that found in Article 14, is manifest and most unfortunate, particularly given the "manifestly deficient" deferential holding of the ECtHR.⁷⁸

VI. CONCLUSION

The German influence on the EU's addressing of human rights has been substantial, from dramatically effecting ECJ jurisprudence, to pressing for an EU Charter on Fundamental Rights, and even to the leadership of Roman Herzog in drafting the Charter of Fundamental Rights. However, an irksome question remains: due to the ECHR's early concession to socialist governments in the drafting of the property right and the subsequent virtual wholesale importation of that ECHR language to the Charter of Fundamental Rights, one wonders whether a singular opportunity for German influence was lost by the failure to import, or at least consider, some part of Article 14 of the *Grundgesetz* in articulating the CFR's right to property. That Roman Herzog oversaw the creation of the CFR shows that real German influence and German constitutional knowledge was present at the table, and therefore, that such a hope was not unrealistic.

Counter-arguments to this concern have been duly raised, generally focusing on the limited scope of such a possibility. The ECJ jurisdiction applies after all to only twenty-eight countries, while the ECtHR applies to forty-eight. ECJ jurisdiction furthermore applies only to citizens of the EU, while ECtHR jurisdiction applies to anyone,

⁷⁸ *Bosphorus Hava Yollari Turizm*, ¶156 available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["Bosphorus"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-69564"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

citizen or other, on the territory of a signatory to the ECHR. Furthermore, ECJ decisions will necessarily have to first include the violation or infringement of some basic economic right, and then will only be charged to address human rights, if one should also be intertwined. Yet many remain concerned and note "growing evidence that the European Union (EU) is becoming more involved in human rights protection and has the capacity to turn into an *unprecedented* post-national human rights protection institution."⁷⁹ This statement in 2006 has all the more resonance in 2014, following the EU's ratification in Lisbon of the Charter of Fundamental Rights in 2010. Specifically in terms of property rights at the European level, given the abysmal track record of the ECJ in adjudicating overwhelmingly against private right interests, it is all the more unfortunate that the unique articulation of property rights found in Article 14 of the *Grundgesetz*, did not in any measure get to serve as a voice for the balance of public interest and private right in the adjudicative process at the supra-national European level.

⁷⁹ Samantha Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution?*, 6 HUM. RTS. L. REV. 323 (2006) (emphasis added).