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The European Community and the Requirement of a Republican Form of Government

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THE EUROPEAN COMMUNITY AND THE REQUIREMENT OF A REPUBLICAN FORM OF GOVERNMENT

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I. THE EUROPEAN COMMUNITY AND LIBERTY

The European Community — that is, the factual entity composed of three legally separate communities[1] which has been and still is one of the basic concerns of Eric Stein[2] — cannot be understood without taking into account European history after 1933. As an irony of history, the stage for a new beginning was set by the man who destroyed the old Europe[3] and who was the reason that so many academics left the "old country" for the new world. This new start was not only influenced by the determination of those Europeans who had lived through the darkness to overcome the dangers of rivalry but also by those European-Americans who were able to build the bridges between the old country of liberty and a Europe trying to find new structures.[4] The role played by lawyers, historians and social scientists familiar with both the old world and the emerging new Europe is a story that remains to be written for the benefit of younger generations.

The European movement cannot be understood without an awareness of the firm determination of those Europeans who were not dominated by the Soviets to secure the "Blessings of Liberty" in the sense of the preamble to the United States Constitution of 1787. The Statute of the Council of Europe of May 5, 1949 refers in its preamble to "individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy."[5] According to article 3 of the same Statute, "Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."[6] A State which has seriously violated

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1. The three separate communities are the EEC, the European Coal & Steel Community, and Euratom. *See* Stein & Sandalow, *On The Two Systems: An Overview*, in 1 COURTS AND FREE MARKETS 43 n.1 (T. Sandalow & E. Stein eds. 1982).

2. As the most recent example, see COURTS AND FREE MARKETS, *supra* note 1.

3. *See* A. BULLOCK, HITLER, A STUDY IN TYRANNY 806 (2d ed. 1964):

> Europe may rise again, but the old Europe of the years between 1789, the year of the French Revolution, and 1939, the year of Hitler's War, has gone for ever — and the last figure in its history is that of Adolf Hitler, the architect of its ruin. *'Si monumentum requiris, circumspice'* — 'If you seek his monument, look around.'

4. Eric Stein acted as "pontifex" of that sort by influencing generations of European students at The University of Michigan Law School in Ann Arbor.

5. Statute of the Council of Europe, May 5, 1949, preamble, 87 U.N.T.S. 103, 104 (1951).

6. *Id.*, at art. 3.

these principles may be suspended or even excluded from the Council under article 8.[7]

The treaties establishing the three different European Communities are much less outspoken in that respect than the Statute of the Council of Europe. The new approach of functional integration made the drafters hesitant to use broad language. Only the last consideration of the preamble to the EEC Treaty of March 25, 1957 mentions the determination of the six founding members to "preserve and strengthen peace and liberty."[8] Article 230 of the treaty includes appropriate forms of cooperation with the Council of Europe in the tasks given to the Community organs, recognizing thereby, if only implicitly, that there exists a very important link between what is called the Economic Community and the international organization that has been given the task of safeguarding freedom and democracy.[9]

Who could doubt that the EEC has always considered itself bound by these principles? To borrow the words of the first President of the EEC Commission, Walter Hallstein, two principles govern the Community — the rule of law and democracy.[10] But a certain time passed before scholars began to discuss more fully the question of the extent to which these principles must be seen as part of Community law or what their impact on that law should be. While the role of fundamental rights in Community law has been a major issue in recent years, not much attention has been paid to the possible membership consequences of events that occurred in Greece in 1967 or in Turkey in 1980. The political organs of the European Community have always taken for granted that dictatorship is incompatible with membership, but the legal consequences of this principle have remained somewhat obscure.[11] It will be our task to examine some of the problems involved here.

II. Federal Systems and the Principle of Homogeneous Constitutions

The European Community is far from being a federal system. However, federal structures may have a certain value as models with which to compare the development of the Community's institutional system. It would seem that much of Eric Stein's writings on the European system is based on that understanding.[12]

The basic values of freedom and democracy, or to put it in the language

7. This procedure was used in the case of Greece in 1970, but Greece left the Council before the procedure was completed. *See* Petzold, *Der gegenwärtige Wirkungsbereich der Europäischen Menschenrechtskonvention und ihrer Zusatzprotokolle, der Konvention zur Beseitigung aller Formen von Rassendiskriminierung sowie der Menschenrechtspakte der Vereinten Nationen,* 30 ZaöRV 417, 422 (1970).

8. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958).

9. *See* Schröder, in 2 Kommentar zum EWG-Vertrag, art. 230, at 1116-18 (H. Groeben, H. Boeckh, J. Thiesing & C. Ehlermann eds. 3d ed. 1983).

10. W. Hallstein, Die Europäische Gemeinschaft 43 (1st ed. 1973).

11. It was always a common understanding before 1974 that Spain and Portugal could not be admitted without a change of their constitutional structures.

12. *See, e.g.,* Stein, *Towards a European Foreign Policy? — European Foreign Affairs System from the Perspective of the United States Constitution*, in Methods, Tools and Poten-

of article IV of the United States Constitution, of the "Republican Form of Government" are of a nature that is not compatible with a fundamentally different constitutional system. It is a widespread feature of federal systems based on the principle of democracy that the member states are under a formal constitutional obligation to keep within a certain homogeneity concerning their own constitutional system. This rule was first implemented in 1787 in article IV of the United States Constitution.[13] The German constitution of 1849, which never came into force, provided for a responsible government with a representative chamber elected by the people in all the German states.[14] The Swiss constitution of 1874,[15] the Weimar Constitution of 1919[16] and the Bonn constitution of 1949[17] are all based on the same principle. Australia,[18] Canada[19] and India[20] also apply this rule. The German federal system created by Bismarck in 1871 consisted mostly of monarchies but also included the free cities of Hamburg, Bremen and Lübeck.[21] The federal constitution said nothing about minimum requirements for the states, not even concerning representation of the people, something which did not exist in the two Mecklenburgs until 1918.[22] This exception in a monarchical federal structure proves the rule. It is a structural impossibility for a federal system of a democratic nature to have members with basically different constitutional systems.

There are important differences in the enforcement of the principle just outlined. The United States Supreme Court has concluded that the issue of whether a particular state's condition is compatible with article IV is a political question over which the Court has no jurisdiction.[23] It is for the political organs, Congress and the President, to make sure that there is no violation of the principle of homogeneity. Congress, by enacting legislation pursuant to article I, section 8, clause 15, in 1792, had already given the President a clear enforcement power for cases in which "the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course

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TIAL FOR EUROPEAN LEGAL INTEGRATION IN THE LIGHT OF AMERICAN FEDERAL EXPERIENCE (M. Cappelletti & J. Weiler eds. forthcoming).

13. U.S. CONST. art. IV, § 4. ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

14. For text of the Constitution of 1849, see F. SIEBERT, VON FRANKFURT NACH BONN DIE DEUTSCHEN VERFASSUNGEN 1849-1949 at 18 (1964). For the history of the German revolution 1848-1849, see 2 E. HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789 at 502-14, 767-73 (1960). *See also* J. MATTERN, PRINCIPLES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN NATIONAL REPUBLIC 35-44 (1928).

15. B. VERF., CONST., COST. FED. art. 6 (Switz.).

16. DIE VERFASSUNG DES DEUTSCHEN REICHS VON 1919 art. 17 (Ger.).

17. GG art. 28 (W. Ger.).

18. AUSTRALIA CONST. ch. V, §§ 106-20.

19. CANADA CONST. arts. 58-90.

20. INDIA CONST. arts. 152-237.

21. For the structure of the federal system of 1871, see 3 E. HUBER, *supra* note 14, at 785 (1963).

22. 4 E. HUBER, *supra* note 14, at 422 (1969).

23. *E.g.,* Luther v. Borden, 48 U.S. (7 How.) 1, 42, 46-47 (1849).

of judicial proceeding[s]."[24] Under those conditions, the President may call forth the militia or use the regular army — as was done, for instance, in Arkansas in 1957 when the governor refused to comply with federal court orders.[25] One may wonder, however, whether the political question doctrine would be involved today if, for example, a state legislature purported to delegate all legislative power to the governor. Indeed, by applying the one-man/one-vote principle to the states in *Baker v. Carr*,[26] the Supreme Court in fact exercised jurisdiction over one of the most important aspects of what constitutes a "Republican Form of Government."

The federal systems on the European continent have an old tradition called "Bundesaufsicht" (federal control or supervision) as well as "Bundeszwang" or "Bundesexekution" (federal execution). The control involves on the one hand the execution of federal laws by state authorities, an approach that is quite common in Switzerland and Germany.[27] But it also includes at least partly the procedures through which to insure that the provisions of state constitutions are compatible with the homogeneity provisions of the federal constitution. The possibility of execution clearly exists where a state government no longer respects the basic principles of democracy made obligatory by the federal constitution.[28] During the difficult years of Weimar there were several cases where the "Reichswehr," the federal army, had to be used against Land-governments that had implemented

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24. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, *repealed by* Act of Feb. 28, 1795, ch. 36, § 10, 1 Stat. 425.

25. *See* N. Y. Times, Sept. 24, 1957, at 1, col. 6.

26. Baker v. Carr, 369 U.S. 186 (1962).

27. *See* GG art. 84 (W. Ger.); PARLIAMENTARY COUNCIL, FEDERAL REPUBLIC OF GERMANY, THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 52 (1977):

> (1) Where the Laender execute federal laws as matters of their own concern, they shall provide for the establishment of the requisite authorities and the regulation of administrative procedures in so far as federal laws consented to by the Bundesrat do not otherwise provide.
> (2) The Federal Government may, with the consent of the Bundesrat, issue pertinent general administrative rules.
> (3) The Federal Government shall exercise supervision to ensure that the Laender execute the federal laws in accordance with applicable law. For this purpose the Federal Government may send commissioners to the highest Land authorities and with their consent or, if such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.
> (4) Should any shortcomings which the Federal Government has found to exist in the execution of federal laws in the Laender not be corrected, the Bundesrat shall decide, on the application of the Federal Government or the Land concerned, whether such Land has violated applicable law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court.
> (5) With a view to the execution of federal laws, the Federal government may be authorized by a federal law requiring the consent of the Bundesrat to issue individual instructions for particular cases. They shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent.

28. *See* GG art. 37 (W. Ger.); PARLIAMENTARY COUNCIL, *supra* note 27, at 29:

> (1) If a Land fails to comply with its obligations of a federal character imposed by this Basic Law or another federal law, the Federal Government may, with the consent of the Bundesrat, take the necessary measures to enforce such compliance by the Land by way of federal enforcement.
> (2) To carry out such federal enforcement the Federal Government or its commissioner shall have the right to give instructions to all Laender and their authorities.

See also J. FROWEIN, DIE SELBSTÄNDIGE BUNDESAUFSICHT NACH DEM GRUNDGESETZ (1961).

non-republican constitutional systems.[29] An early example was the so-called "Räte-System" established in Bavaria for a short time.[30]

In the Federal Republic of Germany, it is clear that the Federal Constitutional Court has full jurisdiction to decide whether or not a state constitution is in line with article 28 of the Basic Law, which lays down the principles of democracy binding for the states.[31] Indeed, cases of that sort have been before the Court, although they have not been very spectacular. Probably the most interesting one concerned the problem of whether the parliamentary system of government guaranteed for the federal level should be seen as included in article 28.[32] A long line of decisions clarified the requirements of the electoral provisions made binding for the Länder in article 28.[33]

The Swiss Constitution of 1874 introduced an interesting system of federal guaranty for the cantonal constitutions. By a specific procedure, the Federal Assembly must verify that a cantonal constitution does not contain any provision contrary to the Federal Constitution and that it secures the exercise of political rights according to republican principles, be they representative or directly democratic (as in a few of the so-called "Urkantone" or earliest cantons).[34] If a canton fails to comply with these rules, an execution is possible under Swiss constitutional law.[35] The Federal Tribunal has jurisdiction in cases where it is argued that constitutional rights of citizens are not respected by cantonal laws.[36]

III. The European Community and the National Constitutions

When the European Council met in Copenhagen in 1978, it declared that respect for and maintenance of parliamentary democracy and human rights in all member states are essential elements of membership in the

29. 6 E. Huber, *supra* note 14, at 741 (1981).

30. This happened before the constitution had been adopted. *See* 5 E. Huber, *supra* note 14, at 1113 (1978).

31. GG art. 28 (W. Ger.); Parliamentary Council, *supra* note 27, at 25:

(1) The constitutional order in the Laender must conform to the principles of republican, democratic and social government based on the rule of law, within the meaning of this Basic Law. In each of the Laender, counties (Kreise), and communes (Gemeinden), the people must be represented by a body chosen in general, direct, free, equal, and secret elections. In the comunes the assembly of the commune may take the place of an elected body.

(2) The communes must be guaranteed the right to regulate on their own responsibility all the affairs of the local community within the limits set by law. The associations of communes (Gemeindeverbaende) shall also have the right of self-government in accordance with the law and within the limits of the functions assigned to them by law.

(3) The Federation shall ensure that the constitutional order of the Laender conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

32. Judgment of July 22, 1969, Bundesverfassungsgericht, W. Ger., 27 BVerfG 44, 55 (1969).

33. Frowein, *Die Rechtsprechung des Bundesverfassungsgerichts zum Wahlrecht*, 99 Archiv des öff. R. 72 (1974).

34. *See* F. Fleiner & Z. Giacometti, Schweizerisches Bundesstaatsrecht 131 (1949).

35. *Id.* at 127.

36. The Federal Tribunal will not, however, control whether a provision of the cantonal constitutions verified by the Federal Assembly is in line with the Federal Constitution.

Community.[37] In 1979, the European Parliament proposed that a formal obligation should be entered into by old members and those wanting to join the Community. According to this agreement, all the states should respect the principles of civil rights and pluralist democracy. The resolution adds an interesting consideration which suggests that the European Court of Justice should have power to decide whether or not a state fails to respect these principles, because such a failure would be incompatible with Community membership.[38]

The Institutional Committee of the European Parliament adopted the same approach in its report of July 15, 1983, which reads in No. 26:

> 26. In the case of serious and persistent infringement of democratic principles or fundamental rights — established by the Court of Justice at the request of the Parliament or of the Commission — the European Council, on receiving the endorsement of the legislative and executive bodies, shall take measures:
> — suspending the application of part or the whole of the treaty mechanisms to the State in question and its nationals,
> — which may go as far as suspending participation in the Institutions of the Union by the State in question and its nationals who are members of the Institutions of the Union.[39]

In the Resolution concerning the substance of the preliminary draft Treaty establishing the European Union of September 14, 1983, the European Parliament adopted the following provisions:

> 8. The Union and its Member States consider the underlying principles of European society to be pluralist democracy, the rule of law, freedom, the exercise and protection of fundamental civil, economic, social and political rights, the preservation of the natural bases of life and cultural values, the fulfilment of resulting obligations and the principle of resolving international disputes through the intermediary of international organizations and negotiations; respect for these principles is necessary for the existence of the Union and for membership thereof.
> 9. *Civil and political rights:* The Union and the Member States undertake to protect the dignity of the individual and to respect and grant to any person coming within their jurisdiction the rights and freedoms that shall be contained in the Treaty and those stemming from the common principles embodied in the Constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
> . . . .
> 26. In the case of serious and persistent infringement of democratic principles or fundamental rights — established by the Court of Justice at the request of the Parliament or of the Commission — the European Council, on receiving the endorsement of the legislative and executive bodies, shall take measures:
> — suspending the application of part or the whole of the Treaty mechanisms to the State in question and its nationals,

37. Declaration on democracy, BULL. EUR. COMM., No. 3, at 6 (1978).

38. *See* Parliament Resolution on the prospects of enlargement of the Community, Part One: political and institutional aspects, 22 O.J. EUR. COMM. (No. C 39) 47 (Feb. 12, 1979).

39. 1983-84 EUR. PARL. DOC. (No. 1-575/83/A) 12 (1983).

— which may go as far as suspending participation in the institutions of the Union by the State in question and its nationals who are members of the institutions of the Union.[40]

The final version of the Draft Treaty establishing the European Union was adopted by the European Parliament on February 14, 1984, and reads in part:

Art. 4 - Fundamental rights:

(1) The Union shall protect the dignity of the individual and grant every person coming within its jurisdiction the fundamental rights and freedoms derived in particular from the common principles of the Constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(2) The Union undertakes to maintain and develop, within the limits of its competences, the economic, social and cultural rights derived from the Constitutions of the Member States and from the European Social Charter.

(3) Within a period of five years, the Union shall take a decision on its accession to the international instruments referred to above and to the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Within the same period, the Union shall adopt its own declaration on fundamental rights in accordance with the procedure for revision laid down in Article 84 of this Treaty.

(4) In the event of serious and persistent violation of democratic principles or fundamental rights by a Member State, penalties may be imposed in accordance with the provisions of Article 44 of this Treaty.

Art. 44 — Sanctions

In the case provided for in Article 4 of this Treaty, and in every other case of serious and persistent violation by a Member State of the provisions of the Treaty, established by the Court of Justice at the request of the Parliament or the Commission, the European Council may, after hearing the Member State concerned and with the approval of the Parliament, take measures:

— suspending the rights deriving from the applications of part or the whole of the Treaty provisions to the State in question and its nationals,

— which may go as far as suspending participation by the State in question in the European Council, the Council of the Union and any other organ in which that State is represented as such. The State in question shall not participate in the vote on the sanctions.[41]

The principles stated here have to a certain extent already played a role in Community practice. After the military coup in Spain failed in 1981, the Parliament — clearly referring to Spain's possible membership — confirmed the view that a pluralistic parliamentary system and respect for human rights are conditions for accession and membership.[42] After the military took over in Greece in 1967[43] and in Turkey in 1980,[44] the associa-

40. Parliament Resolution concerning the substance of the preliminary draft Treaty establishing the European Union, 26 O.J. EUR. COMM. (No. C 277) 95, 97, 100 (Oct. 17, 1983).

41. 1983-84 EUR. PARL. DOC. (No. 1-1200/83/A) 9, 24 (1983).

42. Parliament Resolution on the attempted coup d'état in Spain, 24 O.J. EUR. COMM. (No. C 77) 85 (Apr. 6, 1981).

43. Le Parlement Résolution sur l'association entre la C.E.E. et la Grèce, 10 J.O. COMM. EUR. 2058 (June 2, 1967).

tion treaties were to a great extent "frozen."

Where a member state of the European Community violates the general principle of homogeneity the question as to possible consequences will necessarily arise. While the Statute of the Council of Europe contains specific rules for the exclusion of members that have violated the principles of democracy and fundamental rights, the Community treaties are silent on the matter.[45] Since all member states of the Community are now also bound by the European Convention on Human Rights, an interstate application under article 24 of the Convention is always possible. The case of *Ireland v. United Kingdom*[46] is an example of an interstate procedure between two member states of the European Community. However, it would seem most astonishing if such a procedure were the only reaction in a case in which a member state had completely changed its constitutional system, for instance by a military coup. One wonders whether Community law has nothing more to offer.

IV. Article 169 as a Basis for Community Reaction

An important question is whether or not article 169 can be used against a member state whose constitutional system is no longer in line with the principles recognized by the Community's fundamental structure. This inquiry presupposes that a member state under those circumstances has violated the obligations of the EEC Treaty or secondary EEC law.[47] Article 169 only applies where treaty obligations are violated. Can one go so far as to include an obligation concerning the constitutional principles of a free democracy in the unwritten part of the EEC constitution? Some doubts remain.

There is, however, one provision of EEC law that becomes important here. According to article 1 of the EEC Act on direct elections, free elections to the European Parliament form part of the *acquis communautaire*.[48] There is clearly a Community obligation for the member states to organize real (meaning free) elections to the European Parliament. This is not merely an unimportant formal obligation that may be easily neglected. The European Parliament represents the peoples in the Community. Even in the absence of legislative competence, it has become an essential organ in the Community's constitutional structure. Where a state does not permit free elections to the European Parliament, a procedure under article 169 would seem quite possible. Of course, this procedure could not really aim at constitutional change in the member state, but would instead address one of its consequences. It is probably not very likely that such a procedure would be

44. Parliament Resolution on the military junta in Turkey, 24 O.J. Eur. Comm. (No. C 101) 110 (May 4, 1981).

45. *See* text at notes 7-11 *supra*.

46. Ireland v. United Kingdom, 1978 Y. B. Eur. Conv. Hum. Rts. 602 (Eur. Ct. of Human Rights).

47. As to the practice under article 169 see C. Ehlermann, *Die Verfolgung von Vertragsverletzungen der Mitgliedstaaten*, in Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit 135 (W. Grewe, H. Rupp & H. Schneider eds. 1981).

48. Council Act concerning the election of the representatives of the Assembly by direct universal suffrage, 19 O.J. Eur. Comm. (No. L 278) 1, 5 (Oct. 8, 1976).

in the forefront of considerations if a military coup or other event had really changed the constitutional structure in one of the member states.

V. Reactions Under Articles 224 and 225

The emergency clauses of articles 224 and 225 should be considered as a possible community mechanism in case a member state violates the basic constitutional principles underlying the Community structure.[49] According to article 224, the Treaty presupposes that a member state may be called upon to take measures in the event of serious internal disturbances. These measures may affect the functioning of the common market. This provision recognizes that emergency measures are still completely in the national sphere of jurisdiction. However, the article accepts that in such an eventuality the common market could be affected by the emergency measures and therefore calls on the member states to cooperate in order to avoid such an effect.

How can the common market be affected by those emergency measures? It is clear that the five freedoms, especially the free movement of goods and workers, could be restricted on the basis of the emergency measures anticipated in article 224. However, the functioning of the EEC institutions that guarantee and protect the common market cannot be separated from the five freedoms. Therefore, an emergency measure which would curtail democratic freedoms to such an extent that the constitutional system would be altered must also be seen as affecting the common market. Under those conditions, free elections to the European Parliament would no longer be possible. As a result, the state's representative in the Council would have no democratic mandate.

Article 225, paragraph 2 takes into account the possibility that a member state may make improper use of the powers provided for in article 224. Again, this rule applies primarily to the specific restrictions concerning the freedoms of the common market. But the most serious form of improper use would of course be the change of the constitutional system into one that would be incompatible with the EEC system. It is a common experience that all founders of dictatorships in recent history have tried to justify their action by referring to a national emergency that allegedly threatened serious internal disturbances affecting the maintenance of law and order. Even where this sort of argument is only a pretext, the applicability of articles 224 and 225 cannot be excluded. The mere fact that a member state government would seriously restrict democratic freedoms should be seen as an act being taken in "the event of serious internal disturbances affecting the maintenance of law and order." Although one may admit that this sort of applicability was not foreseen when the articles were drafted, it would not seem to be correct to limit their bearing to the more technical side of the common market.

Article 224 does not clearly state what kind of action can be taken by the other member states. They are obligated to consult each other with a view to taking together the steps needed to avoid affecting the functioning

49. Frowein, *Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozess*, 1983 EuR 301, 312.

of the common market. If at all possible, the member state concerned should take part in the consultation. However, this will frequently be impossible. Necessary steps in the sense provided for in article 224 may well entail the suspension of the treaty rights of the member state that changed its constitutional structure. This suspension may be the only way to avoid seriously affecting the whole structure of the community system.[50]

Article 225, paragraph 2 makes it possible to bring the matter directly before the Court of Justice. Either the Commission or any other member state would have to argue that the state that changed its constitutional structure had made improper use of the powers provided for in article 224, namely the powers to tackle an emergency. The Court of Justice could act immediately and could also take any necessary interim measures under article 186 of the treaty.

Even if article 224 was not originally drafted to include matters of constitutional homogeneity between the Community's member states it seems preferable to stay within the community system when dealing with such an event.[51] That legal provisions acquire a wider applicability through the development of the legal structure within which the provision finds itself is a possibility not at all unknown in the national legal systems.

VI. The Possibility of Excluding a Member State

While articles 224 and 225 have not yet been considered in the context discussed here, some authors have submitted that in a similar case the country could be excluded from the Community. Zuleeg especially sees the exclusion as a last resort where a member state changes its constitutional structure to an undemocratic system.[52] He is of the opinion that one could not require the democratic member states to take part in a law-making procedure in which the representative of a dictatorship participates. This exclusion is, of course, nowhere provided for. It would have to be accepted as an unwritten emergency measure. However, since articles 224 and 225 offer solutions going up to the full suspension of all membership rights, it seems very doubtful whether there is any necessity to accept exclusion as possible. The principle of proportionality should be respected also in case of emergency. It is difficult to see that anything more would be required than sus-

50. *See* Matthies, in 2 KOMMENTAR ZUM EWG-VERTRAG, *supra* note 9, art. 224, at 1034-36; J. Frowein, *supra* note 49, at 313.

51. The applicability of general rules of international law in such an event would certainly not fit better into the structure of community law. *See* H. IPSEN, EUROPÄISCHES GEMEINSCHAFTSRECHT 100-01 (1972); Everling, *Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?*, in VÖLKERRECHT ALS RECHTSORDUNG INTERNATIONALE GERICHTSBARKEIT MENSCHENRECHTE—FESTSCHRIFT FÜR HERMANN MOSLER 173, 183 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Vol. 81, 1983); Schwarze, *Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen*, 1983 EuR 1; *see also* Opinion of Mr Advocate General Roemer *in* Muller v. European Economic Community (Nos. 109/63 & 13/64), 1964 E. Comm. Ct. J. Rep. 663 (delivered Nov. 18, 1964).

52. Zuleeg, *Der Bestand der Europäischen Gemeinschaft*, in 1 DAS EUROPA DER ZWEITEN GENERATION, GEDÄCHTNISSCHRIFT FÜR C. SASSE, 55, 65 (R. Bieber & D. Nickel eds. 1981); *see also* H. WEBER, SCHUTZKLAUSELN UND WIRTSCHAFTSINTEGRATION 450 (1982); M. Hilf, in KOMMENTAR ZUM EWG-VERTRAG, *supra* note 9, art. 240, ¶ 13, at 1331.

pension of membership rights during the existence of the nondemocratic government in the member state.

Indeed, it may well be that return to democracy and the rule of law could be generally encouraged by a system which will only suspend membership rights for the duration of such an event.

VII. Creating Homogeneous Standards Through the Community

It is a well-known phenomenon that federal structures not only presuppose a certain uniformity or at least comparability of component subentities but also create a homogeneous structure. Fundamental rights and their protection through federal organs provide a very important mechanism to create uniformity. As soon as there exists a federal court enforcing a bill of rights vis-à-vis the different states, uniform standards concerning the protection of fundamental rights will develop. This development can be shown by the growing harmonization brought about by the jurisprudence of the United States Supreme Court concerning the Bill of Rights. It can also be shown by the history of federal structures in Europe. For example, one specific aim of the drafters of the bill of rights in Germany in 1848 was to create common standards for the protection of fundamental rights in the different member states.[53] This constitution failed and in 1871 no bill of rights was included in the German federal constitution. One of the reasons was the fear of the harmonizing influence that a bill of rights would have.[54] In Switzerland, the slow movement toward federal protection of fundamental rights through the Federal Tribunal is of particular interest. After the adoption of the Swiss federal constitution in 1874, forty years elapsed before the Federal Tribunal finally became competent to review cantonal acts on the basis of all the fundamental rights guaranteed in the federal constitution. The reason for this slow development was again the fear that the Federal Tribunal's interpretation could have a strong harmonizing influence.[55]

There is as yet no bill of rights of the European Communities. One of the common British arguments against the European Communities joining the European Convention on Human Rights is the fear that such a move would exert an indirect influence upon British law's guarantee of fundamental rights. Although technically not quite correct, the idea seems to be that English courts would not be willing to control community acts on the basis of the provisions of the European Convention or possibly to refer the case to the European Court of Justice under article 177 of the EEC Treaty unless they were also willing to apply the same standards to English law.

But even without a Community bill of rights, one clearly finds examples for the harmonizing influence of Community structures. The law-making and decision-making process in the Communities always exposes different national standards to each other. Some common denominator has to be

53. *See* text at notes 14-22 *supra*.

54. *See* E. Huber, *supra* note 14, at 665, 758.

55. Müller, *Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*, 39 VVDStRL 53, 58-60 (1981).

found. Legal structures with a certain experience in constitutional protection of fundamental rights may offer some guidance in the area. It would seem, for example, that standards such as proportionality and protection of legitimate reliance were to some extent influenced by German constitutional and administrative court practice.

Especially at a time when movements toward a stronger community system seem rather unlikely, we should not underestimate the more subtle influence of existing common European structures. The procedural character of the Community system has important effects here.[56] Besides the European Communities, it is the system of the European Convention on Human Rights which during recent years has become an instrument to shape common standards for the protection of fundamental rights.[57] The European Court of Justice has adopted the Convention principles into Community law. It is an open question whether a stronger link between Community and Convention can still be found.[58]

It is hoped that a real test concerning the principle of harmony between the democratic structures of the member states and the fundamental principles of the Community can be avoided and that the slow harmonizing influence of Community structures will lead to an increasing recognition of common fundamental standards within Europe.

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56. *See* Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267 (1981).

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

58. As to this problem see House of Lords, SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, HUMAN RIGHTS 1979-80 Sess., Rep. No. 71, and GRUNDRECHTSSCHUTZ IN EUROPA (H. Mosler, R. Bernhardt & M. Hilf eds. 1977).