Who is the true promoter of human rights in Europe? At first glance this may be easy to answer since the European Court of Human Rights (ECtHR) is the human rights court for Europe. As seen above, the ECtHR was created by European states to ensure and to monitor human rights observance. Yet, EU Commission President Barroso has referred to the “European Human Rights Culture”, a political term attributable to the European Union (EU), and we witnessed some spectacular cases that have pushed human rights forward in Europe and that have originated in Luxembourg. This leads to the following question: Is even before EU accession to the European Convention on Human Rights (ECHR), Luxembourg the true promoter of human rights in Europe? With the Strasbourg court entrusted with human rights and Luxembourg being an EU law court this would be a paradox.

There are several indicators suggesting that today in fact the true promoter of human rights sits in Luxembourg. The Fundamental Rights Charter, discussed in chapter 5, provides a modernised version of human rights compared to the classic civil and political rights contained in the ECHR. This enhanced protection is guaranteed by the Court of Justice of the European Union (CJEU). Human rights protection by the CJEU stands on a solid foundation of case law from the 1960s and onwards. In recent case law, we have witnessed some bold human rights rulings, suggesting that – surprisingly – it is in fact Luxembourg who is pushing European human rights standards further. There are also indicators that

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1 This term has been circulated by the President of the EU Commission Barroso. See G. Toggenburg, ‘Menschenrechtspolitik’, in W. Weidenfeld and W. Wessels (eds.), *Jahrbuch der Europäischen Integration* (Nomos, Berlin, 2005) p. 181, at p. 182.

2 With regard to this research, “human rights” is used as term also for what is classically called “fundamental rights” in EU terminology. Note that generally for human rights within the EU the term “fundamental rights” is used and “human rights” are used with regard to external relations. This mirrors the terminology of nation states legal systems where fundamental rights are those given in national constitutions and human rights refer to the international dimension.
human rights could be a Pandora’s Box for Luxembourg, and once opened it will be hard to tame or close again.

Is there competition between the European courts or is it a joint-venture of building a European human rights landscape? This chapter provides an overview of the interplay of case law between the European Court of Human Rights and CJEU. It is supplemented by the CJEU members of court’s views on human rights decision-making, human rights cases and the interaction with the ECtHR.

4.1. Luxembourg’s Human Rights Competence: Opening a Pandora’s Box

Luxembourg has matured its own competences in human rights. While originally not a focus of CJEU judges, human rights have grown to be a significant aspect of the CJEU judges’ work. More spectacular is that a review of the CJEU’s case-law on human rights shows that Luxembourg has employed a bold stance with regard to human rights, and that this has pushed the ECtHR to develop their standards further. Have the judges opened a Pandora’s box in the 1960s with the result that today human rights issues are increasingly being invoked at a court that is not actually a human rights court. Are human rights a curse or blessing or both? We will see that human rights are used in creative jurisprudence to enhance competences. We will see strong reactions from member states and we will see that Luxembourg is an engine in the European human rights landscape. Yet, at the same time the judges fear that there is too much human rights in their work. Does this show that human rights can be seen as an annoyance?

3 Taking away possible fears, Lenaerts and Gutierrez recall that with the binding status of the Charter the EU is neither a “human rights organisation”, nor has the CJEU become a second ECtHR, in K. Lenaerts and J. Gutierrez-Fons, ‘The Constitutional Allocation of Power and General Principles of EU Law’, 47 CMLR (2010) p. 1629, at p. 1656.

4 Case C-34/09 Zambrano, Opinion of AG Sharpston, 30 September 2010, para. 155: “Of course, it is true that this Court is not, as such, a ‘human rights court’. As the supreme interpreter of EU law, the Court nevertheless has a permanent responsibility to ensure respect for such rights within the sphere of the Union’s competence. Indeed, in Bosphorus the Strasbourg court indicated that the European Court of Justice has an essential role to play in safeguarding rights deriving from the ECHR and its associated protocols as they apply to matters governed by EU law – a function that can only assume greater significance as and when the European Union accedes to the ECHR. For that reason, it is essential for the Court to ensure that it interprets the Treaties in a way that reflects, coherently, the current role and significance of EU fundamental rights.”