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## "Federal" Aspects of the European Convention on Human Rights

Colin Warbrick  
*University of Durham, England*

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# “FEDERAL” ASPECTS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Colin Warbrick\*

## I. INTRODUCTION

The inquiry pursued in this paper has been prompted by a paradox. In the United States, the Supreme Court has been reluctant to find any constitutional limitations upon the power of the States to allow the administration of corporal punishment in schools, despite being able to rely on the national Bill of Rights — in the interpretation of which the Court has many times circumscribed the power of the State governments in other contexts. The result has been that some children have been left without redress when they have been subjected to exceptionally severe punishment.<sup>1</sup> Under the system of the European Convention on Human Rights,<sup>2</sup> recent judgments of the European Court of Human Rights and decisions of the Commission have all but outlawed corporal punishment of schoolchildren.<sup>3</sup> The United Kingdom, the defendant State principally involved in these cases, has recently legislated to make the infliction of the penalty unlawful in State schools.<sup>4</sup> The European institutions have reached this intrusive conclusion relying on an international treaty, which has no direct

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\* Senior Lecturer In Law, University of Durham, England. This paper started life as a lecture to a seminar on the American Constitution organized by the Institute of European Studies in Durham in 1987.

1. *Ingraham v. Wright* 430 U.S. 651 (1977). In *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. den.*, 108 S. Ct. 1220 (1988), the Court of Appeals for the Tenth Circuit said that *Ingraham* did stand for the proposition that excessive corporate punishment could violate a pupil's substantive due process rights, reversing a lower court decision giving summary judgment in favour of the defendants. See Mlyniec, *Corporal Punishment in the United Kingdom and the United States: Violations of Human Rights or Legitimate State Action?*, 8 B.C. INT'L COMP. L. REV. 39 (1985).

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. There are eight Protocols to the Convention. For extracts, see Appendix I.

3. *Tyrer v. United Kingdom*, 26 Eur. Ct. H. R. (ser. A) para. 31 (1978); *X v. U.K.*, 14 Eur. Comm'n H.R. 205 (1979); *X v. U.K.*, 36 Eur. Comm'n H.R. 49 (1981). Also *Campbell and Cosans v. United Kingdom*, 48 Eur. Comm'n H.R. (ser. A) (1980) (Right of a parent to demand that his child be not beaten protected by 1st protocol, Art. 2). There has been no authoritative judgment which has addressed directly the compatibility with Article 3 of corporal punishment as a means of school discipline. The British government has paid £ 51,000 in compensation to the parents of 17 children beaten at school who had commenced proceedings under the European Convention. *The Guardian*, October 28, 1988, at 6.

4. Education (No. 2) Act 1986, § 47. The prohibition of corporal punishment extends to all State schools and certain private schools in Great Britain.

force of its own within the national legal system and which is a very new regime. The American cases seem to show a remarkable solicitude for state autonomy.<sup>5</sup>

The European practice surprises because it interprets the Convention in a way which carries the provisions of the treaty so deeply into the legal systems of the member States, favoring a European standard over diverse national ones. The difference can hardly be explained in the textual terms of the standards the two Courts have to interpret: "cruel and unusual punishment" of the Eighth Amendment and "inhuman or degrading . . . punishment" of Article 3 of the Convention. These terms are not merely very similar but are run together almost as equivalents in Article 7 of the International Covenant on Civil and Political Rights.<sup>6</sup>

In this article I am not concerned primarily with the question of whether the terms of the constitutional guarantee of individual rights make a difference to their protection. The question I am to look at is, instead, the extent to which or the manner in which federal concerns make a difference to the interpretation of bills of rights. How is State autonomy to be maintained against a centralising tendency of the federal judiciary (and, where the power exists, against the expansion of federal legislative power) which extends the reach of protected rights into areas previously regulated by the States? How is the contest between demands of national uniformity and the ability of the States to respond to local conditions to be resolved?

These are big questions and it might be objected that it is hardly worthwhile to pursue them in the context of the European Convention, which is not a national system, let alone a federal one (which might be better regarded, in Professor Stein's term, as a divided power system<sup>7</sup>). Even so, it has to be conceded that the division of power is vastly asymmetrical in favor of the States and is not uniform across the range of governmental powers.<sup>8</sup> There is nothing equivalent to the Supremacy Clause<sup>9</sup> in the European Convention. What degree of direct/domestic effect is given to the Convention or to the decisions of

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5. See cases cited *supra* note 1. See also *Darden v. Watkins and Russellville Independent Board of Education*, 845 F.2d 325; *Hall v. Tawney*, 621 F.2d 613.

6. GA RES. 2200, 21 U.N. GAOR Supp. (No. 16) at 53, U.N. Doc. A/6316 (1967): "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . ."

7. Stein, *Uniformity and Diversity in a Divided-Power System: The United States Experience*, 61 WASH. L.REV. 1081 (1986).

8. The division of power is judicial only. There are neither legislative nor executive functions (save the administration of the Convention) for any body established by the Convention.

9. U.S. CONST. art. VI, cl. 2.

its institutions is a matter of national constitutional law.<sup>10</sup> Although there is the obligation in Article 53 that the States "will abide by the decision of the Court in any case in which they are parties," the Court has made it clear that it is for the State to choose the means it adopts to secure compliance.<sup>11</sup> The role of the European court vis-à-vis the national legal systems is more hierarchical than parallel (and there is, of course, no "European" law for it to apply). As the Supreme Court has moved to the full incorporation of the Bill of Rights against the States in the United States,<sup>12</sup> a limited analogy can be made between the role (if not the exact legal status) of the national Bill of Rights and the Convention. In spite of these substantial discrepancies and only narrow similarities, problems resulting from the division of power have been thrown up by both systems and some identity of approach to resolving them may be discovered. This article is concerned with the impact of division of power on the interpretation of the substantive rights under the Convention.

## II. THE EUROPEAN CONVENTION SYSTEM

The European Convention on Human Rights is a treaty of the Council of Europe.<sup>13</sup> The Council of Europe is a Western European international organization of twenty-two member States. The object of the Council of Europe is "to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress."<sup>14</sup> Member States must accept the principles of the rule of law and the enjoyment by all persons within their jurisdiction of human rights and fundamental freedoms.<sup>15</sup> The organization is essentially a cooperative one. It has a quasi-legislative function in drafting treaties, which require ratification by the Members to

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10. See generally A. DRZEMCZEWSKI, *EUROPEAN CONVENTION OF HUMAN RIGHTS IN DOMESTIC LAW* (1982).

11. Schmidt and Dahlstrom v. Sweden, 21 Eur. Ct. H.R. 16 (ser. A) (1976).

12. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, ch. 11 (1978); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1949).

13. 87 U.N.T.S. 103 (1951). See A.H. ROBERTSON, *EUROPEAN INSTITUTIONS: CO-OPERATION, INTEGRATION, UNIFICATION* ch. 2 (3rd ed. 1973).

14. Statute of the Council of Europe, Article 1(1)(a). The Council of Europe is to be distinguished from the European Communities, one of the objects of which is the unification of certain aspects of its members' activities and which is sometimes spoken of as a "pre-federal" or "quasi-federal" organization. On the relationship of the Convention with the law of the European Committees, see Weiler, *Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, in *INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS* 113 (R. Bernhardt and J.A. Jolwicz eds. 1987).

15. Statute of the Council of Europe, ch. II, art. 3.

create binding obligations,<sup>16</sup> or making recommendations to Members,<sup>17</sup> but practically no executive function beyond that of administering the organization itself. The European Convention on Human Rights is the result of an exercise of this quasi-legislative authority.

Although only Member States may become parties to the Convention, participation is not automatic. A State must ratify the Convention and its Protocols independently of its membership of the Council of Europe.<sup>18</sup> In addition to setting out the substantive obligations on human rights, the Convention establishes an elaborate and innovative machinery for the supervision of States' obligations under the Convention. Two bodies are set up. The Commission of Human Rights is charged with the preliminary investigation of allegations of violations of the Convention, with negotiating between complainants and defendant States with the object of reaching what the Convention calls a "friendly settlement" of the disputes and, ultimately, in some cases bringing claims to the other supervisory body, the European Court of Human Rights.<sup>19</sup>

At this distance in time, it is easy to forget what a break the Convention system represented with the established international pattern for securing the implementation of States' obligations, especially since the substantive field, human rights, also represented a controversial extension of the content of international obligations.<sup>20</sup> In the circumstances of the drafting of the European Convention, the most the States would accept was optional jurisdiction of the Court and optional rights of individuals within their jurisdiction to initiate proceedings against them. Each required acceptance (and that acceptance was slow in forthcoming from some States, even those which embraced the Convention scheme in general).<sup>21</sup> Although the parties to the Convention largely accept these additional obligations, in general, they have done so for a fixed time only, so that a State's commitment to the international supervision machinery is contingent.

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16. *Id.* ch. IV., art. 15(a).

17. *Id.* ch. IV, art. 15(b).

18. For details, see Appendix II. The uniformity of the Convention regime is further disturbed by the possibility of States making reservations to the Convention. See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 2, art. 64.

19. For a general account, see P. VAN DIJK & G. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 53-174 (1984). See also Kruger, *The European Commission on Human Rights*, 1 *HUM. RTS. L.J.* 66-87 (1980); O'Boyle, *Practice and Procedure under the European Convention on Human Rights*, 20 *SANTA CLARA L. REV.* 697 (1980).

20. See A.H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 80-92 (2nd ed. 1982).

21. The United Kingdom did not accept the right of individual application until 1966 and France did not accept it until 1981. For an explanation of the UK's position, see Lester, *Fundamental Rights: The United Kingdom Isolated?*, 1984 *PUB. L.* 46, 49-55, 58-61.

In concept, the system of the Convention does not provide a right for an individual to have his complaint against a State tried before an international Court, even where the State has accepted the right of individual application and the jurisdiction of the Court.<sup>22</sup> However, practical developments since 1953 have enhanced the procedural status of the individual so that proceedings before the Court increasingly resemble proceedings before a national constitutional tribunal. What the individual still lacks is the right to get his case to the Court. Unless the Commission or a State will take the initiative to do so, the application will finally be determined by the Committee of Ministers, a political body where the odds are stacked against the individual.<sup>23</sup> Nonetheless, there is the possibility of a binding judgment from the Court in favor of an individual against a State, even his State of nationality. The Court has now given about 140 judgments, mainly in cases initiated by individuals. This is a sufficient jurisprudence to detect certain principles of interpretation.

### III. FEDERALISM AND THE INTERPRETATION OF INDIVIDUAL RIGHTS

#### A. *Influence of Federalism in the Interpretation of the U.S. Bill of Rights*

There has always been a dispute about the "proper" nature of American federalism but one object of the federal system is the protection of individual interests against public authority.<sup>24</sup> The division of governmental authority is not an end in itself but one device by which protection of the individual is achieved. The preservation of any particular version of federalism may be no guarantee of the furtherance of individual interest. It was the deficiencies perceived in the existing federal balance in the 1950s for the protection of the rights of minorities against State power and in the provision of fair criminal justice systems in the States which provided the impetus for the judicial na-

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22. The right to refer a case to the court lies only with the Commission and certain States, per Article 48. Cases may be initiated by one State party against another, per Article 24, but such cases form only a small proportion of the eighteen (total) inter-State cases compared with 13,500 individual applications through January 1988.

23. Voting to establish a violation requires a 2/3rds majority of all the members of the Council of Europe, Art. 32(1). See *East African Asians v. U.K.* Res DH(77) 2, XX Y.B. E.C.H.R. 642 (1977).

24. See THE FEDERALIST PAPERS NO. 10 (Madison) (C. Rossiter ed. 1961); Cox, *Federalism and Individual Rights under the Burger Court*, 73 NW. U. L. REV. 1 (1978); McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1500-07 (1987). For a different view, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 244 (1980): ". . . the assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms akin to those conventionally so defined has no solid historical or logical basis."

tionalization of individual rights.<sup>25</sup>

As the content of these rights has also been extended, a reaction has set in, the perception now being that the national intervention has extended into matters "properly" within the power of the States.<sup>26</sup> While the details of these oscillations may not be decisive in the European context, they do show that Federalism is not simply a matter of intergovernmental relations.<sup>27</sup> Positions are struck about the appropriate balance between Federal and State authority because it is believed that it will have different and specific (rather than merely different) outcomes on the protection of individual rights.<sup>28</sup> To an extent, this is, of course, a truism. If a matter is subject to federal determination, there will be a single, national standard. If a matter is left to the states, there is at least the possibility, more likely higher than this, that different standards will be adopted in different states (even if 50 different standards are unlikely to result).

Until recently, the American experience of the nationalization of individual rights has inevitably involved their expansion, that is granting the individual wider protection against governmental interference.<sup>29</sup> Not all questions involve merely the individual against the government; where the individual claims some advantage by reason of his membership of a group, his benefit may be at the expense of non-members. Again, the pattern has been clear: nationalization generally has favored the disadvantaged minority against the advantaged majority.<sup>30</sup>

Against this background, the proponents of a State-orientated approach anticipate that some States at least will take the opportunity to retreat from these expanded national standards — whether the issue

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25. Justice Harlan in *MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR* 59-61 (1969).

26. *Roe v. Wade*, 410 U.S. 113 (1973), probably represents the furthest point of invasion. For a consideration of some of the problems where there has been something of a retreat by the Supreme Court in its understanding of the content of national rights, see Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: a Critique of Michigan v. Long*, 59 *NOTRE DAME L. REV.* 1118 (1984).

27. J. CHOPER, *supra* note 24, at 250-54, is sceptical about the relevance of federalism as contributing to the protection of individual rights in the United States, and seeks to separate entirely federalism and rights matters for the purpose of judicial review. Experience in the United States and with the European Convention suggests that there is no hermetic division between the two categories.

28. See Shapiro, *Freedom of Expression — Transnational and State Interactions in the American Experience*, in *1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE*, BK. 3 249, 277 (1986), maintaining that the principal problem has not been whether the standards that govern expression should be national or State but as to what the governing standards should be.

29. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* ch. 3 (1976).

30. *E.g. Brown v. Board of Education*, 347 U.S. 483 (1954); and 349 U.S. 294 (1955).

be police powers (where a State may choose to remove some of the national limitations which protect an individual suspect), or whether it be minority protection (where a State may be free from any affirmative action obligation). The expansion of the application of national standards has two bases. The first basis is principled. It is that the rights enunciated in the Bill of Rights are the national rights of all Americans and no State has the constitutional power to dilute them.<sup>31</sup> The second basis is functional. It is that some rights can be enjoyed effectively only if there is a uniform standard applied to them.<sup>32</sup> In particular, a state allowing a more capricious exercise of governmental authority will deter the movement of other Americans into and through the state, in obstruction of their rights and in defiance of the other national objectives of the Constitution, notably the pursuit and strengthening of the national market.

Both arguments assume that there are identifiable, individual rights of overriding theoretical and practical importance. Until recently, such an assumption has been part of the received constitutional wisdom in the United States. National protection of fundamental rights, whether by the Supreme Court or Congress, has been demanded on grounds of uniformity and superiority. In the post-New Deal period, national protection has embodied an idea of progress in which the Court would provide superior standards of protection to those found in State Constitutions through a more expansive interpretation of the Bill of Rights and in which the Congress would provide expanding resources to make the enjoyment of such rights effective. Congress can use its coercive powers of the purse and, ultimately, the President could use Federal force to implement national decisions.<sup>33</sup>

### B. *Relevance of U.S. Approaches to Federalism to the European Convention System*

This is not a model having much relevance to the European Convention system. First, there are not two streams of law in the European system equivalent to State and Federal legal systems. To the extent that there is any integration at all between Convention law and

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31. *Mapp v. Ohio* 367 U.S. 643 (1961); *Gideon v. Wainwright* 372 U.S. 335 (1963).

32. *Edwards v. California* 314 U.S. 160 (1941); *Heart of Atlanta Motel v. United States* 379 U.S. 241 (1964).

33. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1988). There are no equivalent Congressional or Presidential powers in the Convention system but the European Court has found a place for positive rights in the Convention. For a recent example, see *Platform Artze für das Leben v. Austria*, 139 Eur. Ct. H.R. (ser. A) (1988). Generally, the Court has not found such rights to impose particularly onerous duties on the States, but there are exceptions, see *Baraona Case*, 122 Eur. Ct. H.R. (ser. A) (1987).



national law, it is a hierarchical relationship of sorts.<sup>34</sup> Also, there is no central power in the Council of Europe to bring the recalcitrant State into line:<sup>35</sup> the mechanism of implementation is wholly persuasive, or, as the Commission usually says, cooperative. Moreover, the functional demand for uniformity in a system of international States is less than that within a national federal system. The European Convention does not guarantee freedom of movement for nationals of the parties throughout the territories of these States. The obstacles and disincentives to taking advantage of those opportunities for trans-frontier movement which do present themselves are far more significant than differences in the protection of fundamental rights.<sup>36</sup>

On the other hand, the presumptions upon which the consensus of the Warren Court were built have lost judicial favour. The Supreme Court has interpreted some of the national guarantees of individual rights in a less stringent manner. One result has been to open the prospect of "better" protection of individual rights by State law compared with the now diminished standards of protection in the national Bill of Rights.<sup>37</sup> Opportunities for this arise where the Supreme Court retreats from its earlier decisions. Previously State courts were compelled to follow its advance but they are not bound to retreat in unison with the national tribunal. Where the Supreme Court finds that the Constitution does not impose positive burdens on the States, State courts can find that the local constitution does. Of course, this leads to a breakdown of uniformity. There will be the possible costs in mobility. Better protection may be bought only at the price of local economic disadvantage. Nonetheless, federal protection is not envisaged as disappearing altogether.<sup>38</sup> It will be there as a minimum standard

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34. See *infra* note 40 and accompanying text.

35. Article 8 of the Statute of the Council of Europe allows the Committee of Ministers to suspend and, ultimately effectively to expel a State which has "seriously violated" its obligations under Article 3. Greece withdrew voluntarily in 1970 after the Commission had found numerous violations of the Convention by the government of the Colonels. Greek Case, 1969 Y.B. EUR. CONV. HUM. RTS. 1 (Eur. Comm'n on Hum. Rts.). Greece was readmitted to the Council of Europe on the restoration of democracy and renewed its participation in the Convention in 1974.

36. There is some trans-frontier movement, temporary and permanent, which is inspired by human rights considerations, for example, of refugees from Turkey to the Federal Republic of Germany, see *Altun v. F.R.G.*, 36 Eur. Comm'n H.R. 209, 236 (1983), and of Irish domiciliaries seeking divorce and remarriage outside the Republic, see *Johnson v. Ireland*, 112 Eur. Ct. H.R. (ser. A) (1986) paras 59-60.

37. Brennan, *The Bill of Rights and the States: the Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). Article 60 of the Convention provides, "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any of the High Contracting Party . . ." clear recognition of the power of the States to provide "better" protection than the Convention demands.

38. Brennan, *supra* note 37, at 552.

that will allow the enjoyment of a core of individual rights to prevent the decentralizing tendencies from becoming distorting.

This model is much closer to the European Convention system. The European Court has described the role of the Convention as "subsidiary"<sup>39</sup> to national systems in securing human rights. This is not merely an interpretative stance but is reflected in the structure of the Convention. Article 60 provides that nothing in the Convention shall be construed to limit rights under national laws. The requirement to exhaust local remedies in Article 26 establishes the primacy of the domestic legal system as the protector of human rights. Article 13 requires States to provide an effective national remedy for persons whose rights are violated. The power of the Court to grant satisfaction to a successful applicant under Article 50 arises only if the national legal system does not provide full repatriation.

While the Court has stopped short of finding an obligation on States to incorporate the Convention directly into its national law, in the *Ireland v. UK* case,<sup>40</sup> it made it clear that it thought such a step was much to be desired. Further, Article 13 has been interpreted to extend the duty on States to provide an effective national remedy beyond the plain terms of its language. In *Klass v. Germany*, the court said, ". . . Article 13 must be interpreted as guaranteeing an effective remedy before a national authority to everyone who *claims* that his rights and freedoms under the Convention have been violated."<sup>41</sup> The applicant must be able to show that he has an "arguable" claim and not, as the plain language of Article 13 suggests, that his rights have in fact been violated.<sup>42</sup>

Finally, the Court has been strict in construing the obligation on an applicant to exhaust local remedies before bringing a claim in Strasbourg.<sup>43</sup> This is not out of deference to State sovereignty but to encourage recourse to national channels of redress which are seen as quicker and more effective, and to provide some protection to the international organs against being overwhelmed by applications.

Of course, the problem is not merely one of process. National systems can still come up with the "wrong" answer. This possibility is most marked in the United Kingdom, where the Convention has not

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39. *Handyside v. United Kingdom*, 24 Eur. Ct. H. R. (ser. A.) para. 48 (1976).

40. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) para. 239 (1978).

41. 28 Eur. Ct. H. R. (ser. A), para. 64 (1978).

42. *Boyle and Rice v. United Kingdom*, 131 Eur. Ct. H.R. (ser. A), para 52 (1987).

43. *Van Oosterwijk v. Belgium*, 40 Eur Ct. H.R. (1980). The case is unusual in that matters of the exhaustion of local remedies are ordinarily determined by the Commission. For a survey of its decisions, see P. VAN DIJK & G. VAN HOOF, *supra* note 19, at 72-84.

been given the force of domestic law and where the Courts have recourse to its only in a limited way.<sup>44</sup> The doctrine of Parliamentary Sovereignty means that there can be no domestic review of legislation against the standards of the Convention.<sup>45</sup> Equally, there can be no reliance on the Convention generating rights at common law.<sup>46</sup> Finally, when a court is faced by a European Convention question, it may fail to address it squarely or, taking the question on, get the answer wrong.<sup>47</sup> Ultimately, then, as with a domestic constitution, the European institutions must determine whether local laws and decisions are compatible with the Convention; they must interpret the general language of the Convention.

As aids to interpretation, federal/state arguments have arisen in a variety of ways. "Federal" arguments include the contentions that:

1. There is no State authority to interfere with or abridge nationally defined fundamental rights, even where the State action is supported by a local majority or locally good reasons — if, say, the right not to be tortured is a fundamental right, a State may not say that a majority of its legislators or voters are in favor of torture or, in the experience of the State, torture leads to more convictions or deters crime;<sup>48</sup>
2. In determining what the content of individual rights is, the central decision-makers are entitled to look at the practice in the States and to regard strong majority practice as important evidence for resolving problems of interpretation — for example, if nine out of ten States forbid discrimination on grounds of sex, that is strong evidence that such should be the national standard and that the tenth State should accordingly bound by it;<sup>49</sup>
3. Localization of rights leads to such differences in the way people are treated that it distorts natural or economically desirable patterns of movement or, because higher regard for some indi-

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44. See Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L. COMP. L. Q. 585 (1980). If anything, recent decisions have been even more cautious than the ones to which the article refers, see, e.g., *R.V. Immigration Appeal Tribunal ex parte Chundawadra*, Imm. A.R. 227 (1987).

45. Article 13 does not require national judicial review of legislation against the standards of the Convention, see *Young et al v. U.K.*, 44 Eur. Ct. H. R. (ser. B), para. 177.

46. *Malone v. Commissioner of Police of the Metropolis* (No.2) 2 All E.R. (1979).

47. *Attorney-General v. Times Newspapers Ltd.*, 3 All E.R. 54 (1973).

48. See, for instance, the arguments made by the British government in *Tyrer v. United Kingdom*, 26 Eur. Ct. H. R. (ser. A), paras. 36-40 (1978), and rejected by the Court, and the rejection of the claims of special local historical and social circumstances in *Loving v. Virginia*, 388 U.S. 1 (1967).

49. See, e.g. *Marckx v. Belgium*, 31 Eur. Ct. H. R. (ser. A) (1979); but see *Roe v. Wade*, 410 U.S. 113, 174 (Rehnquist, J. dissenting: diversity of practice shows that a claimed right is not fundamental).

vidual rights will impose extra costs of various kinds, competition will lead to a reduction of protection in the interest of saving these costs.<sup>50</sup>

Against these claims may be ranged the "decentralist" arguments which will hold that:

1. The sovereignty/identity of States as significant autonomous units requires that certain central matters be left to them to determine or, at least, the ambiguities about the reach of nationally determined fundamental rights should be resolved to leave matters in the power of the States;<sup>51</sup>
2. Federal or divided power systems imply a substantial degree of diversity on important questions among the units of the system, so that the preservation of the federal system requires that certain significant powers should be left to the States;<sup>52</sup>
3. There is a national interest in preserving the leeway for States to experiment on political and social questions (and, perhaps, to be allowed to demonstrate that one solution is so much more successful than others that it should be adopted as a national standard);<sup>53</sup>
4. On many questions, particularly where rights are qualified or a decision turns upon whether general standards are satisfied in fact, States are the best judges, both more sensitive and more effective, of such issues.<sup>54</sup>

The ways in which the European Court has used these arguments will be considered in the next section. It should be emphasized that these are arguments: the European Court has developed no theory

50. See *supra* note 32.

51. Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

52. *National League of Cities v. Usery* 426 U.S. 833 (1976); *Garcia v. Metropolitan Transport Authority* 469 U.S. 528, 589 (1985) (O'Connor J., dissenting); Redish & Duzin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987); Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (Ser. A.) (Matscher J., dissenting).

53. *New State Ice Co. v. Liebmann* 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting); *cf.* *Roth v. United States* 354 U.S. 476, 504 (1957) (Harlan, J., dissenting). *But cf.* J. CHOPER, *supra* note 23, at 255, arguing that the development of the nation has refashioned the functions of federalism and "has rendered the States incapable of effectively functioning as laboratories of social experimentation." Whatever the truth of this generally, it is less obviously true where changing social or scientific conditions are throwing up new problems for which there is no "right answer". See E.R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY* ch. 9 (1986).

54. *Younger v. Harris* 401 U.S. 37, 44 (1970), in which Justice Black, writing for the court, referred to "Our Federalism." For the view that the Supreme Court ignored these considerations in a recent case, see Maroney, *Bowers v. Hardwick: A Case Study in Federalism. Legal Procedure and Constitutional Interpretation*, 38 SYRACUSE L. REV. 1223-50 (1987).

which makes any of the contentions, with the exception of the first "Federal" argument, mandatory. What is more, the weight of any particular argument in some measure depends upon the interpretative context in which it is being used.

#### IV. INTERPRETATION OF THE EUROPEAN CONVENTION<sup>55</sup>

##### A. *Approaches to Judicial Review Under the Convention*

There is no doubt about the legitimacy of judicial review as a function under the Convention, although its operation is dependent upon the acceptance of the jurisdiction of the Court by a contracting State. There are, on the other hand, considerable disputes about the nature of the judicial review function. The Convention is a treaty. The Court has many times indicated that the interpretation provisions of the Vienna Convention of the Law of Treaties<sup>56</sup> apply to the interpretation of the European Convention.<sup>57</sup>

States were wont to argue (and were from time to time supported by individual judges) that the Convention was simply an "ordinary" treaty, that participation was an act of sovereignty and that the treaty, like all treaties, should be interpreted so as to derogate from State sovereignty only to the extent that such derogation was clearly intended by the States.<sup>58</sup> If the argument had been sustained, it would have had a repressive consequence for the interpretation of the Convention. The general language of the Convention is such that only minimal obligations would be put on a State if the words were interpreted strictly in the States' favor. Nonetheless, while there may appear to be no restraint upon the Court adopting standards of interpretation in favor of individuals, the contingent nature of a State's participation in the Convention system is protection for the States. For most of them, it would not be a question of having to withdraw from their commitments; they would simply fail to renew the right of individual applica-

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55. This is not intended as a comprehensive account — neither of the approaches the Court has used nor of its approach to all the articles of the Convention. For that, see Frowein, Schulhofer & Shapiro, *Fundamental Human Rights as a Vehicle of Legal Integration in Europe*, in 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, BK 3, 300-44 (1985), and Warbrick, *The European Convention on Human Rights and the Prevention of Terrorism*, 32 INT'L. COMP. L. Q. 82, 89-101 (1983).

56. Vienna Convention on the Law of Treaties, (1980) U.K.T.S. No. 58, Cmnd. 7964, Arts. 31-33.

57. *Golder v. United Kingdom*, 18 Eur. Ct. H. R. (ser. A) paras. 29-30 (1975).

58. See, especially, the dissenting judgments of Judge Fitzmaurice in *Golder*, *id.*; *Tyrer v. United Kingdom*, 26 Eur. Ct. H. R. (ser. A) para. 31 (1978); *Ireland v. United Kingdom* 25 Eur. Ct. H. R. (ser. A) para. 239 (1978).

tion or the jurisdiction of the Court when the time came.<sup>59</sup> The States have further institutional protections. Although the judges of the European Court and the members of the Commission have guarantees of independence during their terms of office,<sup>60</sup> they are appointed (and effectively nominated) by the States and have no security of tenure beyond their relatively short terms.<sup>61</sup> Supervision of the Convention is in the power of the Committee of Ministers of the Council of Europe, a body consisting of the Foreign Ministers of the member States.<sup>62</sup>

In fact, these institutional restraints have not altogether inhibited the Court from adopting an approach to interpretation of the Convention which departs appreciably from the orthodox standards of treaty interpretation. Some words of caution ought to preface an explanation of this phenomenon. First, individual judges do not share a uniform approach to the interpretation of the Convention, a matter of more significance for the European Court than for the U.S. Supreme Court because, unlike the U.S. Supreme Court, the European Court often sits in a chamber of seven (largely randomly chosen) judges.<sup>63</sup> Further, the liberality or progressiveness of the interpretations seems to vary according to which Article of the Convention is under consideration,<sup>64</sup> and the rhetoric of the judgments sometimes exceeds their application.<sup>65</sup> Finally, no "over-arching" theory, in general or with respect to individual articles, has been elaborated by the Court with any consistency.<sup>66</sup>

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59. Only Sweden and the Irish Republic have accepted the right of individual application without limit of time.

60. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 23, 21(1), 213 U.N.T.S. 221, 236 (Commission); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 39(1), 213 U.N.T.S. 221, 242 (Court). There is a requirement for a judge *ad hoc* in cases before the Court, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 43, 213 U.N.T.S. 221, 244.

61. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 22(1), 213 U.N.T.S. 221, 236: Commission members elected for six year terms; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 40(1), 213 U.N.T.S. 221, 244: Court members elected for nine year terms.

62. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 54, 213 U.N.T.S. 221, 248.

63. See C. MORRISON, *THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM* (1981).

64. *Golder v. United Kingdom*, 18 Eur. Ct. H. R. (ser. A) (1975), is a typical example of a liberal interpretation of Article 6. The Court and Commission have been much more cautious, for example in their interpretation of Article 14, see P. VAN DIJK & G. VAN HOOF, *supra* note 19, at 386-98.

65. The stirring language in favour of the right of freedom of expression and the corresponding obligation of tolerance on the States in *Handyside v. United Kingdom*, 24 Eur. Ct. H. R. (ser. A) para. 49 (1976), has hardly been honoured in subsequent decisions, including *Handyside* itself; see, e.g., *Arrowsmith v. United Kingdom*, 19 Eur. Comm'n H. R. 5 (1978).

66. An undoubted obstacle to the development of general theory by the Court is its sheer

The Court has departed from orthodox treaty interpretation in the following ways:

1. It has taken a wide view of the purpose of the Convention, finding it the States' intention to establish a mechanism for the protection of individual rights rather than preserving their own sovereign interests.<sup>67</sup>
2. It has interpreted the Convention as requiring effective protection of individuals' rights and not merely imposing formal obligations on the Parties.<sup>68</sup>
3. It has adopted a progressive or dynamic approach to interpretation, to take into account changing political, social and economic circumstances.<sup>69</sup>

These approaches to interpretation of the Convention have become the orthodoxy. The question now is whether they will represent the limit of the development of the Court's approach to interpretation or whether there is more to come. That there might be was shown by the judgments in *Feldbrugge v. The Netherlands*<sup>70</sup> and *Deumeland v. F.R.G.*<sup>71</sup> cases. Although there were detailed differences between the two applications, each raised the question of whether social insurance decisions fell within Article 6(1) which guarantees a fair trial in the "determination of . . . civil rights and obligations."

Deciding what are "civil rights and obligations" has been a central but troublesome preoccupation of the Court and Commission.<sup>72</sup> Once it had been decided that the national classification was not decisive, the Court was faced with elaborating the content of what it calls the "autonomous" concept of civil rights and obligations.<sup>73</sup> There has been a tension between two contrasting approaches. On the one hand, a majority in the Commission has generally taken a rather narrow view of the question, essentially concerned with a formal inquiry as to

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size. When the full Court decides a case, potentially 21 judges may be on the bench. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 38, 213 U.N.T.S. 221, 242.

67. *Wemhoff v. Austria*, 7 Eur. Ct. H. R. (ser. A) (1968).

68. *Airey v. Ireland*, 32 Eur. Ct. H. R. (ser. A) para. 24 (1979).

69. *Tyrer v. United Kingdom*, 26 Eur. Ct. H. R. (ser. A) para. 31 (1978), *Ireland v. United Kingdom*, 25 Eur. Ct. H. R. (ser. A.) para. 154.

70. *Feldbrugge v. Netherlands*, 99 Eur. Ct. H. R. (ser. A) (1987).

71. *Deumeland v. Federal Republic of Germany*, 100 Eur. Ct. H. R. (ser. A.) (1986). See also Drzemczewski & Warbrick, *The European Convention on Human Rights*, 6 Y.B. EUR. L. 417, 432-35 (1986).

72. *Bentham v. Netherlands*, 97 Eur. Ct. H. R. (ser. A) (1985). See also, Drzemczewski & Warbrick, *The European Convention on Human Rights*, 5 Y.B. EUR. L. 422, 422-29 (1985); and generally, Boyle, *Administrative Justice, Judicial Review and the Right to a Fair Hearing under the European Convention on Human Rights*, 1984 PUB. L. 89.

73. *Konig v. Federal Republic of Germany*, 25 Eur. Ct. H. R. (ser. A) paras. 88-89 (1978).

whether the right in issue was "like" civil rights as generally understood in the national legal system.<sup>74</sup> This majority recognized that so to restrict the protection of Article 6(1) would exclude completely from the protection of the Convention many public law determinations of matters crucial to individuals but, the Commissioners argued, that to embark on an expansion of the decisions to which Article 6(1) applied would undermine the administrative decision-making of the member States and would involve impressing upon them procedural guarantees of too strict a quality. Article 6(1) allowed very little room for manoeuvre by way of adopting a sliding due process standard. The States had not submitted their public law procedure to Convention scrutiny. It would be wrong to interpret the Convention as achieving this end, however desirable it be. It was up to the States to amend the Convention if *they* thought that its extension was desirable.<sup>75</sup> To the contrary, it was maintained by a minority in the Commission that the importance of *some* public law decisions to individuals was so great that they ought to be taken by a procedure which protected a person against arbitrariness or unfairness. This was the real object of Article 6 and it would be delinquent not to find protection within the terms of the Convention, even if this meant working out on a case by case basis just what processes in which States were within its reach.<sup>76</sup>

In deciding that the protection of Article 6 did not extend to the determination of social insurance matters, the minority of the court in *Feldbrugge* and *Deumeland* adopted the approach described above as "the orthodoxy." The judges conceded that the concept of "civil right" in Article 6 was not sufficiently clear to show whether the drafters of the Convention intended to include within its ambit interests like those of the applicants. The rights were not classified as "civil" in the national law but that could not be decisive if similar rights were regarded as "civil" in the legal systems of the other parties. However the minority found that there was no European standard on this classification. It then went on to apply Articles 31 and 32 of the Vienna Convention on the Law of Treaties noting that:

The Court has recognized the need to construe the European Convention on Human Rights in the light of modern-day conditions obtaining in the democratic societies of the Contracting States and not solely according what might be presumed to have been in the minds of the drafters of

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74. *Feldbrugge v. Netherlands*, 99 Eur. Ct. H. R. (ser. A) paras. 96-103 (1986).

75. *Id.* para. 110.

76. *Id.*, opinion of the minority, section II. For the equivalent debate in the United States, see *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cox, supra* note 24, at 3-10.



the Convention. . . .<sup>77</sup>

The minority judges looked to object and purpose of Article 6(1) and were unable to discover a basis for the "[j]udicialisation of procedures for allocation of public welfare benefits . . . ."<sup>78</sup> Indeed, they found to the contrary because the elaborate safeguards demanded by Article 6(1) would necessarily lead to increases in costs and delays in the administration of benefits programmes. Nor was a different conclusion to be reached if recourse were had to the supplementary means of interpretation authorized by Article 32 of the Vienna Convention. Neither the drafting history, nor subsequent State practice, nor an evolutive approach to interpretation could justify extending Article 6(1) to the process before the Court. In particular, the judges noted that, ". . . evolutive interpretation . . . does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the member States of the Council of Europe."<sup>79</sup> This approach seems to me to stay clearly within the international (and even federalist) tradition. It recognizes the peculiar characteristics of the treaty under consideration without letting them overwhelm the legal basis of the Convention, the agreement of sovereign States. By looking for a "European standard," the minority acknowledged that the interpretation of the Convention ought to be influenced by the practice of the States if that practice points clearly in favor of a particular solution.

The approach of the minority paid careful attention to the development of the jurisprudence of the Court. In contrast, the majority enunciated a test to determine whether a right is public or private (and, if the latter, "civil" within Article 6(1)) which found no antecedents in the previous case-law and none in the international practice of treaty interpretation. The Court balanced what it perceived to be the public qualities of the welfare schemes against what it determined to be their private aspects. The applicants' rights, it said, were "personal, economic and individual" which brought them "close" to the civil sphere.<sup>80</sup>

If the source of the balancing test is not clear, neither is the way in which it works: how does one weigh public against private factors?<sup>81</sup> The proper explanation is probably to be found in the minority opin-

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77. *Feldbrugge v. Netherlands*, 99 Eur. Ct. H. R. (Ser. A) para. 12 (1986) (Farinho Pinheira, J., minority opinion).

78. *Id.* at para. 15.

79. *Id.* at para. 24.

80. *Id.* at para. 37 (judgment). The *Bentham-Feldbrugge* arguments have been followed in *Boden v. Sweden* and *Pudas v. Sweden*, 125 Eur. Ct. H.R. (ser. A) (1987).

81. For criticism of balancing as an interpretive device, which can certainly be sustained

ion of the Commission, which emphasized the importance of these interests to the individuals, an importance which demanded that their enjoyment should be protected by stringent process, almost independently of the language of the Convention, the intention of the drafters or the practice of its parties.<sup>82</sup> This is not merely vehement centralisation of rights but an assertion of an active role for judicial review. If pursued vigorously by the Court, this process will transform the Convention into a constitutional bill of rights rather than an international convention.<sup>83</sup>

The majority's approach will have profound repercussions if it is sustained in future cases. It seems to mark a clear passage across the divide, however difficult it may be to define exactly, between international and constitutional interpretation. Even on the minority's technique, the reach of the Convention into national legal systems has been substantial and unanticipated. Of course, the States' participation is contingent but so far there has only been the most marginal reduction in their commitment.<sup>84</sup> There have been no outrageous examples of States using their power of nomination of judges and members of the Commission to prejudice their independence. There is no coercive enforcement of judgments but so far there has always been eventual, if sometimes grudging, compliance. The conclusion seems to be that the States have accepted the general approach to the interpretation of the Convention, even in the face of some surprising outcomes of particular cases. Their acquiescence has been the readier because the Court and Commission have taken note of State's concerns and have accommodated States' interests, while at the same time pursuing their new manner of interpretation of the Convention.

### B. *Applying the Interpretative Standards to the Convention*

Two different, though not wholly distinct, kinds of questions arise: one is what role the Court will play in defining the protected rights set out in the Convention; the other is how to establish the limits of the

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against the approach taken in this judgment, see Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987).

82. See *supra* note 76.

83. It should be said that the Court has demonstrated no great radical pretensions outside the Article 6 cases. *Kosiek v. Federal Republic of Germany*, 105 Eur Ct. H. R. (ser. A) (1986), and *Glaserapp v. Federal Republic of Germany*, 104 Eur. Ct. H. R. (ser. A) (1986), are perhaps the most disappointing examples.

84. The United Kingdom did not renew the right of individual application from the Isle of Man after the *Tyrer* case. There are constitutional obstacles for the United Kingdom in giving effect to judgments of the European court in the Isle of Man, *Teare v. O'Callaghan*, 4 E.H.R.R. 232 (1982).

States' powers to derogate from their obligation, under the Convention, so defined.

### 1. *Defining Rights*

#### a. *Express Words*

The general words of the Convention's guarantees are not self-interpreting. For example, Article 3 forbids "torture, inhuman or degrading treatment or punishment". In *Tyrer v U.K.*,<sup>85</sup> the Court had to decide whether judicial corporal punishment applied to a juvenile by order of a court in the Isle of Man fell within the prohibition of Article 3. In coming to the conclusion that it did, the Court said that, "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions,"<sup>86</sup> and it found that there had developed a European standard excluding corporal punishment as a penal sanction, a standard from which only the U.K. and the Republic of Ireland continued to deviate. The Court was helped to its conclusion because here there was a "bright line" between corporal punishment and other forms of sentences. The Court was not asked to determine relative questions of the "severity" or inappropriateness of the penalty. The Commission has been reluctant to concede that these questions raise an issue under Article 3.<sup>87</sup> Once the Court had decided that the developing European standard was the one required by Article 3, it could dispose of the British government's argument that local conditions in the Isle of Man, particularly the strong local sentiment in favor of the retention of corporal punishment, justified a decision in the government's favor. Article 3 established absolute obligations from which there could be no retreat even to take into account local circumstances.

The Court has not required that the States travel forward at the speed of the fastest. Where there remains diversity among the States' practices, a State may well be justified in maintaining its position. While States may experiment (by conceding to individuals more than the Convention presently requires),<sup>88</sup> other States will not be com-

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85. *Tyrer v. United Kingdom*, 26 Eur. Ct. H. R. (ser. A) para 31 (1978).

86. *Id.* at para. 31.

87. *See, e.g. Kotalla v. Netherlands*, 14 Eur. Comm'n. H. R. 238 (1978). *See, also, Hutto v. Davis*, 454 U.S. 370 (1982), holding that certain line-drawing exercises are properly legislative and not judicial functions, here a claim that an excessive prison sentence (within the limits established by the State legislature) was in breach of the 8th and 14th Amendments. *See also Frowein, Schulhofer & Shapiro, supra* note 55, arguing that the need for a clear standard is not based on the simple demand for uniformity, but on the functional ground of ensuring the effective protection of individual rights by making it clear what governmental authorities must (or must not) do.

88. An unusual example is the Swedish law criminalising parental chastisement of children. *See X, Y and Z v. Sweden*, 5 E.H.R.R. 147 (1983).

pelled to imitate the innovation; but if they follow suit voluntarily, there may come a time when the laggards will be held to be in breach of their Convention obligations.<sup>89</sup> Thus, the Court has noted the changes in approach to the status of the illegitimate child and family and to homosexuality which have influenced the interpretation of Article 8. This was clear in *Dudgeon v. United Kingdom*, which rejected consideration about local conditions as a justification for interfering with individual rights.<sup>90</sup>

The "progressive" interpretation and the "European standard" march together. The Court can find objective support for its judgments which drag along the reluctant State, where for reasons of local prejudice, inertia, even for conscious cost allocation reasons, the State has not kept up with the European understanding of the fundamental right. There is little room here for recourse to the *travaux préparatoires*, to look for the equivalent to the views of the founding fathers.<sup>91</sup> The Court has concluded, and the States have concurred, that their intention was to allow for progressive interpretation for the increasing protection of individual rights.

It is usual to assume that a dynamic approach which takes into account changing conditions will invariably work in favor of expanding the area of liberty free from State interference.<sup>92</sup> A decision of the Commission shows that this is not necessarily the case. In *McVeigh v. U.K.*,<sup>93</sup> the Commission took into account the growth of international terrorism in interpreting Article 5(1) of the Convention to uphold detention for checks to be made on travellers as part of the UK's anti-terrorist measures, a determination which is at odds with an earlier decision of the Court in *Lawless v. Ireland*.<sup>94</sup> On the other hand, the States cannot lightly change their legislation to retreat from a previous judgment of the Court because the new laws would be contrary to the Convention.

The Court can protect the national interest of a State not only by a narrow interpretation of the rights but also by its characterization of

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89. According to the Court, a State which finds itself in an isolated position as a result of a process of evolution in the laws of other States will "not necessarily" be in breach of the Convention, *F v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) (1987) [text]. But, as the outcome of this case shows, it will have a substantial burden to discharge to justify its singular situation.

90. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (ser. A) (1981).

91. The preparatory work is not entirely without importance, see *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) (1986) paras. 52-53.

92. Cf., Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975), discussing the "ratchet" argument about the power of Congress to legislate under § 5 of the 14th Amendment.

93. *McVeigh v. U.K.*, 25 Eur. Comm'n H. R. 15 (1982).

94. *Lawless v. Ireland*, 3 Eur. Ct. H. R. (ser. A) (1961).

the individual's application. If the Court finds that what the individual is "really" asking for, however he phrases his application, falls outside *any* right enumerated in the Convention or its Protocols, then it can dispose of the case.

Recent examples of this can be seen in the cases of *Glaesnapp v. F.R.G.*<sup>95</sup> and *Kosiek v. F.R.G.*<sup>96</sup> and *Leander v. Sweden*.<sup>97</sup> The applicants were civil servants who argued that they had lost their jobs because of the way that they had exercised their rights of expression.<sup>98</sup> The Court said that in each case the central claim was for access to the public service, a right not guaranteed by the Convention and so, even if interfered with by the State, showing no violation. There is no direct reference to federal concerns in the judgments but the Court did not contest that a State must have some mechanism for protecting its civil service against infiltration by persons it found undesirable. If the Court had found that the States' actions were interferences with the applicants' freedom of expression, the States would have been permitted to argue that the restraints were justified on the basis that they were necessary on grounds of national security.<sup>99</sup> The Court would have found such inquiries and assessments very difficult and the States might well have regarded them as too intrusive into their domestic affairs.<sup>100</sup>

### b. Implied Rights

While the States have shown at least resignation in the face of the progressive interpretation of the express terms of the Convention, they have been more resistant to the implication by the Court of unexpressed obligations into the Convention.<sup>101</sup> The first became a serious issue in the *Golder v. United Kingdom*.<sup>102</sup> Golder, a prisoner in England, complained that the authorities would not allow him to communicate by letter with his solicitor for the purpose of bringing a civil

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95. *Glaesnapp v. Federal Republic of Germany*, 104 Eur. Ct. H. R. (ser. A) (1986).

96. *Kosiek v. Federal Republic of Germany*, 105 Eur. Ct. H. R. (ser. A) (1986).

97. *Leander v. Sweden*, 116 Eur. Ct. H. R. (ser. A) (1987).

98. Convention, *supra* note 2, art. 10(1) at 230.

99. Convention, *supra* note 2, art. 10(2) at 230.

100. See *Council of Civil Service Unions v. U.K.*, 10 Eur. H. R. Rep. 169 (1988), where the Commission did look at the evidence that the British government's interference with the freedom of association rights of a group of British civil servants was necessary on grounds of national security.

101. See, e.g., the Swedish government's argument in *Schmidt and Dahlstrom v. Sweden*, 21 Eur. Ct. H.R. 16 (ser. A) (1976), which was accepted by the Court. That dynamic interpretation does not allow the Court to find new rights in the Convention, although it can apply to the interpretation of express rights and their limitation.

102. *Golder v. United Kingdom*, 18 Eur. Ct. H. R. (ser. A) (1975).

action against a prison officer. The government was prepared to concede only that Golder had a right to a fair trial of his action whenever he was able to bring his case to court, which Golder would have been able to do upon his release. The Court held, however, that there was an implied right of access to a court, since Article 6 was central to the Convention's overall scheme. Since Golder, being incarcerated, could proceed only through a legal representative, he was entitled to communicate with him for the purpose of bringing the action. The doctrine of implied rights is particularly controversial in international law<sup>103</sup> and some protection for the States is afforded by the Court. For a right to be implied, its implication must be necessary for the enjoyment of an express right. Such implication can be defeated if it is clear that the States did not intend to concede the particular right, evidence for which can be found in the diversity of State practice, a factor which has resulted in a particularly narrow interpretation of trade union rights in Article 11.<sup>104</sup>

## 2. *Setting Limits to Rights*

Although the Convention sets out protected individual rights, it also provides many instances where the States are specifically authorized to restrict or even to remove the enumerated rights. Examples of such powers appear in Article 5(1), Articles 8(2)-11(2), Article 15, Article 17 and Article 1 of the 1st Protocol. Where it has been faced with the interpretations of these limitation clauses the Court has often indicated that they are to be construed narrowly.<sup>105</sup> The different language in which they are expressed means that a single approach is not possible.<sup>106</sup>

For present purposes, it will suffice to examine the interpretation of the "clawback"<sup>107</sup> clauses of Articles 8(2)-11(2). These each allow restrictions upon the guaranteed rights to be imposed by law, such as are "necessary in a democratic society" for the purposes set out in each provision. In discharging the complex task of assessing the compatibility of restrictions with the Convention, the Court has had frequent

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103. *Certain Expenses of the United Nations*, 1962 I.C.J. 151.

104. *National Union of Belgian Police v. Belgium*, 19 Eur. Ct. H. R. (ser. A.) (1975); *Swedish Engine Drivers' Union v. Sweden*, 20 Eur. Ct. H. R. (ser. A.) (1976).

105. *See, e.g. Winterwerp v. Netherlands*, 33 Eur. Ct. H. R. (ser. A.) (1980).

106. There is a very wide margin with respect to Art.12, "... right to marry ... according to the national laws governing the right ...", *Rees v. United Kingdom*, 106 Eur. Ct. H. R. para. 50 (ser. A.) (1986), and Art.1, "... 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 ...", *AGOSI v. United Kingdom*, 108 Eur. Ct. H. R. (ser. A.) (1986).

107. *Higgins, Derogations under Human Rights Treaties*, 48 BRIT. Y. B. INT'L. L. 281 (1976-77).

reliance on the doctrine of the "margin of appreciation,"<sup>108</sup> which allows it to maintain the ultimate power of decision while accepting the primary responsibility of the national legal systems for the protection of individual rights. The "margin of appreciation" involves respect for State decision-making based on its better functional position to assess the situation, for example, to determine facts or to balance other interests. The doctrine is not one of judicial abstention or deference to the national decision maker. The mere fact that the State has made a good faith and independent assessment of the question will not necessarily exclude the review function of the Court<sup>109</sup> because it must still be satisfied that there is a "pressing social need"<sup>110</sup> for the restriction the State seeks to impose. The "margin of appreciation" leaves a discretion to the State, but the measure of that discretion is not uniform.

It seems clear that the institutions are far more willing to defer to State's claims that a measure is necessary for the protection of national security<sup>111</sup> than they are to a State's contention that it is required for the prevention of crime.<sup>112</sup> To assist its determination of the justification for a restriction, the Court can sometimes discern a "European" conception, for example, the need to maintain the independence of the judiciary, at issue in the *Sunday Times* case,<sup>113</sup> and subject the State's decision to closer scrutiny than where it can see no common standard. It has said, for instance, that there is no common European conception of "morals."<sup>114</sup> While the Court has sometimes said that regional variations cannot be a justification for imposing a restriction,<sup>115</sup> it does not necessarily decide that, because of a restriction has not been im-

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108. For a pioneering article which benefitted from the author's American law experience, see Morrisson, *Margin of Appreciation in European Human Rights Law*, 6 HUM. RTS. J. 263 (1973); see also P. VAN DIJK & G. VAN HOOF, *supra* note 19, at 427-49.

109. See *Sunday Times v. United Kingdom*, 30 Eur. Ct. H. R. para. 48 (ser. A.) (1979).

110. *Handyside v. United Kingdom*, 24 Eur. Ct. H. R. para. 48 (ser. A.) (1976).

111. For an excessively deferential reaction by the Commission, see *Arrowsmith v. U.K.*, 19 Eur. Comm'n. H. R. 5 (1978).

112. See the various English prison cases, including *Silver et al v. United Kingdom*, 61 Eur. Ct. H. R. (ser. A.) (1983).

113. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H. R. (ser. A.) (1979). The interaction of the European standard and the evolutive test can be seen well in the *Rees* case, 106 Eur. Ct. H. R. (ser. A.) (1986), where in considering a State's margin of appreciation in defining the rights of transsexuals and the State's power to interfere with such rights the Court said that the present diversity of practice left a wide discretion to the U.K. but, at para. 47, the foreseeable impact of medical and social developments required that States should keep their legislation under constant review.

114. *Handyside v. United Kingdom*, 24 Eur. Ct. H. R. (ser. A.) (1976); *Muller v. Switzerland*, 133 Eur. Ct. H. R. (ser. A.) (1988). In the latter case, the applicants unsuccessfully argued that, if there were different standards of morals, those standards should at least be national ones and that a person should be exposed to restrictions imposed by the predilections of a local authority.

115. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (ser. A.) (1982).

posed elsewhere in Europe (or even in the same State), it cannot be necessary in the State or region where it has been enacted.<sup>116</sup> The State must have addressed the question which is faced by the European organs. The Court is more likely to defer to national decision-making where there has been inquiry into the justification for interfering with a protected right than where there has not.<sup>117</sup> Finally, there are considerations of *what* right is being truncated to be taken account of. There is a growing practice of regarding some rights as more important than others, so that the burden on the State to justify its interference is correspondingly higher.<sup>118</sup>

In *Dudgeon*,<sup>119</sup> the court had to decide whether laws in Northern Ireland criminalising private acts of homosexuality between consenting adults were compatible with the Convention. The applicant maintained that the maintenance of the legislation interfered with his right to private life in Article 8 and could not be said to be "necessary in a democratic society . . . for the protection of morals" within Article 8(2). The government, relying on *Handyside v. United Kingdom*, claimed a particularly wide margin of appreciation to determine what was necessary for the protection of morals. It resisted claims that such regulation could not possibly be necessary in Northern Ireland because similar legislation in the rest of the United Kingdom had been repealed. Social conditions and moral standards, the British government said, were different in Northern Ireland than in the rest of the United Kingdom.

The Court accepted that this latter consideration was something which it was legitimate for the British authorities to take into account but they also ought to have taken into account that this criminal law interfered with "a most intimate aspect of private life."<sup>120</sup> Among the hallmarks of a democratic society are "tolerance and broadmind-

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116. *Handyside v. United Kingdom*, 24 Eur. Ct. H. R. (ser. A) (1976), where the prohibited book was circulating, not only in other European countries, but also in other parts of the United Kingdom.

117. In the *Sunday Times* case, 30 Eur. Ct. H. R. (ser. A.) (1979), the Court divided 11-9 for the majority, a crucial part of its judgment being that the House of Lords had not taken into account the interest of freedom of expression when prohibiting the publication of the article on the grounds that this might interfere with a fair trial.

118. *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H. R. (ser. A.) para. 78 (1985), requiring "very weighty reasons" to justify discrimination on grounds of sex; *Dudgeon v. United Kingdom* 45 Eur. Ct. H. R. (ser. A.) para. 52 (1981), requiring "particularly serious reasons" for interference with sexual activities, "a most intimate aspect of private life." The approach of the European Court approximates the "strict scrutiny" test of the United States Supreme Court in equal protection cases, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938).

119. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. para 56 (ser A.) (1981).

120. *Id.* at para. 52.



ness."<sup>121</sup> Developments elsewhere in Europe had shown an increasing acceptance of private adult, homosexual activities. Even if there were some regulation that a State could make, the "breadth and absolute character" of the prescription in UK law went beyond the margin of appreciation. There were strenuous dissenting judgments, notably by Judge Walsh who objected to the "nationalization" of the moral standard in the face of the extensive diversity of attitudes in the European States. He said:

In my view the Court's reference to the fact that in most countries in the Council of Europe homosexual acts in private between adults are no longer criminal (paragraph 60 of the judgment) does not really advance the argument. The twenty-one countries making up the Council of Europe extend geographically from Turkey to Iceland and from the Mediterranean to the Arctic Circle and encompass considerable diversities of culture and moral values. The Court states that it cannot overlook the marked changes which have occurred in the laws regarding homosexual behavior throughout the member States (*ibid.*). It would be unfortunate if this should lead to the erroneous inference that a Euro-Norm in the law concerning homosexual practices has been or can be evolved.<sup>122</sup>

He went on:

It is to be noted that Article 8 § 1 of the Convention speaks of 'private and family life.' If the *ejusdem generis* rule is to be applied, then the provision should be interpreted as relating to private life in that context as, for example, the right to raise one's children according to one's own philosophical and religious tenets and generally to pursue without interference the activities which are akin to those pursued in the privacy of family life and as such are in the course of ordinary human and fundamental rights. No such claim can be made for homosexual practices."<sup>123</sup>

The language here is redolent of that of Justice White in *Bowers v. Hardwick*,<sup>124</sup> rejecting a claim that a State law criminalising certain acts of homosexuality interfered with the applicant's interests protected by the due process clause. Justice White found the precedents establishing the range of that protection referred to "family, marriage and procreation," none of which had any connection with homosexuality. He rejected as "facetious" the claim that the right to engage in homosexual activity fell within the concept of ordered liberty.<sup>125</sup>

The Court has recently delivered its judgment in the case of *Norris v. Ireland*,<sup>126</sup> upholding a challenge to the same law as in issue in

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121. *Id.* at para. 53.

122. *Id.* at para. 16 (Walsh, J. dissenting).

123. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. para. 23 (ser. A.) (1981) (Walsh, J., dissenting).

124. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

125. *Id.* at 2484, 2486.

126. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

*Dudgeon*, in the Republic.<sup>127</sup> The Irish government had argued that the application of the "pressing social need" test to laws for the protection of morals led to an undesirable "Pan-European" morality and called in aid the judgment of the U.S. Supreme Court in *Bowers* to establish that its legislation did not exceed its margin of appreciation.<sup>128</sup> The majority in *Norris* said that the Irish government's argument was essentially for an unfettered national discretion in matters alleged to be for the protection of morals. The court was not concerned with whether there was a "European" standard of morality but with upholding the European standard of tolerance and broad-mindedness established by its jurisprudence. It followed its decision in *Dudgeon* and held the Republic's law to be contrary to the Convention.<sup>129</sup>

## V. CONCLUSION

The delicate and subtle relationship between the Convention system and the national legal system for the assurance of individual rights is a developing one. Adherence to the Convention standards and its supervisory mechanisms are a mark of being a "European" State. There are indications in the *Feldbrugge* judgment that a majority on the Court might want to abandon the constraints of this international relationship and aspire to a supra-national or constitutional role. The greater good of protecting individual rights would swamp the limitations imposed by considering contrary State interest, whether general or particular. The costs of this process, if pursued too enthusiastically, are not only likely to be a weakening of the legitimacy of the Convention system but, in the short term, an undermining of the national systems for protecting individual rights. As Dean Sandalow has written of the U.S. Supreme Court, "The subordination of the states has been accompanied, inevitably, by diminished respect for their capacity to contribute to the resolution of important social issues."<sup>130</sup> One notices already a pervasive tendency of litigants in the U.K. not to be satisfied with domestic consideration of their claims but to threaten

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127. By coincidence, the governing legislation is exactly the same in *Dudgeon* and *Norris*, the Offence against the Person Act 1861, dating from the time when the United Kingdom was sovereign over the whole island of Ireland.

128. Memorial of the Republic of Ireland, Cour (87) 117, paras. 46-55.

129. The Court rejected any interpretation which would evacuate its responsibility to ensure the observance of the Convention under Article 19, *id.* In Madisonian terms, the European standard protected a discrete minority against local faction. For a criticism of the technique of the Supreme Court in ignoring this aspect in *Bowers*, see Stoddard, *Bowers v. Hardwick: Precedent by Personal Prediliction*, 54 U. CHI. L. REV. 648 (1987).

130. Sandalow, *Federalism and Social Change*, 43 L. CONT. PROBS. 29, 33 (1979-80).

(that is often all it is) to "go to Strasbourg" about any issue at all, whether within the Convention or not.<sup>131</sup>

Unlike in the American Constitution the States are not protected by anything as specific as the 10th and 11th amendments,<sup>132</sup> although one might think that there are other institutional safeguards for the States, including the ultimate sanction of withdrawal, that are more substantial than these guarantees. The absence of any comparably sweeping provisions in the Convention to the equal protection and due process clauses, limits the range of issues upon which the Court can decide. There is a whole other essay which could be devoted to matters of standing, political questions and remedies, for these too are general constitutional questions. On the quasi-federal matter, one can conclude that the Court has exhibited an awareness of State interests but that the fostering of diversity as a value in itself has seldom been referred to. The infiltration of the Convention into the domestic legal systems has sometimes been surprising; important matters have fallen for international decision; but as yet it has not threatened the "States as States."

Finally, what of our opening paradox? The issue was essentially the same in *Tyrer v. United Kingdom* and in *Ingraham v. Wright*: did Article 3 of the Convention or the Eighth Amendment forbid corporal punishment? The European Court used its "federalism" inquiry to show that the practice in the U.K. was anomalous and that States had been moving away from sentencing their criminals to being beaten. Furthermore, the court was able to enunciate a clear rule: no judicial corporal punishment; no need, therefore, to assess conditions in the State, to "second guess" State decision-makers, to leave itself having to grapple with complicated factual enquiries. In *Ingraham*, there was no such wide consensus among the States to support the Court in its search for meaning of the Eighth Amendment. The practice of beating children as an instrument of school discipline was widespread. The Supreme Court could not find other grounds for excluding corpo-

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131. For a general survey of the debate, see Jacobs, *Towards a United Kingdom Bill of Rights* 18 U. MICH. J. L. REF. 29 (1984). For a lament that the British inspiration of the U.S. Constitution has been lost or forgotten in the U.K., see THE ECONOMIST, Feb. 28, 1987, at 19, 22.

There is no doubt that, since the acceptance of the right of individual application in 1966, the UK's participation in the Convention has had an impact, even if indirectly, on some areas of UK law, notably in the field of prisoners' rights; but the effect can be limited by carefully tailored legislation, as it has been in the area of immigration. Its significance is a long way short of the Bill of Rights in the United States and it would be optimistic to claim for it any of the "educative" qualities attributed to the Bill of Rights, cf. L. BOLLINGER, THE TOLERANT SOCIETY, *passim* (1986).

132. Of course, the capacity of these provisions to provide protection for the States has fluctuated, see Van Alstyne, *supra* note 52.

ral punishment altogether and, indeed, to have done so would have intruded far into the authority of the States. Yet to examine each beating to see whether it obtained that degree of severity or to determine whether it was so out of proportion to the pupil's offense as to bring it within a constitutional prohibition could have led to a plethora of difficult cases, which, the Court adjudged, could be best dealt with by the States' tort laws.

In each of these cases, the question for the Court was relatively simple but, even in these cases, federalism considerations had a part to play in determining the content of the protected rights. *Tyrer* also illustrated an important limit of local concerns. Once the content of a right is established, good, local arguments cannot justify diminishing it. That there was a majority in the Isle of Man in favour of birching, that it might have been an effective deterrent were factors the Court was not prepared to consider as justifying its use. When the Court moved to the more complicated questions of assessing the legitimacy of authorised State interferences with rights, the principle of *Tyrer* remained good: as the homosexuality cases show, a State is not entitled to propitiate a local moral majority by seriously interfering with the rights of minority. The limitation cases involve a variety of balancing tests for the Court, in which various "federal" factors have been taken into account. What the Court has largely set its face against are arguments based on the original intentions of the States. It makes it less likely that majority prejudice or conviction in a region can find respectable support in the equivalent to the intentions of the "founding fathers."

Courts in a divided-power system must have a proper concern for a balance between regional and central interests. This is not just a matter of inter-governmental relations. Where the system is provided with a set of guarantees of individual rights, the very interpretation of those rights is influenced by federal factors. What the *Tyrer-Ingraham* cases show is that degree of specific protection of an individual rights will not necessarily be proportional to the degree of intergraiton of the divided-power system.

## APPENDIX I

## SELECTED ARTICLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Signed November 4, 1950; entry into force September 3, 1953*

*Section 1 - Convention for the Protection of Human Rights and Fundamental Freedoms and Its Five Protocols*

The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights

Have agreed as follows;

## Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

## Section I

## Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence

of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

### Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### Article 4

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
  - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.

### Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person effected for non-

- compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision of his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

## Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a demo-

cratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

#### Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



### Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

### Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity of public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

### Article 12

Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right.

### Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by person acting in an official capacity.

### Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### Article 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

### Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not applied for any purpose other than those for which they have been prescribed.

PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF  
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS  
(FIRST)

*Signed March 20, 1952; entry into force May 18, 1954*

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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.

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.

### Article 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

### Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

**PROTOCOL NO. 4 TO THE CONVENTION FOR THE PROTECTION OF  
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS  
SECURING CERTAIN RIGHTS AND FREEDOMS  
OTHER THAN THOSE ALREADY**

**INCLUDED IN THE CONVENTION AND IN THE PROTOCOL THERETO**  
*Signed September 16, 1963: entry into force May 2, 1968*

The Governments signatory hereto, being Members of the Council of Europe.

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as "the Convention") and in Articles 1 and 3 of the First Protocol to the Convention, signed at Paris on 20th March, 1952.

Have agreed as follows:

### Article 1

1. Everyone lawfully within the territory of a State within that territory have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of "order public", for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject in particular areas to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

### Article 3

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

## APPENDIX II PARTICIPATION IN THE EUROPEAN CONVENTION OF HUMAN RIGHTS

All the Members of the Council of Europe (listed below) are parties to the Convention. The 2nd, 3rd, 5th and 8th Protocols are concerned with procedural matters.

State	1st Protocol	4th Protocol	6th Protocol	7th Protocol	Declaration under Art. 25 (Individual Application)	Declaration under Art. 46 (Jurisdiction of Court)
Austria	Yes	Yes	Yes	Yes	Yes	Yes
Belgium	Yes	Yes	No	Yes	Yes	Yes
Cyprus	Yes	No	No	No	Yes	Yes
Denmark	Yes	Yes	Yes	Yes	Yes	Yes
France	Yes	Yes	Yes	Yes	Yes	Yes
Germany	Yes	Yes	No	No	Yes	Yes
Greece	Yes	No	No	Yes	Yes	Yes
Iceland	Yes	Yes	Yes	Yes	Yes	Yes
Ireland	Yes	Yes	No	No	Yes	Yes
Italy	Yes	Yes	No	No	Yes	Yes
Liechtenstein	No	No	No	No	Yes	Yes
Luxembourg	Yes	Yes	Yes	No	Yes	Yes
Malta	Yes	No	No	No	Yes	Yes
Netherlands	Yes	Yes	Yes	No	Yes	Yes
Norway	Yes	Yes	No	No	Yes	Yes
Portugal	Yes	Yes	Yes	No	Yes	Yes
Spain	No	No	Yes	No	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes	Yes
Switzerland	Yes	No	No	Yes	Yes	Yes
Turkey	Yes	No	No	No	Yes	No
United Kingdom	Yes	No	No	No	Yes	Yes

(San Marino has recently become a member of the Council of Europe, but it has not yet accepted any of the human rights treaties.)