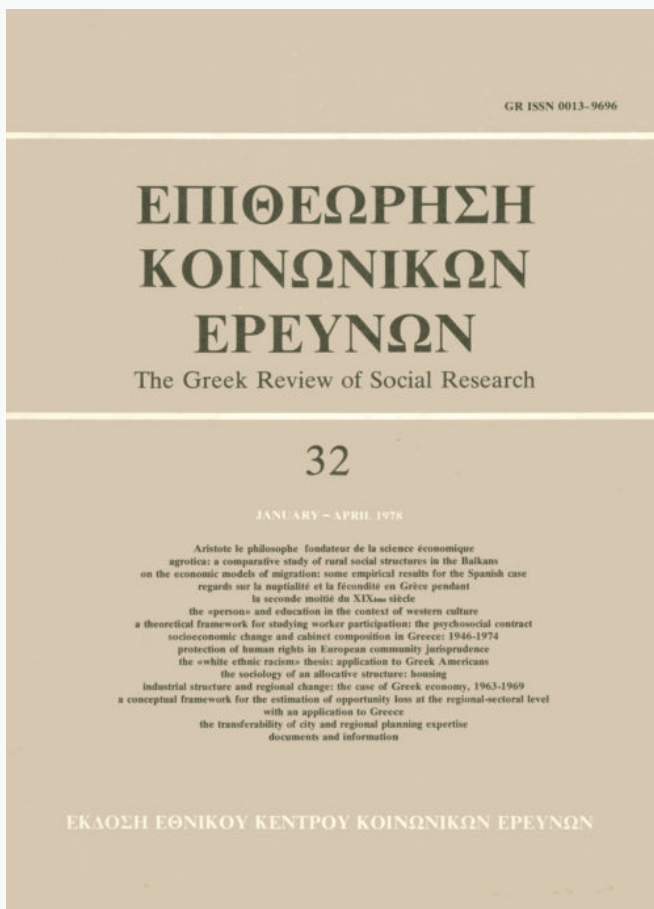


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Protection of human rights in European community jurisprudence: An appraisal

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protection of human rights in European community jurisprudence

An Appraisal

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It is only recently that the interest of the academic community has been drawn to the particulars of the EEC's system for the protection of human rights.¹ Several factors contributed to the development of this new field of Community literature. First, the increasing number of human rights violation cases that during the last few years have come before the Community's Court of Justice. Second, the fact that in its reports the EEC Commission has, in several occasions, treated the rights of the individual as a matter of great significance for the future of European integration.² Finally, memories from gross violation of fundamental freedoms in Greece, the Community's first associate member and now an applicant for full membership—along with the general question of geographical expansion of the Community towards the Mediterranean region, a politically unstable part of Europe—have given additional impetus to discussions on the subject.³

1. See written communication submitted by Pierre Pescatore, Judge of the EEC Court of Justice, to the Parliamentary Conference on Human Rights, held in Vienna, 18-20 October 1971, under the auspices of the Council of Europe (Doc. AS/Coll. DH (71)8). Also the results of a special session of the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe (held in Strasbourg on June 12, 1975) on the protection of fundamental rights within the European Communities. Also the published discussions on the same issue at the 7th International Congress of the International Federation of European Law (FIDE) of 2 to 4 of October 1975 (Brussels) and the 4th International Colloquium on the European Human Rights Convention of 5 to 8 of November, 1975 held in Rome.

2. See e.g. the Davignon report of July 20, 1970: «United Europe shall be based on a common heritage of respect for fundamental liberties and human rights». See also, *Bulletin of the European Communities*, «Report on European Union» Supplement 5/1975: «The general political vocation of the European Union and the extension of its competence to include fields more and more closely connected with the life of the citizen argue in favour of a formal affirmation of human rights. They should be given the force of rules of law which can be applied by the courts and which the Union institutions will have to observe when exercising their powers and indeed provide by adopting positive standards for their effective implementation (this applies particularly to economic and social rights)...» See further *Bulletin of the Communities* «European Union», Report by Mr. Leo Tindemans to the European Council, Supplement 1/1976: «The gradual increase in the powers of the European institutions which will make itself felt while the Union is being built up, will make it imperative to ensure that rights and fundamental freedoms, including economic and social rights are both recognized and protected. In this the Union will find confirmation of its political objectives», and finally *Bulletin of the European Communities* «The protection of fundamental rights in the European Community» Supplement 5/1976.

3. See e.g. D.W. Jones, «Human Rights in Europe after the Greek Case: Action Plan for Strengthening the Safeguards», *European Review*, XXI, No. 4 (1971) 22ss; John Pesmatzoglou, «Greece and the European Community» in H. Vlachos ed., *Free Greek Voices—A Political Anthology* (London: Doric Publications, (1971), 74-77; Arne Trenhold, «Europe and the Greek Dictatorship» in R. Clogg & G. Yannopoulos eds., *Greece under Military Rule* (London: Secker & Warburg, 1972), 163-190, and G. Yannopoulos, *Greece and the European Communities—The First Decade of a Troubled Association*, Sage Research Papers in the

The studies so far produced have dealt with various aspects of the Community's human rights treaty-law and have attempted critical reviews of the Court of Justice's case-law. In their total these studies have been very cautious in making suggestions for drastic changes in the system.⁴ This paper will also avoid over-ambitious proposals in the understanding that any consideration of human rights issues separately from prevailing realities and short-term European integration prospects would be unrealistic. It is with this understanding, however, that the suggestion is made that progress towards political unification in the Community might be facilitated should some adjustments to existing human rights law and implementation mechanisms be brought about.

The preamble of the Treaty of Rome refers to the strengthening of «the safeguards of peace and liberty» as one of the primary objectives of «an even closer union among the European peoples». From the text that follows, however, it becomes evident that the «contracting states» undertake no specific obligation to guarantee certain individual liberties in their dealings with their own citizens or other persons within their jurisdiction.⁵ This does not mean that no explicit or implicit reference to human rights is made into the treaty. On the contrary there are provisions that seek the promotion of certain aspects of the rights of the European *homo economicus et socialis*, rights that come very close to those defined as economic and social rights by the United Nations Universal Declaration of 1948.

The positive norms contained in these provisions can be summarized under two headings: (a) the *principle of equality*; e.g. Article 7 of the EEC Treaty provides that «any discrimination on the grounds of nationality shall be prohibited», and such discrimination is explicitly prohibited in matters of common agricultural policy (Articles 40 and 45), transportation (Article 79), imposition of charges (Article 95) and (b) the *principle of freedom*, e.g., freedom of

movement for workers (Article 48 et seq.), freedom of establishment (Article 52 et seq.), free supply of services within the Community (Article 59 et seq.) etc.

A number of issues emerge as a result of this human rights treaty-law of the Community. Besides the question of interpretation and actual implementation of these provisions—a heavy load for any judicial organ—the nature of the whole issue of human rights and the peculiar character of the Community's pattern of relations give rise to additional, equally fundamental problems. A standard of «public interest»—limitation to the exercise of these rights, is one of them. A second is the relationship and hierarchy among three distinct but interrelated legal orders, namely international, Community and national, in the specific area of human rights. A third and probably more important one is that, even at the elementary stage of «political» union in which the EEC currently operates, the possibility can not be ruled out that other rights (of those that come closer to the classical definition of political rights) may be infringed upon, as a result of the exercise of certain of the functions already assigned to the Communities.⁶ It is in the light of these questions that those Community organs which have a say in human rights matters assume a high degree of responsibility.

At the decision-preparatory stage, the European Community's Commission, the Parliament and the Council, all take part in a system of legal checks against human rights abuses. According to a decision taken in 1958, all documents intended for the Commission «...either with a view to their forming the subject of a proposal to the Council or for the adoption of one of the measures laid down in Article 189, are at first to be referred to the Legal Service».⁷ The Legal Service of the Commission, therefore, as the one of the Council, has the duty «...to clarify any fundamental rights questions which may arise with regard to general legal principles or the constitutional traditions of one or more Member States».⁸

In case of Community acts, in respect of which the Commission has the right to make only a proposal, responsibility for human rights issues rests with the European Parliament which discusses, and with the Council that makes the decision. If the Parliament finds that the rights of the individual may be adversely affected by the Commission's proposals it may ask it to reconsider and modify them pursuant to Article 149(2) of the EEC Treaty. At the final stage the Council, with the Commission and experts from

6. See *Bulletin of the European Communities*, «The protection...», op. cit., n. 2, p. 28.

7. Decision of October 1, 1958, Doc. COM (58), Minutes 31.

8. See *Bulletin of the European Communities*, «The protection...», op. cit., n. 2, p. 12.

Social Sciences (Contemporary European Studies) 1975, particularly pp. 21-31; Dimitris C. Constan, *The Greek Case before the Organs of the Council of Europe: 1967-1969* (Athens: Papazissis Publishing House, 1976), particularly pp. 146-147, 182-185.

4. See Pierre Pescatore, «Fundamental Rights and Freedoms in the System of the European Communities», *American Journal of Comparative Law*, Vol. 18 (1970), 343-351, and «Protection of Human Rights in the European Communities», *Common Market Law Review*, Vol. IX (1972), 73-79; Gottfried Zieger, *Das Grundrechtsproblem in den Europäischen Gemeinschaften* (Tübingen, n.p., 1970); Max Sorensen, «The Enlargement of the European Communities and the Protection of Human Rights», *Annuaire Européen* (European Yearbook), Vol. XIX (1973), 1-17; and C. Shachor-Landau, «Protection of Fundamental Rights and Sources of Law in European Community Jurisprudence», *Journal of World Trade Law*, Vol. 10, No. 3 (May-June 1976), 289-300.

5. Sorensen, op. cit., n. 4.

member-states participating in the work, is able to ensure that any issues bearing on human rights have received satisfactory solutions.

But, undoubtedly, the actor of primary importance, in this «checks and balances» system, a system that according to Judge Pescatore stresses the difference between the Community and other purely inter-governmental bodies,⁹ is the Court of Justice. The supranational character and the powers wielded by this Court, represents a significant advance beyond that of previous international tribunals.¹⁰

According to the Treaties, four different types of legal action may be pursued in this Court: action against member states for breach of their treaty obligations (EEC Art. 169); supervision of the legality of rules and decisions issued by the Community institutions (Art. 173); reparations for damages caused by the Community to third parties (Arts 178 and 215); preliminary rulings on questions involving the interpretation of Community law or the validity of Community decisions sought by national tribunals (Art. 177). It is then apparent from the above that suits testing the legality of Community acts, the tort actions, and the requests for preliminary rulings on the validity of Community decisions might be used in order to seek redress for an infringement of fundamental rights and freedoms.¹¹

Given this broad jurisdictional competence we can now discuss types of substantive law that the Court may draw upon in the exercise of its jurisdiction over cases involving human rights questions. When we described above¹² the Community's human rights treaty-law, we came up with a number of questions resulting from the limited scope and the ambiguity that characterize this law. The obvious issue then, is to examine how and to what extent these provisions may, and have actually been supplemented by other sources of law, so as to provide for a more sound legal basis for the protection of rights of the individual within the Community.

In this context, two key provisions of the EEC Treaty must be considered, namely Articles 164 and 173. The first defines the general role of the Court of Justice as follows: «the Court of Justice shall ensure the observance of law and justice in the interpretation of this Treaty». The second, dealing with «appeals for annulment» of unlawful Community acts, specifies as one of the grounds for the declara-

tion of such an act as null and void the «...infringement of this Treaty or of any legal rule relating to its application». The letter of these provisions implies that the Community law is not to be found only in the basic Treaties and the Community legislation in general, but also in a set of «general principles of law common to the political systems of the nine member states».¹³ This conclusion finds additional support in other Articles e.g. 215 EEC and 188 Euratom treaty, which, on the question of the Community's non-contractual liability for damages, make specific reference to the general principles of the domestic laws of the member-states.¹⁴

It has been contended by scholars who have dealt with the subject, that «general principles of law» as have been elaborated in the legal literature¹⁵ and have been applied in the jurisprudence of the Court, provide, along with written legislation, an adequate substantive law coverage for cases involving human rights.¹⁶ Given then, the broad discretion that the treaties allow the Court in its choice of the law applicable in each particular case,¹⁷ the system for the protection of rights of the individual in the context of the Community becomes both flexible and effective.

In order to allow ourselves a more precise evaluation of the above judgements we must examine the development of the Court's human rights case-law in three particular areas: limitation of rights; general principles as sources of law; applicability of the European Convention of Human Rights within the Community.

13. Cf. D.G. Valentine, *The Court of Justice of the European Coal and Steel Community* (The Hague: Martinus Nijhoff, 1961), 56.

14. These provisions were applied in *Wünsche Co. v. EVGF* (50/71) (1973), CMLR 35 (59/72) (1974) CMLR 61 and in *Werhan Hansamühle v. Council and Commission* (63-69/72) (1973), Recueil 1229, 1258. See also L.J. Brinkhorst & H.G. Schermers, *Supplement to Judicial Remedies in the European Communities* (London: Stevens & Sons Ltd, 1972), 149-153.

15. See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, 1953); Lord McNair, «The General Principles of Law Recognized by Civilized Nations», *British Yearbook of International Law* (1958), 1-19; Werner Lorenz, «General Principles of Law: Their Elaboration in the Court of Justice of the European Communities», *American Journal of Comparative Law* 13 (1964), 1-29.

16. Pescatore, «Fundamental Rights...», AJIL, op. cit. n. 4, p. 351; and Landau, «Protection...», op. cit., n. 4, p. 299. On the same subject Prof. Rudolf Bernhardt, «The Problems of Drawing up a Catalogue of Fundamental Rights for the European Communities», Annexed in *Bulletin of the European Communities*, «The protection of fundamental rights...», op. cit., n. 2, p. 68, concludes that «... if the protection of fundamental rights is entrusted to the Court of Justice by way of general legal principles, Community law can progressively be developed by judgements rendered in accordance with practical needs».

17. Paul Reuter, *La Communauté Européenne du Charbon et de l'Acier* (Paris: Librairie Générale de Droit et de Jurisprudence, 1953), 89.

9. See Pierre Pescatore, «International Law and Community Law — A Comparative Analysis», *Common Market Law Review*, Vol. VII (1970), 172.

10. See Forest L. Griebes, *Supranationalism and International Adjudication* (Chicago: University of Illinois Press, 1969), 151.

11. Pescatore, «Fundamental Rights...», AJIL, op. cit., n. 4, p. 347.

12. See supra, pp. 4-5.

a. national authorities discretion to impose limitations on human rights

The Court was, for the first time, faced with this issue in the *Van Duyn v. Home Office Case*¹⁸ where the exercise by a member-state of the rights given to it in Article 48(3) EEC, i.e. to limit free movement of workers on grounds of public policy, public security or public wealth, was questioned. The case, referred to the Court by the English High Court (Chancery Division), involved a Dutch national (Miss van Duyn) who was refused entry to England on the grounds that she was to take employment with the Church of Scientology, an organization which, although not prohibited by national law, was considered engaged in activities contrary to the public good. The Court, although it admitted that «the concept of public policy...must be interpreted strictly, so that its scope cannot be determined unilaterally by each member-state without being subject to control by the institutions of the Community», it finally concluded that

«...the particular circumstances justifying recourse to the concept of public policy may vary from one country to another country and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty». (Judgement, para 18).

With regard to the merits of the case, the Court found that a member-state may derogate from the principle of free movement of persons within the Community (Art. 48 EEC Treaty) in circumstances «socially harmful» despite the fact that the treatment of a member-state's nationals becomes, as a result, discriminatory to the nationals of other members.¹⁹ Thus, the contents of «public policy» remained unspecified and certainly to the discretion of the member-states.

These criteria, however, were soon to undergo a drastic change. The *Bonsignore v. The Oberstadtdirektor of the City of Cologne Case*, that came before the Court shortly after the *Van Duyn Case* raised again questions involving Art. 48(3) and particularly, the compatibility of a deportation order, issued against an Italian national by the German authorities, with the provisions of Council Directive No. 64/221/E.E.C. This Directive issued on February 25th 1964 and aiming at the co-ordination of special measures concerning the movement and residence of foreign nationals, was also involved in the *Van Duyn Case*. In interpreting it, the Court found this time that the concept of «personal conduct» used in the Direc-

tive required that a deportation order may only be issued for breaches of the peace and public security which might be committed by the individual affected «...and not, in the words of the national court, on reasons of a 'general preventive nature'». ²⁰ The decision of the national authorities was, thus, challenged on the grounds that neither the *motive* nor the *justification* of the deportation order were to be left to their sole discretion.

In the next case, the *Rutili v. Minister of the Interior Case*, the Court went on to focus even more narrowly the discretion of national authorities to determine limitations of rights for reasons of public policy. The case involved again the interpretation of Art. 48(3) and the provisions of Directives Nos 64/21 (the same with the cases examined above), 68/630 and 73/148.

The facts of the case were: An Italian national, Roland Rutili, resident of France since his birth in 1940 and married to a French national, was until 1968 holder of a privileged resident's permit and domiciled in the department of Mearthe-et-Moselle where he worked and became involved in trade union activities. In August 1968, a deportation order was issued against him. In September of the same year another order was issued requiring him to reside in the department of Puy-de-Dôme. In October 1970 Mr. Rutili was granted a residence permit for a national of a member-state of the EEC but was prohibited from residing in the departments of Moselle, Mearthe-et-Moselle and Vosges. He initiated then proceedings before the Tribunal Administratif of Paris, asking the annulment of the decision that limited the territorial validity of his residence permit. The Tribunal decided next, to stay proceedings under Art 177 of the EEC Treaty and ask the EEC Court to give a preliminary ruling on the interpretation of the expression «subject to limitation justified on grounds of public policy» of Art. 48 of the EEC Treaty.

The Court held that

«...restriction cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move within it unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy». ²¹

It further, clearly, ruled out the imposition of any restriction on nationals of another member state with regard not only to their entry into the territory of another member state but also on their right to reside in any part of its territory «except in cases and circumstances in which such measures may be applied to nationals of the State concerned». ²²

18. Case 41/74 (1975) 1 *Common Market Law Reports*, pp. 1-19.

19. *Ibid.*, p. 19.

20. Case 67/74 (1975) 1, CMLR 488.

21. Case 36/75 (1976) 1, CMLR 155.

22. *Ibid.*, pp. 157-158.

The evolution of the concept of national authorities' discretion to determine issues, e.g. «public policy», with a bearing on the exercise of the rights of the individual protected by the EEC Treaty, is indeed spectacular. Within a period of less than a year, the case-law of the Court made large steps towards the establishment of tight controls over this discretion. The positive results of this development are undeniable.

On the other hand, rapid change of legal concepts and criteria in areas so sensitive as human rights has an inevitable and undesirable consequence, namely a degree of legal uncertainty. The need that all actors in a human rights violation case, i.e. individual citizens, national authorities and Community organs, have clear views with regard to the existing law before the case reaches the court, is self-evident and needs no further elaboration.

b. «general principles» as sources of community human rights law

We will turn now to another particularly significant question, which arises as a result of the peculiar nature of the Community's system for the protection of human rights. In view of the fact that the Court has to resort often to «general principles» in order to fill gaps and interpret provisions of written Community law, it faced a twofold task. First, it had to preserve the autonomy and supremacy of the Community's legal order and ensure that the domestic laws and constitutional principles could not be used to abrogate acts of the Community's organs.²³ On the other hand, the whole concept «general principles» *per se* implies the existence of principles common to the legal systems of member-states to which the Court must have access.

In his judgement in the *Stauder v. City of Ulm Case*, the Court made a first general reference to fundamental rights of the individual as being part of the general principles of the law of the Community and that the Court must ensure their observance.²⁴

In another case which came before it shortly afterwards, the *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel Case*, the Court established that this reference to general principles should not affect «the unity and efficacy of Community Law». The case concerned a system known as «agricultural deposits» which intended to enable the Commission as well as the competent national authorities, to exercise control over

the functioning of agricultural markets. However, this deposit mechanism although in principle protected freedom of trade, involved in it a number of constraints and burdens. Four firms challenged this system before the competent German Court, i.e., the Administrative Court of Frankfurt-on-Main which found it contrary to certain basic principles of German constitutional law, namely freedom of action and disposal, economic freedom and proportionality, resulting from Articles 2 and 14 of the German Basic Law. After making some statements along these lines the Administrative Court recognized that the disputes against the Community agricultural regulations gave rise to legal uncertainty and decided to submit the matter to the Community Court in a request for a preliminary ruling.

In its ruling European Court held *inter alia* that

«Recourse to legal rules or concepts of national law, to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Community law. The validity of such instruments can only be judged in the light of Community law. In fact the law born from the Treaty, the issue of an autonomous source, could not, by its very nature, have the courts opposing to its rules of national law of any nature whatever without losing its Community character and without the legal basis of the Community itself being put in question. Therefore, the validity of a Community instrument or its effect within a member-state cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure.

An examination should be made, however, as to whether some analogous guarantee inherent in Community law, has not been infringed upon. For respect for fundamental rights is an integral part of the general principles of law of which the Court of Justice ensures respect. The protection of such rights, while inspired by the constitutional principles common to the member-States must be ensured within the framework of the Community's structure and objectives».²⁵

The conclusion from this reasoning is that reference to the member-state's constitutional principles is a privilege of the Court that is to be exercised unilaterally and only to the extent that it supports the «validity of instruments promulgated by Community institutions».²⁶ These principles are not to be considered as a source of law binding the Court and as it was made evident in subsequent rulings, e.g. *Luisa Sabbatini v. European Parliament*,²⁷ *Monique Cholle v. E.C. Commission*,²⁸ the inspiration of the Court from them is optional and not based on «previous systematic consideration of trans-Community standards».²⁹ This holds also true for the *Sopad Case*, where the general principle of the non-retroactivity

25. (Case 11/70), CMLR (1972), 283.

26. *Ibid.*

27. Case 20/71, CMLR (1972), 945.

28. Case 32/71, *Ibid.*

29. See in particular the *Re Civil Service Salaries Case* (81/72) (1973), CMLR 639.

23. On the principle of supremacy of Community law, see D. Lasok, *An Introduction to the Law and Institutions of the European Communities* (London: Butterworth & Co., 1973), 200.

24. (Case 29/69), CMLR (1970), 119.

of new legislation was found applicable to a Community regulation.³⁰

This careful systematic evolution of case-law guidelines was seriously challenged in a subsequent case, the *Firma J. Nold KG. v. E.C. Commission*³¹ decided on May 14, 1974. The case involved an application for annulment of a decision of the Commission of December 21, 1972, which authorized new business terms for Ruhrkohle GmbH. The undertaking, J. Nold, a first-stage coal wholesalers partnership, objected essentially on the grounds that the decision authorized the Ruhr coal selling agency to render direct supplies of coal, subject to the conclusion of fixed two-year contracts providing for the purchase of at least 6.000 tons annually for the supply of domestic homes and small industry sector, a quantity which exceeded by far its annual sales in this sector and that the decision, as a result, affected its status as a direct wholesaler. The applicant firm asserted, *inter alia*, that certain of its fundamental rights had been violated as a result of the restrictions introduced by the new trading rules authorized by the Commission which had the effect of depriving it of its direct supplies, of endangering the profitability of the undertaking and the free development of its business activity and, jeopardizing its very existence. More specifically, with regard to the applicant, the Commission's decision was said to violate «a-quasi-proprietary right» as well as its right to freely pursue a business activity, a right protected by Article 14 of the Constitution of the German Federal Republic and by the Constitutions of other member States. Also by various international treaties, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocol of March 20, 1952.

In its ruling the Court re-asserted that «fundamental rights form an integral part of the general principles of law which it enforces». It then went on to say that

«In assuring the protection of such rights, this Court is required to base itself on the constitutional traditions common to the member-states and therefore could not allow measures which are incompatible with the fundamental rights recognized and guaranteed by the constitutions of such states... It is in the light of these principles that the complaints raised by the applicant should be assessed».³²

Therefore, the constitutional laws of member-states become a binding source of community law and the Court «is required» to base its judgements upon them. However, this judgement hardly reconciles with the previous jurisprudence of the Court and par-

ticularly with its judgement in the *Internationale Handelsgesellschaft Case* where it is affirmed that in cases involving human rights the Court is «inspired by the constitutional principles common to member-states».³³ What we are witnessing then, is that the Court's resort to constitutional laws of member-states, is transformed into a clear-cut legal obligation.

In the light of this conclusion, it would be appropriate to put some more emphasis to the Court's reference to traditions «common to member-states» and «recognized and guaranteed by the constitutions of such states». As in its previous judgements the Court again did not elaborate under what criteria the «common» principles are to be sought, specified and applied. Recent comparative analysis of the human rights safeguards recognized and incorporated in the constitutions of member-states has come to the conclusion that «considerable differences exist».³⁴ The question that arises then is: what are the standards of these «common» principles? Shall the Court base its judgement on the constitutions that accord the maximum protection or on those that accord the minimum protection?

Judge Pescatore in interpreting the Court's judgement in the *Nold Case*³⁵ as well as in previous ones,³⁶ argued that the Court's task is to ensure in each case that the standard of protection given to human rights must not be inferior to the guarantees accorded by any one of the national constitutions of the member-states and that «...the method of reconciling and levelling will be in an upward direction, that is to say towards solution giving the best protection to individual rights».³⁷ The statement of the learned judge, with all due respect, conflicts both with the letter of the Court's judgement in the *Nold Case* («common») and even more sharply with the judgement in the *Internationale Handelsgesellschaft Case* where it was stressed that: «recourse to legal rules or concepts of national law to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Community law».³⁸

c. the European convention on human rights as a source of community law

The European Convention on Human Rights,

33. Op. cit., n. 24. See also Landau, op. cit., n. 4, pp. 294-5.

34. Bernhardt, op. cit., n. 16, p. 45.

35. P. Pescatore, «Les exigences de la démocratie et la légitimité de la Communauté Européenne», *Cahiers du Droit Européen* (1974), 499, 512-13, footnote 16.

36. Pescatore, «The Protection of Human Rights...», op. cit., n. 4, p. 79.

37. *Ibid.*

38. Op. cit., n. 24. See also Landau, op. cit., n. 4, pp. 294-5.

30. Case 143/73, Recueil 1433.

31. Case 4/73, CMLR (1974:Vol. 2), 338-359.

32. *Ibid.*, p. 354.

signed in Rome in November 4, 1950, under the auspices of the Council of Europe represents the most comprehensive and systematic mechanism for a collective-international protection of human rights that exists in the world today.³⁹ Since the French ratification in 1974, all the member-states of the EEC have been bound by the provisions of this Convention. This fact gave a renewed impetus to the question of interaction between these two formally distinct but essentially highly interrelated legal orders. Is the European Convention a source of Community law and if the answer is affirmative what is the nature of this source? Certainly, the Communities as such are not a party to the Convention and they can not become a party since the Convention has been concluded by *states* members of the Council of Europe and leaves no room for adherence by any other subject of international law besides states.

On the other hand the Communities, although endowed with a certain degree of treaty-making capacity, have not and may not become a party to the Convention because competence to legislate on subject-matters that the Convention deals with has not been transferred from the Member-states to the Communities.⁴⁰ Further, for the Court of the EEC to be bound by constitutional traditions or international agreements to which all member-states are contracting parties,⁴¹ an express provision of the Treaty of Rome must exist, something which is not the case with the European Convention on Human Rights. Therefore, the question of the treatment of the Convention by the Court as a source of Community law must be examined within the general category of «general principles».

The Court made reference to the European Convention in two recent cases that we have already reviewed, i.e. the *Nold Case* and the *Rutili Case*. In the latter it referred specifically to the provisions of the European Convention on Human Rights and to the general principles of law enshrined in its provisions with regard to the criteria for the establishment of a

balance between the interests of the individual and the interests of national security. The judgement stated *inter alia* that

«Taken as a whole, these limitations placed on the powers of member States in respect of control of aliens, are a specific manifestation of the more general principle enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, and ratified by all Member States, and in Article 2 of Protocol No 4 of the same Convention signed in Strasbourg on 16 September 1963, which provided, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests «in a democratic society».⁴²

However, in the process of «reception» of general principles into the legal order of the Community, resort to international treaties to which the EEC member-states are parties, is not conceived as being on the same footing as constitutional traditions or principles. This conclusion comes from the Court's judgement in the *Nold Case* where it emphasized that «...international treaties on the protection of human rights in which the member-states have co-operated or to which they have adhered *can also supply indications which may be taken into account within the framework of Community law*».⁴³ As it has already been mentioned,⁴⁴ in the same judgement the Court referred to constitutional traditions as a source of Community law on which it «*is required*» to base its decisions.

It seems, therefore, that the judgement in the *Nold Case* establishes some kind of an hierarchy in the «reception» of general principles of law with those of the constitutional laws of member-states coming first, and those deriving from international conventions following.⁴⁵ An even more substantial difference appears established between these two sources of law with regard to their legal character. While constitutional traditions are raised to the status of a *binding* source of Community law, international conventions are regarded as being of a *persuasive or exhortative* nature, with no binding effects whatsoever. The differentiation, however, is hardly justifiable in so far as the treaty-law of the Community is concerned. This is so because according to this law neither the nine national Constitutions (both written and unwritten) nor the international treaties are recognized as *formal sources* of Community law.⁴⁶

The consequences of this distinction can be further realized on more practical grounds. One of the issues that emerged from the preceding analysis is the un-

39. On the Convention, see J.E.S. Fawcett, *The Application of the European Convention of Human Rights* (Oxford: Clarendon Press, 1969); G.L. Weil, *The European Convention of Human Rights* (Leyden: A.W. Sijthoff, 1963); Phedon Vegleris, «Twenty Years Experience of the Convention and Future Prospects» in A.H. Robertson ed., *Privacy and Human Rights* (Manchester: Manchester University Press, 1973), 340-424; Polys Modinos, «Effects and Repercussions of the European Convention on Human Rights», *International and Comparative Law Quarterly*, Vol. II (1967), 1097-LL08.

40. Sorensen, *op. cit.*, n. 4, p. 7. See also analysis of relevant issues in *British Institute Studies in International and Comparative Law*, No. 6, «Legal Problems of an Enlarged European Community» ed., by M.E. Bathurst, K.R. Simmons, N. March Hunnings, Jane Welch (London: Stevens & Sons, 1972), 128-130.

41. E.g. the GATT. See the judgement of the EEC Court in the *International Fruit Co. Case* (21-24/72) 18 (1972), Recueil 1219.

42. *Op. cit.*, n. 21.

43. *Op. cit.*, n. 30, p. 354.

44. See *supra*, p. 19.

45. Landau, *op. cit.*, n. 4, p. 295.

46. *Ibid.*

certainty regarding the formulation of specific standards for human rights. The existence of such standards would have made easier the task of the Court to accord justice in human rights cases involving issues which have not been touched upon in the Community Treaties. The European Convention on Human Rights, on the other hand, incorporates in its provisions, all those human rights principles commonly held and safeguarded in the constitutions of the EEC member-states, which are now all Contracting Parties to the Convention. Further, the Convention and its Protocols, is not limited to economic and social rights, which may at the present be regarded as being of primary significance for the Community, but is principally concerned with civil and political rights. Provisions on such rights are present only incidentally in the EEC treaties, a fact with significant consequences not only for the future but for the present operation of the Community as well.

It seems, therefore, that the Convention, covering a variety of categories of individual rights, meets the need for a comprehensive «common» standard, that would facilitate enormously the Court's process of «reception» of «general principles» into Community law. It is in this sense that the Court's refusal to accord to the principles incorporated in the Convention the same status that it recognized for the constitutional traditions common to «member states» becomes more difficult to understand.

d. some conclusions

In the preceding discussion, an attempt was made to outline some of the questions that the existing system of legal protection of human rights in the EEC may give rise to. The jurisprudence of the Court, in the cases analyzed, reveals a certain degree of inconsistency and lack of clarity, in so far as the development of EEC human rights case-law is concerned. The cause of this inconsistency is certainly not the incompetence of the learned and highly qualified judges that form the Court. It is rather a result of legal obscurity, a quality inherent in the system of law on which the Court is required to base its judgements. Despite this, it seems probable that in its future judgements, the Court will overcome some of the problems involved, and the evolution of its human rights case-law will follow a more smooth and clear process. But even in view of such an eventuality several questions remain unanswered.

The Court's function in the general framework of the institutions of the Community is defined in Article 164 of the EEC Treaty as follows: «the Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty». Nowhere in the European Communities' Treaties it is

stated that the Court has been given power to legislate on behalf of the Community. Unlike the Council and the Commission (Art. 189), which enact legislation through regulations, directives and decisions, the Court may only interpret the existing law and also state what the law is when explicit Community legislation does not provide for it.⁴⁷ This does not mean that the Court does not or should not contribute, through its rulings, to the evolution of Community law. But in the case of human rights, the silence of written provisions in important matters and their limited scope in general, make the whole issue of «evolution» of law highly problematic. The judicial authority of the Community simply «lacks any direct democratic mandate»⁴⁸ as to the direction and limits in the process of the evolution of human rights law within the Community. Even under the present state of European integration, where only a limited section of the total legal relationship between the individual and public authorities is involved, the development of human rights law by the Court without its decisions having a clear basis on the Treaties establishing the Communities may create a precedent with future undesirable consequences.

In the light of this analysis a recommendation made by Prof. Rudolf Bernhardt in his recent study, prepared on the request of the EEC Commission, becomes particularly relevant. He suggests that under present conditions, it is indispensable that the other Community organs, i.e. the Parliament, the Council and the Commission, acknowledge in an express declaration «the validity of fundamental rights in the European Communities and their protection by the Court of Justice».⁴⁹ Even if such declaration would have no binding force, it would, undoubtedly, encourage states accepting the Court's future initiatives in the field.

A second issue must also be considered relating to an individual's capacity to institute proceedings before the Court in cases involving human rights violations. As the system stands now the infringement of obligations undertaken by a state under the EEC Treaty might give rise to a direct action before the Court at the suit either of the Commission or other organs as well (Art. 175 (3)) or of another Member State but never by an individual without some prior action (Art. 175 (3), 177). If an individual believes that his rights have been affected by an infringement of the Treaty by a member-state he can, certainly, lodge a complaint with the Commission. It is at the discretion of the Commission to decide that, for reasons independent of the merits of the complaint,

47. P.S.R.F. Mathijssen, *A Guide to European Community Law* (London: Sweet & Maxwell, 1972), 151-2.

48. See Bernhardt, *op. cit.*, n. 16, p. 68.

49. *Ibid.*, p. 69.

the moment is not appropriate for the institution of proceedings under Article 169 of the EEC Treaty. The person affected can not normally invoke Article 175—despite the broad wording of paragr. 3—to force the Commission to act.⁵⁰ But even on the assumption that the Commission does initiate the two-stage procedure envisaged in Article 169, it may take months or even years before the case can be decided. The remedy, then, seems inadequate to provide to the individual effective protection in case of an abuse of its fundamental rights.

One way open to the individual to reach the Court of Justice is by instituting proceedings before a competent national court. Cases that can be brought before this court are those involving (a) disputes between national authorities of member states and private individuals concerning the application by the former of directly applicable Community law. (b) a challenge of the applicability of national law on the grounds that it is incompatible with Community law. (c) the applicability of a Community act on the grounds, e.g. that it is contrary to the Treaty provisions and therefore invalid. (d) substantive rights conferred by Community law, e.g. the case of a plaintiff who has been refused leave to enter United Kingdom and who claims that as a national of a member-state of the EEC he is entitled under Community law to enter United Kingdom and take up employment there.⁵¹ In all these cases, a question or questions may be referred to the European Court by a national court at any stage of the proceedings either at its own volition or at the request of either party.

However, while the jurisdiction of the EEC Court is limited in proceedings for a preliminary ruling to ruling on the interpretation or validity of «acts» of Community institutions—including recommendations, etc.—or execution of decision etc., the national court retains its exclusive jurisdiction to apply the ruling of the European Court in reaching its decision on the merits.⁵² Under these conditions, an amendment of the Treaties which would grant to the affected individual direct access to the European Court in cases involving violation of his fundamental rights, would be enormously beneficial to the Community's system for the protection of these rights *in toto*. Such a right of direct petition would constitute a major step towards a more uniform human rights Community law (an aim only partially served with the procedure of preliminary rulings). Even more, it would enhance the democratic image that the Community

as a whole has, or should have, for the peoples of Europe.

The final issue to be touched on in this discussion, the question of a fundamental rights catalogue for the Communities, has already caused a considerable degree of disagreement among scholars.⁵³ Each side has strong arguments to support its views and in order to keep the promise that we gave in the introduction of this paper i.e. to limit ourselves (to the extent that this is possible) to problems of the present or of the immediate future, we will abstain from any elaboration of the issues involved.

We will take, however, this opportunity to give some emphasis to a question that has so far received no attention in relevant discussions. This refers to the repercussions that such a catalogue of rights, becoming legally binding by means of a formal supplement to the Community Treaties (in the form of an international treaty to be ratified according to the law of each member-state) might have for the protection of human rights in the non-EEC West-European states.

It can be reasonably expected that such a catalogue of rights should be drafted in a way that three requirements will be met: (a) an evolutionary conception of the Communities taking into account the prospects for a closer political co-operation among the EEC countries and of an enhanced political authority of the Community's institutions. (b) the rights to be protected can not be limited to those that the present activity of the Community is more likely to threaten and, therefore, political and civil rights must be included. (c) the standard of such a protection must go far beyond the one currently accorded to these rights by the European Convention of Human Rights, signed under the auspices of the Council of Europe.

Even if we suppose that such a new system will be confined to the activities of a supranational Community institutions and will not provide for protection against acts of national authorities which will not be *stricto sensu* Community acts, the consequence will be more or less the same: a group of countries will participate in two formally distinct human rights protections systems and in each one of them it will guarantee for the same rights different standards of protection. To go one step further, this would mean that the EEC countries are solemnly abandoning the idea of «european unity» (in so far as a broader Europe, represented by the Council of Europe is concerned) not only in the economic sphere—already a *fait accompli*—but also in the field of democratic rights.

On the assumption then that such a «european

50. In order to act the Commission must be under a legal obligation to do so, see joined cases 19 and 21/60, 2 and 3/61 *Fives Lille Cail v. High Authority*, Recueil 1961, p. 561.

51. See e.g. *Van Duyn v. Home Office* (1974), supra, p. 11.

52. Francis G. Jacobs, *References to the European Court: Practice and Procedure* (London: Butterworths Co., 1975), 153.

53. See Bernhardt, op. cit., n. 16, pp. 67-69.

unity» in the field of human rights is conceived by the Community in a broad geographical sense, one is tempted to suggest a more comprehensive and realistic method for the realization of such a «unity». The existing pattern of strong, economic in particular, links, between non-EEC Council of Europe Members and the Community should motivate the mem-

bers of the latter to take the initiative and propose an amendment, identical to both the EEC Treaties and the European Convention on Human Rights, which would make respect for the rights of the individual guaranteed in the Convention, an explicit and absolute requirement for economic cooperation *with or within* the Community.