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European Integration Through Fundamental Rights

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EUROPEAN INTEGRATION THROUGH FUNDAMENTAL RIGHTS†

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I. INTRODUCTION—THE EUROPEAN TRADITION: RECOGNITION OF FUNDAMENTAL RIGHTS IN THE ABSENCE OF JUDICIAL ENFORCEMENT

The conception of fundamental rights as natural rights of human beings developed in European legal thinking mainly in the seventeenth and eighteenth centuries. John Locke, Jean-Jacques Rousseau, and also Immanuel Kant should be mentioned.[1] But it was in the new world that the principles of fundamental human rights were first put into practice.[2] A little more than ten years after the first American declarations, the "Déclaration des droits de l'homme et du citoyen" was adopted in Paris; it remains part of French constitutional law today.[3] But, unlike the development in the United States, the French guarantees could

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1. *See* Oestreich, *Die Entwicklung der Menschenrechte und Grundfreiheiten,* in BETTERMANN-NEUMANN-NIPPERDEY, DIE GRUNDRECHTE Vol. I/1, 1966, at 1; Shestack, *The Jurisprudence of Human Rights,* in 1 HUMAN RIGHTS IN INTERNATIONAL LAW, LEGAL AND POLICY ISSUES 69 (T. Meron ed. 1984).

2. *See* The Bill of Rights, U.S. CONST. amends. I-X; The Virginia Bill of Rights (1776), *reprinted in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 895-96 (1830).

3. By the reference in the preamble of the constitution of 1958 which reads:

Le Peuple français proclame solennellement son attachement aux Droits de l'Homme et aux principes de la souveraineté nationale tels qu'ils sont définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946 . . . .

(The French people solemnly proclaim their commitment to the Rights of Man and the principles of national sovereignty such as they are defined by the Declaration of 1789, confirmed and completed by the preamble of the Constitution of 1946.)

CONST. (Fr.) preamble.

The Conseil Constitutionnel decided for the first time in 1970 that the preamble and thereby the declaration is binding constitutional law. *See* Judgment of June 19, 1970, Con. const., Fr., 1971 Revue du Droit Public 203.

not be enforced by judges. The legislature was seen as the last arbiter of whether or not a specific regulation could be accepted as compatible with the bill of rights.[4] As soon as the legislature had adopted a law, that law could not be challenged. In 1958 a very limited challenge became possible, through the Conseil Constitutionnel, but only before the formal promulgation of the law.[5]

In Germany the first bills of rights were introduced in the early nineteenth century, after the conclusion of Napoleon's invasion.[6] A good example is the constitution of Baden; the German state bordering France adopted a constitution in 1818.[7] Most of the German states guaranteed the rights to life and liberty, to the enjoyment of property, and to equality under the law by the beginning or the middle of the century. But as in France, judicial protection of these rights was impossible against the legislature and was rather weak against the administration. Although recent research has revealed that in a number of cases courts have protected rights, for instance, the freedom of religion, against administrative decisions, the main function of the guarantee of rights was to influence the legislature and to provide guidance or even a program of reform.[8]

When the German Empire was founded in 1871 as a federal state, with the states having a very strong position, no federal bill of rights was adopted, mainly because the unitary influence of such a guarantee was seen as unacceptable. It may be of interest that the German Empire in fact brought about important effects of legal unification later through legislation in the field of fundamental rights, for instance freedom of religion and freedom of movement.[9]

Why do I mention these historic examples? I want to show that on the European continent an important tradition has long existed concerning bills of rights. What was lacking, until recently, was real judicial protection, especially against the legisla-

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4. For the French tradition, see J.-L. QUERMONNE, LE GOUVERNEMENT DE LA FRANCE SOUS LA VE RÉPUBLIQUE 333-402 (1980).

5. P.E. GOOSE, DIE NORMENKONTROLLE DURCH DEN FRANZÖSISCHEN CONSEIL CONSTITUTIONNEL (Schriften zum öffentlichen Recht Bd. 212, 1973).

6. Scheuner, *Die rechtliche Tragweite der Grundrechte in der deutschen Verfassungsentwicklung des 19. Jahrhunderts*, in FESTSCHRIFT FÜR E.R. HUBER 139 (1973), *reprinted in* U. SCHEUNER, STAATSTHEORIE UND STAATSRECHT 633 (1978).

7. *See* 1 E.R. HUBER, DOKUMENTE ZUR DEUTSCHEN VERFASSUNGSGESCHICHTE 156 (1961).

8. *See* Scheuner, *supra* note 6.

9. Huber, *Grundrechte im Bismarckschen Reichssystem*, in FESTSCHRIFT FÜR U. SCHEUNER 163 (1973).

ture. This protection came into existence after the First World War in Austria and, to a very limited extent, in Germany.[10] Only after the Second World War did Europe experience a change which led to the introduction of judicial protection of fundamental rights in the Federal Republic of Germany, in Italy, to a limited extent in France, and more recently in Spain and Portugal.[11] Britain, without a written constitution, stands apart. Ireland, though belonging to the common law tradition, has accepted the American example. The Irish Supreme Court has jurisdiction for judicial review on the basis of fundamental rights.[12]

When the European Convention of Human Rights was signed in 1950, did the countries realize that they had introduced a legal revolution? I believe not. The ratifying nations believed that the rather general principles enshrined in this international bill of rights already were well-protected in all states. How could a country like Britain, with her proud history of protecting the liberties of Englishmen, see any danger in ratifying the Convention? While it was important for the ratifying nations to state that the European countries, including the liberated western part of Germany, agreed on basic principles, it was taken as a matter of course that these principles were well-protected in all the old European democracies.

II. THE IMPACT OF THE CONVENTION: AN EMERGING TRADITION OF JUDICIALLY-ENFORCEABLE FUNDAMENTAL RIGHTS

For a long time those who had prepared and signed the Con-

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10. For the historical development in Germany, see Friesenhahn, *Die Verfassungsgerichtsbarkeit in der Bundesrepublik Deutschland,* in VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 88, 92 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 36, 1962); Scheuner, *Die Überlieferung der deutschen Staatsgerichtsbarkeit im 19. und 20. Jahrhundert,* in 1 BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ 1 (C. Starck 1976). For the development in Austria, see Melichar, *Die Verfassungsgerichtsbarkeit in Österreich,* in VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 439 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 36, 1962).

11. For Italy, see Sandulli, *Die Verfassungsgerichtsbarkeit in Italien,* in VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 292 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 36, 1962); for Spain, see Villalón, *Zwei Jahre Verfassungsrechtsprechung in Spanien,* 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 70 (1983); for Portugal, see Thomashausen, *Der Freiheitsbegriff, die Grundrechte und der Grundrechtsschutz in der neuen Portugiesischen Verfassung vom 2 April 1976,* 8 EUROPÄISHE GRUNDRECHTE ZEITSCHRIFT 1 (1981).

12. *See generally* J.M. KELLY, THE IRISH CONSTITUTION 219 (1980) (discussing article 34.3.2 of the Irish Constitution).

vention proved right. The Convention entered into force on September 3, 1953; the United Kingdom was the first country to ratify. One may say that for almost twenty years the Convention remained a sleeping beauty, frequently referred to but without much impact.[13] During this time, some amendments were made to the Austrian and German codes of criminal procedure but they were viewed as not very important.[14] But after 1973 things changed rapidly. Today, there are few countries that have been subject for some time to the jurisdiction of the Commission on the basis of individual applications[15] that have not been found in violation of the Convention at least once. Several states with proud records of protecting fundamental rights, such as Britain and Belgium, have had to comply with several Court judgments establishing a violation of the Convention and granting compensation to the applicant.

How is this dramatic change in direction to be explained? I leave aside those cases where, under emergency conditions, security forces went beyond what is permissible under article 3 outlawing inhuman treatment.[16] That, unfortunately, can happen anywhere. Much more interesting are the cases in which Convention organs have found that the application of a particular national law has violated a specific right guaranteed in the Convention. Let me mention four examples:

1. A prisoner could bring a suit in a court of law only if authorized by the Home Secretary. Commission and Court found a violation of article 6 guaranteeing access to court in civil matters.[17]
2. A mother of an illegitimate child was not the legal mother before she had recognized the child. This was

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13. Statistics show that in 1973 the Commission adopted 3 reports in admissible cases under Art. 31, 10 in 1978, 21 in 1981, and 21 in 1983. Of the 70 judgments of the Court delivered up to July 13, 1983, 40 were rendered during the last five years. *See* EUROPEAN COMMISSION OF HUMAN RIGHTS, SURVEY OF ACTIVITIES AND STATISTICS 11 (1983) (DH (84) 1).

14. The general limit for detention on remand in Article 121 of the German Code on Criminal Procedure, *see* THE GERMAN CODE OF CRIMINAL PROCEDURE (H. Niebler trans. 1965) (American Series of Foreign Penal Codes No. 10), was introduced because of cases brought under art. 5, para. 3 of the Convention.

15. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25, 213 U.N.T.S. 221 ("The Commission may receive petitions . . . from any person . . . claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this convention . . . .") [hereinafter cited as Convention].

16. One of the most prominent cases is Ireland v. United Kingdom, 2 E.H.R.R. 25 (Eur. Ct. Hum. Rights 1978).

17. *See* Golder v. United Kingdom, 1 E.H.R.R. 524 (Eur. Ct. Hum. Rights 1975).

found to be a violation of her right to respect for her family life.[18]

3. An accused, convicted in the first instance, did not get a free defense counsel for an appeal limited to legal questions because the court, on the basis of a statute, found the free defense counsel to be unnecessary. Commission and Court found a violation of article 6, paragraph 3(c), which grants the right to a free defense counsel if the accused cannot pay and the interests of justice so require.[19]

4. People interned on the basis of mental illness could not get court control, either because there was no remedy,[20] or the remedy was of a merely formal nature.[21] No court proceeding could consider the lawfulness of the detention. Commission and Court found a violation of article 5, paragraph 4, the habeas corpus rule of the Convention.

I have chosen these examples because it may well be that in 1960 both the Commission and the Court would have found a way to uphold the rules underlying these national decisions. The arguments that prisoners ought to be subject to inherent limitations on their freedom; that "family" as defined under article 8 excludes the "illegitimate" family; that the "interests of justice" do not require free defense counsel on appeal of a point of law; and that the special difficulties of establishing mental illness may require detention without court control all could have served as justifications for the rules concerned. What are the reasons behind the new approach of Commission and Court?

A probable first reason is a growing awareness that violations of fundamental rights under the Convention, like violations in a national context with an existing bill of rights, should not be seen as a tragedy in itself but rather as a failure which should be remedied. The Convention is viewed as a remedy which should be used as effectively as possible.

This attitude probably could have developed only after a period of time during which the member states became accustomed to the procedure before Commission and Court and developed a certain confidence in those proceedings. And I would

18. *See* Marckx v. Belgium, 2 E.H.R.R. 330 (Eur. Ct. Hum. Rights 1979).

19. *See* Pakelli v. Germany, 6 E.H.R.R. 1 (Eur. Ct. Hum. Rights 1983).

20. *See* Winterwerp v. The Netherlands, 2 E.H.R.R. 387 (Eur. Ct. Hum. Rights 1979).

21. *See* X v. United Kingdom, 4 E.H.R.R. 188 (Eur. Ct. Hum. Rights 1981).

suggest that the interstate application brought by Ireland against the United Kingdom played a role in this change of perspective which cannot be underestimated.[22] It was established that even a country like Britain is not above the possibility of being found in violation of the Convention, even of article 3 forbidding inhuman treatment. The Convention had to be used to protect people in reality.

Judicial activism may of course be dangerous, especially in an international context. Can these developments be analyzed as instances of judicial activism? Much depends on the perspective one has. The best check against unjustified activism would seem to be a strong consensus in Commission and Court composed of lawyers with different backgrounds, representing different legal traditions. All my examples concern cases where a large majority came to the conclusion that a violation had occurred.

Of course, doubts may still exist. Sir Gerald Fitzmaurice criticized the majority in his dissent in the *Tyrer* case[23] concerning judicial corporal punishment, for using article 3 "as a vehicle for indirect penal reform, for which it was not intended."[24] In *Tyrer*, Commission and Court by very large majorities found judicial corporal punishment—birching—to be degrading treatment in violation of article 3.[25] Here we see a very basic disagreement over the judicial character of the Convention. How could one doubt that bills of rights in many countries' legal systems have proved and should prove to be "vehicles of indirect penal reform"?

Hans Huber, a very highly regarded Swiss constitutional lawyer, has described fundamental rights as a type of countermovement built into a legal system.[26] It may not be out of proportion to call them a sort of conscience within the legal order which should control and correct developments of the normal lawmaking procedures. At least when it represents a strong consensus, a Convention decision upholding fundamental rights will comport roughly with the conscience of most European nations, without impinging significantly on national autonomy. To this

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22. *See* Ireland v. United Kingdom, 2 E.H.R.R. 25 (Eur. Ct. Hum. Rights 1978). The case concerned especially the use of the five so-called "deep interrogation" techniques, which the Commission found to be torture, *see* 19 Y.B. EUR. CONV. ON HUM. RIGHTS 512, the Court "only" inhuman treatment.

23. Tyrer v. United Kingdom, 2 E.H.R.R. 1 (Eur. Ct. Hum. Rights 1978).

24. *Id.* at 24 (Fitzmaurice, J., dissenting).

25. *Id.* at 8-12; *see also Tyrer*, Report of the Commission of Dec. 14, 1976, at 13-15 (Eur. Comm'n Hum. Rights) (Application No. 5856/72).

26. Huber, *Über die Konkretisierung der Grundrechte*, in DER STAAT ALS AUFGABE, GEDENKSCHRIFT FÜR MAX IMBODEN 199, 201 (1972).

extent, the Convention will contribute to European integration by nurturing the development of a pan-European conscience. Of course, the notions of what rights are fundamental cannot be petrified at a specific moment in time. Such notions have to answer new questions put by new social conditions. And who could doubt that these social conditions are influenced by public opinion, awareness of problems and even the general "Zeitgeist"?

III. Some Weaknesses in the Convention's Power to Protect Fundamental Rights

If this picture, which may be novel to many of you, looks attractive at first sight for somebody who knows of the achievements of the United States Supreme Court, let us not forget the Convention's very important inadequacies. There are many. First, the procedure, calling for hearing by the Commission before hearing by Court, is rather cumbersome. We cannot change it however. Second, until now, the Strasbourg organs, Commission and Court, have been part-time bodies. This creates great difficulties. One may doubt, however, whether full-time organs would currently be acceptable to the member States. In principle, one European Court of Human Rights with jurisdiction to decide applications would certainly be preferable.[27] But it does not appear that the ratifying states would be willing to agree to that change soon. Also, the argument is made that full-time judges would lose contact with the realities in the different legal systems of the ratifying countries. I personally don't see any real problem there.

The most important drawback of the Convention system is the lack of uniformity of the internal applicability of the European Convention on Human Rights.[28] The Convention is not internally applicable in Britain, Ireland, and the Scandinavian states. This means that national judges cannot rely on the Convention in these countries. The consequence is, of course, that many lawyers will not be familiar with the system. In Britain, this lack of familiarity has been overcome during the recent years because of the activities of some members of the London Bar. One would strongly hope that this weakness of the Conven-

27. *See* Frowein, *Zur Fortentwicklung des europäischen Menschen- und Rechtrechtsschutzes*, in FESTSCHRIFT FÜR KARL CARSTENS (forthcoming).

28. *See* A.Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW (1983).

tion system can be terminated. Discussions are occurring in Britain and some of the Scandinavian countries about whether to transform the Convention into the law of the state. I am sure that Professor Jacobs will mention these discussions.[29] This transformation would have great importance.

In the countries where the Convention is internally applicable, its role is rather different. In some jurisdictions the Convention is frequently applied by national courts. This is true for Austria, where it has the rank of constitutional law, and for Switzerland.[30] But the courts also look to the Convention in Germany and France. Where internal guarantees of fundamental rights are stronger than the guarantees of the Convention, it is clear that the Convention's role will be limited.

The fact that the Convention is not applied internally in several countries creates considerable difficulties for the Convention organs, because they have no national decision before them that answers the questions that must be addressed under the Convention. It is clear that countries that do not apply the Convention internally will have to answer more frequently before the Convention organs. Britain has been found in violation of the Convention more often than any other country, a fact that may be due to this situation.

You may ask whether it would be possible to read into the Convention's text the obligation to apply the Convention internally within each ratifying state. Proposals of that sort were made rather early on the basis of article 1, according to which the parties agree to secure the rights in Section I to "everyone within their jurisdiction," and article 13, which states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy."[31] But one has to admit that these provisions also can be interpreted under the dualistic theory that recognizes parallel rights in the laws of ratifying states. Since it was well-known in 1950 that Britain would not apply the Convention internally, an obligation to so apply the Convention would have had to be established in much clearer terms. The Court has stated recently that no such obliga-

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29. *See* Jacobs, *Towards a United Kingdom Bill of Rights*, 18 U. MICH. J.L. REF. 29 (1984).

30. For examples, see A.Z. DRZEMCZEWSKI, *supra* note 28, at 93-106, 116-124 (1983).

31. *See* Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member States*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 79 (International and Comparative Law Quarterly Supplementary Publication No. 11, 1965).

tion exists.[32]

Of course, if one speaks of weak points one must not forget that the right of individual application to the Commission, under article 25, is not automatic. Only four states have not accepted the right of individual application: Greece, Turkey, Cyprus, Malta. But there is no formal obligation of renewal of the right for the other states. Britain has set a very bad example by failing to renew article 25 for the Isle of Man, after the decision in the *Tyrer* case.[33] Fortunately, as yet no other country has reacted to a finding of a violation by failing to renew the right of individual application. One would hope that this remains a unique example.

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32. Silver v. United Kingdom, 5 E.H.R.R. 347 (Eur. Ct. Hum. Rights 1983). Paragraph 113 of the judgment reads:

> The principles that emerge from the Court's *jurisprudence* on the interpretation of Article 13 include the following:
>
> (a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress [*see* Klass v. Federal Republic of Germany, 2 E.H.R.R. 214, 238 (Eur. Ct. Hum. Rights 1978)];
>
> (b) the authority referred to in Article 13 may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective [*see Klass*, 2 E.H.R.R. at 239];
>
> (c) although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so [*see, mutatis mutandis,* X v. United Kingdom, 4 E.H.R.R. 188, 205 (Eur. Ct. Hum. Rights 1981); Van Droogenbroeck v. Belgium, 4 E.H.R.R. 443, 467 (Eur. Ct. Hum. Rights 1982)];
>
> (d) neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention—for example, by incorporating the Convention into domestic law [*see* Swedish Engine Drivers' Union v. Sweden, 1 E.H.R.R. 617, 631 (Eur. Ct. Hum. Rights 1976)].
>
> It follows from the last-mentioned principle that the application of Article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 directly to secure to anyone within its jurisdiction the rights and freedoms set out in section 1. [*See* Ireland v. the United Kingdom, 2 E.H.R.R. 25 (Eur. Ct. Hum. Rights 1978).]

5 E.H.R.R. at 381-82.

33. Tyrer v. United Kingdom, 2 E.H.R.R. 1 (Eur. Ct. Hum. Rights 1978).

IV. RESTRICTION OF FUNDAMENTAL RIGHTS: THE CASE FOR COMMON STANDARDS

A. The Convention's Requirement of "Lawfulness"

I would now like to address myself to some specific questions concerning the restriction of fundamental rights guaranteed in the Convention. The Convention itself provides that many of its rights may be restricted by law, subject to the satisfaction of several requirements. The first requirement for such a restriction is that it be provided for by law, or that it be "lawful," as articles 5, 10 and 11 say. What does that mean? There must be a law as the basis for the interference with the fundamental rights. For somebody brought up in the tradition of the rule of law developed on the European continent, that seems to be self-evident. But this is not a necessary conclusion about the nature of a fundamental right, as illustrated by the famous case of *Malone*.[34] In that case, an English judge chose to apply the negative rule that restriction of a fundamental right is legal unless forbidden by law and permited secret surveillance of telephone lines.[35] The Convention organs have rejected this theory in reversing the English judge.[36] It seems clear that the reasoning of the English judge is erroneous under the Convention's explicit language protecting the individual against interferences not provided for "by law."

However, as Court and Commission have clearly accepted, common law as developed in England and Ireland has the quality of law in this sense. Common law, like statutory law, should be at least to some extent predictable. This is a difficult matter which was before the Court and the Commission in the *Sunday Times* case and came before the Commission again in a recent case concerning common law crimes.[37] In the *Sunday Times* case, the Court rightly stressed that a law must not only be adequately "accessible," but a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the cit-

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34. *See* Malone v. United Kingdom, — E.H.R.R. — (Eur. Ct. Hum. Rights 1984); Malone v. United Kingdom, 5 E.H.R.R. 385 (Eur. Comm'n Hum. Rights 1982). The Court confirmed the position of the Commission. The case was decided first in England. *See* Malone v. Commissioner of Police of the Metropolis (No. 2), 1979 Ch. 344.

35. *See* Malone v. Commissioner of Police of the Metropolis (No. 2), 1979 Ch. 344.

36. Malone v. United Kingdom, — E.H.R.R. — (Eur. Ct. Hum. Rights 1984); Malone v. United Kingdom, 5 E.H.R.R. 385 (Eur. Comm'n Hum. Rights 1982).

37. *See* Gay News Ltd. and Lemon v. United Kingdom, 5 E.H.R.R. 123 (Eur. Comm'n Hum. Rights 1982).

izen to regulate his conduct.[38] He must be able, if need be with appropriate advice, to foresee to a degree that is reasonable in the circumstances the consequences which a given action may entail. The Court had to admit, however, that those consequences need not be foreseeable with absolute certainty. Experience shows this to be unattainable. The Court rightly underlines that while certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws inevitably are couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[39]

There is an interesting uncertainty to the question of the extent of the responsibility of the Convention organs to determine whether national organs have applied their law correctly when interfering with fundamental rights. Somebody accustomed to systems of internal protection of fundamental rights would have no difficulty seeing that the Convention organs can never consider the correctness of the application of the national law, but can only determine whether the specific legal basis of a particular decision was used arbitrarily.[40] However, the European Court of Human Rights has not adopted this view of the scope of its power of judicial review. Some judgments can be interpreted as holding that the Court has jurisdiction to determine even the lawfulness of the interference under national law.[41] This would of course be a quite astonishing result, since Commission and Court are certainly less well-equipped than national courts to decide matters of national law.

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38. According to the Court:

> Firstly the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to forsee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Sunday Times v. United Kingdom, 2 E.H.R.R. 245, 271 (Eur. Ct. Hum. Rights 1979).

39. *Id.*

40. *See* J.A. FROWEIN, DER EUROPÄISCHE GRUNDRECHTSSCHUTZ UND DIE NATIONALE GERICHTSBARKEIT 13 (1983).

41. *See* Winterwerp v. The Netherlands, 2 E.H.R.R. 387, 404-06 (Eur. Ct. Hum. Rights 1979).

B. The Purpose of a Restriction: Is It "Necessary in a Democratic Society"?

In determining whether a particular restriction of a fundamental right is compatible with the Convention, Commission and Court next must determine whether a national legislature has imposed that restriction for one of the permissible aims listed in the Convention's specific restrictive clauses. Article 10, paragraph 2 makes it possible to restrict freedom of expression in the interests of national security, territorial integrity or 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. This is a long list which makes it easy to categorize the restriction under one of the headings. Indeed, none of the items listed above has caused any difficulties so far for the Convention organs.

Much more difficult, however, is the next and last condition for the restrictions. In order to uphold on this final ground, Convention organs must find a restriction "necessary in a democratic society."[42] How far can the control of the Convention organs go in this respect? It seems beyond doubt that *necessity* may not be the same in all twenty-one Convention countries. This can be seen easily if one compares such notions as "morals," "security of state," "public order." Matters of this sort cannot be judged without regard to the specific traditions, conditions and dangers prevailing in a given society. On the other hand, it is also clear that the Convention organs must have some control.[43]

V. THE STANDARD FOR CONVENTION DEFERENCE: A "MARGIN OF APPRECIATION" FOR NATIONAL LEGISLATURES AND COURTS

Deciding whether a given restriction of a fundamental right is "necessary in a democratic society" thus inevitably calls upon the Convention organs to strike a balance between normative

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42. Convention, art. 8.

43. The reference to a "democratic society" would also seem to imply that it is the democratic legislature that has to make the first choice and take the first decision. The specific legitimacy of the democratic process concerning the interference with the rights guaranteed is recognized here.

standards and differing national circumstances. In striking this balance, Commission and Court purport to grant national legislatures and judicial organs a "margin of appreciation."[44] But how far have the Convention organs gone to control that margin of appreciation? According to the Court, supervision by the Convention organs is not limited to ascertaining whether a state exercised its discretion "reasonably, carefully and in good faith." In the Court's view, even a state so acting remains subject to control through the Court's determination of whether the conduct is compatible with the European Convention on Human Rights.

The problems of exercising such control were quite visible in the decisions on the cases of *Handyside*,[45] *Sunday Times*[46] and *Dudgeon*.[47] *Handyside* concerned the confiscation of pornographic literature. *Sunday Times* determined the compatibility with the Convention of an injunction to publication of an article. The national court had threatened the publisher with contempt should it have published in the face of an injunction. In *Dudgeon*, the legislation in Northern Ireland on homosexuality was at issue.

A. *The Rationality Test of* Handyside*: Have National Authorities Acted Reasonably and in Good Faith?*

In the case of *Handyside*, the Court stressed that international control is subsidiary and concluded that the English courts were entitled to think that the book could have damaging results for the morals of children and juveniles.[48]

In the *Sunday Times* judgment, the majority was of the opinion that when a restriction seeks to protect the authority of the judiciary, a court may determine compatibility with the Convention under far more objective criteria than it may apply to a restriction that seeks to protect moral standards.[49] Since the *Times* case raised only the former concern, the Court was not

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44. For a critical evaluation, see O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474 (1982).

45. Handyside v. United Kingdom, 1 E.H.R.R. 737 (Eur. Ct. Hum. Rights 1976).

46. Sunday Times v. United Kingdom, 2 E.H.R.R. 245 (Eur. Ct. Hum. Rights 1979).

47. Dudgeon v. United Kingdom, 4 E.H.H.R. 149 (Eur. Ct. Hum. Rights 1981).

48. Handyside v. United Kingdom, 1 E.H.R.R. 737, 755-57 (Eur. Ct. Hum. Rights 1976).

49. Sunday Times v. United Kingdom, 2 E.H.R.R. 245, 282 (Eur. Ct. Hum. Rights 1979).

satisfied that the interference was necessary. It stressed the fact that responsibility for the thalidomide disaster, which lay at the heart of the Sunday Times dispute, raised issues of general public interest. The Court came to the final conclusion that the restriction proved not to be proportionate to the legitimate aim pursued.

The strong dissent by nine judges[50] showed that the violation of article 10 established by the judgment had something of an accidental nature to it. The minority would have applied the formula used in *Handyside*. According to this rationality test, the Court must uphold a restriction imposed by national authorities if it determines that they acted in good faith, reasonably, and with due care in evaluating the danger to the protectable interests listed in paragraph 2 of article 10. To this test the dissenters would have added consideration of whether a measure restricting freedom of expression is proportional to the legitimate aim pursued. The dissent stressed that the latter consideration looms especially large for any society that seeks to remain democratic. They found that the House of Lords was entitled to think that the publication of the article in question would have detrimental effects upon the due administration of justice in relation to actions pending before the courts at the relevant time.

B. The Proportionality Test: Is the Restriction of a Fundamental Right Proportionate to the Social Need Claimed for It?

Convention organs may consider two possible standards for deference to national organs: the rationality test and the proportionality test. The tension between these two approaches appears most clearly in the *Dudgeon* judgment of October 22, 1981.[51] The Court had to consider the legislation on homosexuality in Northern Ireland. Homosexual acts between consenting adult males still constituted a crime under Northern Irish legislation. No prosecutions in fact took place, but the applicant in the case before the Court had been threatened with prosecution. In passing this restrictive legislation, the United Kingdom government apparently had relied on the specific social and cultural conditions prevailing in Northern Ireland. The Court stressed that the United Kingdom government had acted carefully and in

50. *Id.* at 285-95 (dissenting opinion).
51. Dudgeon v. United Kingdom, 4 E.H.H.R. 149 (Eur. Ct. Hum. Rights 1981).

good faith. The opinion adds that the government made every effort to arrive at a balanced judgment between the differing viewpoints before concluding that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken. Nevertheless, the Court stated that good faith and due care alone could not decide the question of whether interference with the applicant's private life was "necessary in a democratic society."[52] It is for the Court to make the final evaluation of whether the reasons it has found to be relevant were sufficient in the circumstances. The test the Court adopted was whether the interference complained of was proportionate to the social need claimed for it.

In analyzing this matter further, the Court referred to changed attitudes towards homosexual behavior. In support of its position, the Court noted that in the great majority of the member states of the Council of Europe it is no longer considered necessary or appropriate to subject homosexual practices, at least of the kind in question, to criminal sanctions. The Court could not overlook the marked changes which had occurred in this regard in the domestic law of the member states. The Court then stressed that the authorities in Northern Ireland had refrained in recent years from enforcing the law in respect of private homosexual acts between competent consenting males over the age of twenty-one. No evidence was adduced to show that this practice was injurious to moral standards in Northern Ireland, or that there has been any public demand for stricter enforcement of the law.

Under these conditions, the Court did not see a "pressing social need"[53] to make such acts criminal offenses, in the absence of risk of harm to vulnerable sections of society requiring protection, or of effects on the public. On the issue of proportionality, the Court found that such justifications as existed for retaining the law in force unamended were outweighed by the detrimental effects that the very existence of the legislation could have on the life of a person of homosexual orientation. Although members of the public who regard homosexuality as immoral may be shocked, offended, or disturbed by the commission by others of private homosexual acts, such a reaction cannot on its own warrant the application of penal sanctions when only consenting adults are involved.

The Court here seems to base its reasoning on two considera-

52. *Id.* at 162-65.
53. *Id.* at 167.

tions. It is not quite clear which is the prevailing one. On the one hand the Court stresses that the legislation in Northern Ireland had not been enforced. On the other hand, the Court seems to rely on the objective consequences of such a criminal statute on a homosexual personality. The latter reasoning is to me rather weak. Can it be the Court's or the Commission's task to find out whether it is correct to penalize homosexual conduct? Determining whether particular behavior ought to be subject to criminal sanctions inevitably rests on political, not legal, decisions. Societies traditionally have left such decisions to their legislative bodies, partly because no objective standards can be found. The case is quite unlike outlawing a particular form of punishment, such as birching, which itself is degrading. The first argument, however, which relies on the fact that the criminal statute lay unenforced before being raised in this particular case as a sword of Damocles, would seem to be sufficient to show that the law really was not necessary, and was therefore disproportionate.

The principle of proportionality is certainly a most important criterion. By intelligent application of this principle, Convention organs can give some structure to their efforts to strike a balance between fundamental rights and national autonomy. Such a balance gives meaningful content to the "margin of appreciation" left to the states under several Convention articles. It seems that the Convention organs inevitably will be unable to offer any fixed determinations of what constitutes necessity in a democratic society. It is a difficult line that must be drawn between on the one hand watering down the Convention guarantees, and on the other hand permitting members of the Commission or Court to give effect to their own political or general viewpoints. Here again, unanimity or quasi-unanimity of Commission reports or judgments is of crucial importance. If this can be reached, it is difficult to argue that it is just an individual position which has influenced the procedure.

VI. TOWARD A EUROPEAN BILL OF RIGHTS: THE ROLE OF THE CONVENTION IN THE PROCESS OF EUROPEAN INTEGRATION

European integration through fundamental rights is already occurring at Strasbourg. The process is a slow one. It cannot be doubted, however, that a common denominator on many important issues concerning the protection of fundamental rights is being found through decisions on individual applications. The

criticism that this may sometimes jeopardize legal certainty is of course not without relevance. The Convention organs must always be careful to remain within the European consensus that can be deduced from the legal traditions and developments of the member states taken together.[54] This can, however, never be the lowest common denominator. It must be based on a comparison of the traditions along the lines that have been accepted by the formulation of the Convention.

A. Imposition of an Emerging Consensus by the Convention

A good example of this process would seem to be the case now pending before the Court concerning criminal procedures in the absence of the accused. The Italian proceeding at issue in the cases of *Colozza & Rubinat v. Italy*[55] is of a peculiar nature, insofar as it must be rare to have a trial of that sort without the accused being necessarily aware of it, or at least permitted to reopen the proceeding. Mr. Rubinat, a Spanish sailor who had been involved in a fight in Genoa, had left the country without knowing that a criminal trial would be started against him. He was convicted and sentenced to twenty-one years in prison. When he consented to extradition from France—apparently without getting legal advice, because France would not have extradited him—he had no remedy whatsoever. The Commission found unanimously that his right to a fair trial had clearly been violated. Here, the traditions of all the Convention countries except Italy viewed such a procedure as grossly unfair to the accused.

B. The Propriety of Imposition

1. Where the Convention's language is explicit— One may put the question whether the Convention system as a whole has sufficient legitimacy to interfere with important traditions in the legal systems of the member states. But it would seem clear that the Convention was drafted as an instrument that should produce real effects.[56] This is demonstrated in areas where the Con-

54. Mosler, *Report on the Results of the Colloquy*, in PROTECTION OF HUMAN RIGHTS IN EUROPE 333 (I. Maier ed. 1982).

55. Report of the Commission of May 5, 1983 (Eur. Comm'n Hum. Rights) (Application Nos. 9024/80, 9317/81).

56. The Court has held that the rights protected by the Convention are not "theoreti-

vention provisions leave little room for interpretation. The minimum rights of the accused under article 6, paragraph 3 are good examples. One case where Commission and Court unanimously found against the Federal Republic of Germany provides an illustration.[57] Article 6, paragraph 3(e) guarantees the right to a free interpreter. Free must mean without having to pay for the interpreter.[58] Since there are no conditions attached to the provision, one can only conclude that free means once and for all. If one includes provisions of that sort into a Convention and creates judicial organs to supervise the application of this Convention, the result must be clear. A Convention organ failing to give effect to such plain language would appear so deferential to national autonomy as to be practically impotent.

2. *Where the language may be either procedural or substantive*— A slightly more difficult case is presented where there is a clear provision, but it may be applied in a merely formal or in a substantive way. Take the case *X v. United Kingdom* as an example.[59] A mentally ill person could bring a habeas corpus procedure. But in this procedure, the court could only look to the order made by the Home Secretary. The court could not control the substantive grounds for detention. Could this be viewed as conforming with article 5, paragraph 4 of the Convention, which says that everyone who is deprived of his liberty shall be entitled to a hearing at which the lawfulness of his detention shall be decided speedily by a tribunal? Commission and Court came to the conclusion that a procedure which could not review the substantive ground of the detention could not suffice. The Court held that the right to judicial control must not be of such a scope as to empower the tribunal to substitute its own discretion for that of the decision-making authority. The review must, however, be wide enough to bear on those conditions which, according to the Convention, are essential for the "lawful" detention of a person on the ground of unsoundness of mind, especially since the reasons capable of initially justifying such a detention may cease to exist. In this case, an interpretation going beyond a merely formalistic compliance with the rule could leave hardly any doubt as to the result.

Already more difficult may be the cases where Commission

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cal or illusory but practical and effective." Airey v. Ireland, 2 E.H.R.R. 305, 314 (Eur. Ct. Hum. Rights 1978).

57. Luedicke, Belkacem, and Koc v. Federal Republic of Germany, 2 E.H.R.R. 149 (Eur. Ct. Hum. Rights 1978).

58. In the French text it is "gratuitement."

59. 4 E.H.R.R. 188 (Eur. Ct. Hum. Rights 1981).

and Court have interpreted the presumption of innocence under article 6, paragraph 2 to bear on the validity of the reasons given by criminal courts when assigning the costs of discontinued criminal procedures. In Germany, Switzerland and Austria a widespread practice still exists where such courts will themselves pronounce on the culpability of an accused when they decide to discontinue the procedures. Courts do that to justify a decision not to reimburse the former accused. In response to this practice the Commission started to take the rule concerning the presumption of innocence seriously, and questioned whether the practice could be legal.[60] Two German cases were settled under article 28 without a final decision.[61] A Swiss case went before the Court after the Commission had unanimously found a violation. The Court affirmed the Commission.[62]

3. Where the language is ambiguous or deficient— An even more difficult level is reached where there is practically no or very little guidance in the wording of the Convention. Does the right to form and to join trade unions include the right not to join them? The argument that the article speaks of a freedom in that respect should of course be seen as rather important. But on the other hand, a specific clause concerning the negative freedom of association existing in the Universal Declaration on Human Rights[63] was not inserted into the Convention. There was nevertheless a very broad consensus in Commission and Court that article 11 is breached where, only because of the refusal to join a specific trade union, workers are fired from their jobs.[64] It is certain that it was of great influence in Commission and Court that such a system is clearly illegal in almost all European countries.

4. Where consensus between nations is lacking— The most difficult level is reached where the consensus between the European countries is low or nonexistent. This may prove to be the crucial issue for the interpretation of article 6, paragraph 1, which guarantees access to a court in the determination of civil

60. *See* Neubecker v. Federal Republic of Germany, 5 D. & R. 13 (Eur. Comm'n Hum. Rights 1976); Liebig v. Federal Republic of Germany, 5 D. & R. 58 (Eur. Comm'n Hum. Rights 1976).

61. Neubecker v. Federal Republic of Germany, 8 D. & R. 30 (Eur. Comm'n Hum. Rights 1977); Liebig v. Federal Republic of Germany, 17 D. & R. 5 (Eur. Comm'n Hum. Rights 1978).

62. Minelli v. Switzerland, 5 E.H.R.R. 554 (Eur. Ct. Hum Rights 1983).

63. *See* Universal Declaration on Human Rights, Dec. 10, 1948, art. 20(2), G.A. Res. 217, U.N. Doc. A/811 (1949), *reprinted in*, 1948-49 U.N.Y.B. 535.

64. Young, James and Webster v. United Kingdom, 4 E.H.R.R. 38 (Eur. Ct. Hum. Rights 1981).

rights and obligations. After thirty years, it is still completely unclear what is covered by that notion. The Court has held that disciplinary procedures terminating or suspending the right of a medical doctor to practice, as well as the granting of an expropriation permit settling the lawfulness of an eventual expropriation, fall under this rule.[65] That means that a wide area of administrative law may be included in the notion. How far can that go? Only a few European countries have experience with a complete system of judicial review of administrative acts by courts. Most countries still have a rather limited system of such judicial review. From a logical point of view, it may be almost impossible to distinguish the cases already decided from the general area where the state, by administrative devices, regulates the liberty of the citizen to avoid dangers for others. The case raising that issue in principle may soon come before the Court.[66]

The examples I have just given will certainly show that the Convention organs frequently have to face the choice between a narrow and a wider interpretation. The consensus existing or developing in the European countries will be of great importance for that choice to be made.

VII. THE CONVENTION AND THE EUROPEAN ECONOMIC COMMUNITY: THE INTEGRATION EFFECT OF FUNDAMENTAL RIGHTS

If one speaks of European integration, one cannot forget the European Economic Community. The issue of human or fundamental rights in the Community legal system has had different phases. Underestimated at first, it was then in danger of being overestimated for some time. In a jurisprudence well established by now, the European Court of Justice has recognized that the fundamental rights protected by the Constitutions of the member states form an integral part of Community law.[67] International treaties for the protection of human rights, as binding on the members of the Community as is the European Convention on Human Rights, were ten years ago considered to furnish

65. Le Compte, Van Leuven and De Meyere v. Belgium, 4 E.H.R.R. 1 (Eur. Ct. Hum. Rights 1981); Sporrong and Lönnroth v. Sweden, 5 E.H.R.R. 35 (Eur. Ct. Hum. Rights 1982).

66. It is now pending before the Court in *Bentham v. The Netherlands*. A majority of the Commission found that Art. 6 is not applicable. *See* 6 E.H.R.R. 283 (Eur. Comm'n Hum. Rights 1983).

67. *See* Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E. Comm. Ct. J. Rep. 1125; Stauder v. City of Ulm, 1969 E. Comm. Ct. J. Rep. 419.

guidelines and indications for the standards to be adopted in Community law.[68]

The German Federal Constitutional Court was not satisfied with the protection of fundamental rights in the Community system. A famous decision by this Court,[69] and some indications that the Italian Constitutional Court could move in the same direction,[70] have led to considerable activity by the Community in the area of fundamental rights. The political organs of the Community have subscribed formally to the binding force of fundamental rights, including those protected by the European Convention on Human Rights.[71] In addition,the Commission of the European Community has also formally proposed in a memorandum that the Community should become a party to the European Convention on Human Rights and Fundamental Freedoms.[72] Whether this will be possible is difficult to evaluate. The technical problems are great. As an alternative to a formal accession, the Community could adopt the substantive provisions of the European Convention on Human Rights as internal Community law by a Community regulation based on article 235.[73] This would be a practice similar to the old Canadian Bill of Rights. Although it may seem doubtful whether this could finally lead to judicial review of later regulations, one could at least expect the European Court of Justice to view that regulation as confirming its earlier jurisprudence about the binding nature of fundamental rights.

The discussions concerning the possible accession of the Community to the European Convention on Human Rights prove what the German author Rudolf Smend in 1928 called the integration effect of fundamental rights.[74] A population may find its

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68. Hauer v. Land Rheinland-Pfalz, 1979 E. Comm. Ct. J. Rep. 3727, 3745 (Preliminary Ruling); Rutili v. Minister for the Interior, 1975 E. Comm. Ct. J. Rep. 1219 (Preliminary Ruling). *See generally* GRUNDRECHTSSCHUTZ IN EUROPA (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 72, 1977).

69. Judgment of May 29, 1974, Bundesverfassungsgericht, W. Ger., 37 Bundesverfassungsgericht [BVerfG] 271; *but see* Judgment of June 23, 1981, Bundesverfassungsgericht, W. Ger., 58 BVerfG 1; for a critical discussion of the first decision, see Frowein, *Europäisches Gemeinschaftsrecht und Bundesverfassungsgericht*, in 2 BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ 187, 201 (1976); concerning the last decision see Frowein, *Anmerkung des Bearbeiters*, 9 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 179 (1982).

70. Judgment of Dec. 27, 1973, Corte const., Italy, 1974 Foro It. I 314.

71. Declaration of Apr. 5, 1977, 20 O.J. EUR. COMM. (No. C 103) 1 (1977).

72. Memorandum of Apr. 4, 1979, BULL. EUR. COMM. (Supp. 1979-80) (No. 2/79).

73. *See* J.A. Frowein, *Human Rights in International Law and Community Law*, in HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, HUMAN RIGHTS 73, 77 (1979-80 H.L. 362).

74. R. Smend, *Verfassung und Verfassungsrecht* (1928), *reprinted in* STAATSRECHT-

identity in a catalogue of fundamental rights. Because the Community is developing into areas where it affects the population more and more, such an identification could well help to improve the legitimacy of the system as a whole. It seems very doubtful that the Community should draft its own catalogue of fundamental rights. It would not be surprising if no consensus on the formulation of important principles could be reached by European governments at the present time.[75]

VIII. SOME PREDICTIONS

Paul Kauper, who was my teacher in constitutional law when I studied as a foreign graduate student at the University of Michigan Law School in 1957-1958, once wrote an article describing human rights as a tide in the history of mankind.[76] Of course the tide is always coming and going. If I am not mistaken, there have been high and low tides in the development of the protection of civil rights within the national system of the United States even during the last years. An international system for the protection of fundamental rights is certainly much more restricted by its political climate.

If one or two of the bigger European states ceased to adhere to the right to individual application under article 25 of the Convention, the system would encounter great difficulties. An old Swiss claim is that there should be no foreign judges interfering with national conditions. Members of the Commission and of the Court are to the greatest possible extent foreign judges looking into very internal matters. Let us hope that these organs will be able during the coming years to gain the confidence of the citizens in Europe, and through them of the governments and ruling elites. Although we should not take it for granted, there seems to be a growing awareness of the possibilities created by the Convention in countries where the national judicial system is not too well developed. One can witness a most interesting side effect of the Convention system in that respect. Advocates who realize that the existence of a general consensus in all or most countries may be important for the Convention organs will try to use a comparative method in arguing their position.

LICHE ABHANDLUNGEN 119 (2d ed. 1968).

75. Frowein, *Europäische Grundrechtsprobleme*, in 2 DAS EUROPA DER ZWEITEN GENERATION, GEDÄCHTNISSCHRIFT FÜR CHRISTOPH SASSE 727, 737 (1981).

76. Kauper, *Human Rights: A Tide in the Affairs of Men*, U. MICH. L. QUADRANGLE NOTES, Spring 1969, at 11.

It was a special occasion when, in a case before the Commission, an English advocate referred to a decision by the Federal Constitutional Court of the Federal Republic of Germany. He tried to convince the Commission and later the Court that they should take the same approach. From time to time one may find that through the Convention procedures, a specific legal experience of one country may be transformed into a general system. The same would seem to be true for the jurisprudence of the European Court of Justice in Luxembourg.

The system we are working with is still of a very modest nature. However, it is the only international or supranational system for the protection of fundamental human rights that really functions in a judicial manner. Let us hope that it can develop smoothly.