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Eurocacy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities

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EUROCRACY AND DISTRUST:
SOME QUESTIONS CONCERNING THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS WITHIN THE LEGAL ORDER OF THE EUROPEAN COMMUNITIES

Joseph H.H. Weiler*

I dedicate this study with profound sadness to the memory of a dear friend.

I. BACKGROUND: GENERAL PROBLEMS WITH JUDICIAL REVIEW OF HUMAN RIGHTS

Protection of individual rights has been a central feature of much of the judicial review by supreme courts in Western countries in the postwar era. Concepts such as individual dignity and privacy, as well as more classical notions of liberty and equality before the law, have been the standard repositories of constitutional interpretation by courts reviewing governmental legislation and administrative action.

The concept and practice of judicial review have penetrated, albeit in a limited way, even legal cultures which for long have resisted, such as Britain and France.[1] Indeed, judicial review in general and the protection of individual rights in particular, are widely considered as a *conditio sine qua non* of democracy and the rule of law. But it is no exaggeration to say that all jurisdictions where this judicial power is exercised—even the oldest, the United States—have seen in the last forty years fierce controversies concerning the limits within which, and the principles upon which, judges should exercise their power to overturn majoritarian legislation.[2]

Characterizing the debate with precision is difficult, since it varies from one jurisdiction to another. But in all jurisdictions we will find the following traits. Understandably, the debate typically focuses on the gap between the language of constitutional provisions and the conduct to which it must apply. This is an inevitable gap conditioned *inter alia* by the nature of

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1. *See* Cappelletti, *The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis*, in 2 LEGAL ISSUES OF EUROPEAN INTEGRATION 1 (1979).

2. *Id.*

constitutional language (and of language in general), the passage of time between drafting and interpretation, and, perhaps, even the inherent indeterminant nature of law.[3] It is rendered acute by social, ideological, and economic differentiation of society.[4]

This gap is filled by judicial interpretation, but as it grows, so will the need to explain and legitimate by reference to legal and other principles the modes in which this judicial power is exercised. Put differently, there is a recognition of the immense power, and hence the need for its control, given to constitutional adjudicators whose decisions bind even the legislators and can be overturned only by extremely cumbersome procedures. The debate—a reflection of the general discomfort with the indeterminancy of law—is fueled by the fear that judges will not remain faithful to the true constitutional standards of review, the question of course being the correct method of determining what these standards are, if indeed they exist at all. Thus, both the normative outcome of the judicial review process and the power it vests in those entitled to exercise this function have come under severe scrutiny.

Of course constitutions contain grounds other than individual human rights which courts will utilize in their judicial review function (such as division of powers in nonunitary systems), but individual rights have often been the focus of controversy spilling over to society at large. Although in abstract terms the protection of the individual against governmental power has a wide appeal, in many cases the exercise of this jurisdiction by courts, for the benefit of persons regarded as controversial at best and unsavoury at worst, has met widespread resistance. The fear of a *governement des juges* is not a uniquely French malaise. Indeed, in some judicially oriented jurisdictions there are signs that judicial retrenchment has begun.[5]

II. HUMAN RIGHTS AND THE EUROPEAN ECONOMIC COMMUNITY—THE DEBATE THAT WAS AND THE DEBATE THAT NEVER WAS

It is against this background that we may turn to examine judicial protection of fundamental human rights in the European Economic Community (EEC or the Community). At first sight it would seem that the controversy over human rights-based judicial review within the EEC would be particularly acute.

3. *Cf.* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

4. The greater the "shared culture" and ideology of a society the less visible will be the policy choices and interpretative leaps of judicial review.

5. Bender, Book Review, 82 MICH. L. REV. 635 (1984).

If, as suggested above, the *problematique* is rooted in the interpretative gap which exists between the constitutional provision and conduct, the European Court of Justice (ECJ or the Court) would be in an especially embarrassing situation. For, as is well known, the Treaty[6] establishing the European Economic Community—the constitution of the EEC[7]—does not contain a bill of rights at all. There is nothing to be bridged: one side of the chasm is completely missing. And yet the ECJ has declared that it will review Community legislation so as to prohibit violation of fundamental human rights.

If one ever needed an example of sheer judicial power it would appear to be in this particular "saga." The story is well known and does not need an elaborate reiteration. Briefly stated, in the absence of a written bill of rights in the Treaty and an apparent freedom for the Community legislature to disregard individual rights in Community legislation, the European Court of Justice, in an exercise of bold judicial activism, and a reversal of earlier case law, created a judge-made higher law of fundamental human rights, culled from the constitutional traditions of the Member States and international agreements such as the European Convention on Human Rights (ECHR). On the basis of this higher law, legislative and administrative acts of the Community organs, binding on or affecting individual citizens, could be struck in the normal course of judicial review provided by the Treaty.[8]

Not surprisingly, these developments generated an impressive secondary literature. The debate shaped by this literature is interesting for what it contains, but equally interesting for what it does not contain. This essay is concerned as much with the *discussion* concerning the Court's jurisprudence as it is with the issues themselves. What then has been the focus of debate in the European Economic Community?

In considering the literature, the first apparent paradox is that despite the extraordinary boldness of the Court's judicial move, there has been scant controversy concerning its review of acts involving human rights,[9] in

6. In this study I shall concentrate exclusively on the Rome Treaty establishing the EEC, and therefore the singular will be used. Treaty Establishing the European Economic Community, March 25, 1957, in 298 U.N.T.S. 11 (1958).

7. The "constitutionalization" of the treaties establishing the EEC occurred by a combined circular process by which they were interpreted by techniques associated with constitutional documents rather than multipartite treaties and in which the treaties both as cause and effect assumed the "higher law" attributes of a constitution. For an interesting discussion, see 1978 PROC. AM. SOC'Y INT'L L. 166, 166–97.

8. For the system of judicial review in the EEC, see, *e.g.*, H. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (3d ed. 1983); Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980).

9. Even Cappelletti, one of the few who raised the legitimacy question, *see supra* note 1, has shifted and restates the "mighty problem" as one of supremacy, jurisdiction, and standards. Cappelletti &

contrast to the extensive discussion of such review by national courts. Although the Court arrogated a power nowhere mentioned explicitly in the Treaty, the literature has generally been supportive of the Court. Writers have attentively examined each case emerging from the Court in the human rights field with a view to anchoring this bold jurisprudence to secure legal foundations. It is now widely accepted that the Court did have sufficient legal justification on which to base its activism. It is also a widely shared view that the Court not only acted legally, but also wisely and courageously in filling an embarrassing lacuna in the Treaty and in giving the individual an additional judicial guarantee.[10]

My first concern will be to explain why human rights-based judicial review in the European Economic Community has not raised in any significant sense the type of controversy which has characterized similar judicial activity in other jurisidictions, despite the prima facie case for a major controversy. I shall suggest that the quest for a legal foundation for the Court's assertion of a human rights-based power of judicial review, is, *at this stage in the development of the Community,* if not irrelevant, of secondary importance.

The second issue which has dominated the literature has been one of standards.[11] In asserting its right to subject Community legislation (not Member State legislation) to human rights-based judicial review, the Court denied Member State courts the right to apply Member State constitutional standards to Community legislation. A Community-wide standard of protection administered by the ECJ was to replace—in relation to Community legislation—review by Member State courts based on Member State constitutional provisions. As is well known, the constitutional courts of Italy and the Federal Republic of Germany refused to accept this "dictate." There is extensive literature dealing with this issue. The question that has been posed is one of comparative standards of judicial protection. Could the ECJ meet the highest standards of protection imposed by any of the Member States (and in particular Germany and Italy) which it had replaced? Much has been said about the particular standard actually adopted

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Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration,* in 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 345 (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986)

10 Thus Dauses, in the most recent pronouncement on the subject gives the flavor of the majority of authors, calling the Court's case law "courageous and coherent." Dauses, *The Protection of Fundamental Rights in the Community Legal Order,* 10 EUR. L. REV. 398, 419 (1985).

11. Again Dauses captures the general sentiment:

> The quintessential problem with regard to fundamental rights in the Community is to ensure that protection of fundamental rights in the Community context does not fall behind such protection in the liberal-democratic constitutions of the Member States . . . .

Id. at 400.

by the Court. If there were doubts raised about the Court and its human rights jurisprudence these were usually focused on the ability of the Court to match these Member State standards.

My second concern will be then to readdress some of the issues raised by the "standards debate" and to offer a different perspective to its resolution. In fact I shall argue that the discussion of standards has been at least in part misconceived; that the Court is not concerned, despite some explicit language, with *matching* Member State standards; indeed, such matching is impossible. Instead, the Court has staked a jurisdictional claim to human rights-based judicial review and asserts the right to impose autonomous Community standards which Member State courts could *not* apply.

A third issue, generating a sea of writing, has concerned the proposals that the Community should join the European Convention on Human Rights system. One part of this literature addresses the technical issues of such accession and concludes that there are no insurmountable obstacles.[12] Another part considers the value of such accession and the most widely accepted view is that the level of protection afforded the individual by the ECJ is sufficiently high as to obviate the need.[13]

Politically this proposal has been, and remains, dead for all practical purposes. But it raises some interesting questions concerning the *self-perception* of the European Court of Justice. In this regard, I shall argue very briefly that the functional criterion applied to the question of EEC accession to the European Convention on Human Rights system is not sufficient. Accession to the ECHR may be of important symbolic value.

I will not only reexamine old issues but also raise two of my own. I have already claimed that in the European Economic Community, for reasons which shall become clear, there is no real problem concerning the legality and democratic legitimacy of human rights-based judicial review. There is instead at least a prima facie delicate question of judicial credibility which may be formulated as follows.

At the core of the human rights "issue" in the European Economic Community is a basic tension, perhaps even paradox. To understand this tension is to understand much of the underlying dynamics of legal and political developments in this field.

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12. The most recent and authoritative analysis is McBride & Brown, *The United Kingdom, the European Community and the European Convention on Human Rights*, 1 Y.B. EUR. L. 167 *passim* (1981). *See also* Economides & Weiler, *Accession of the Communities to the Euopean Convention on Human Rights: Commission Memorandum*, 42 MODERN L. REV. 683 (1979).

13. This was the thrust of the 71st Report of the House of Lord's Select Committee on the European Communities, HOUSE OF LORD'S SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, 71ST REPORT, 1979–80, H.L. 362.

On the one hand, human rights, and the machinery for their protection, represent an *integrational* value and instrument. Basic freedoms enshrined and protected by law are among the elements which give society and its members a sense of identity. The very nebulous, yet existent feeling of belonging, say, to what may be loosely called Western democracies, may be traced in part to this protection. Likewise, in nonunitary systems such as federations, "federal human rights" have played a strong integrational role.[14]

On the other hand, protection of human rights is typically designed to protect the individual against public authority, against, even, majority rule. In the context of the European Economic Community then, the protection afforded the individual may be turned *against* the Community, its policies, and even its values. Clearly there is no problem when the protection prevents bad faith *abuse* of power. But to be meaningful, protection will have to extend on occasion even against policies adopted in good faith to further the goals of European integration. It is trite but true that violations of fundamental human rights occur not only at the instigation of autocratic and dictatorial regimes, but also by the paternalistic benevolence of democratically elected governments who feel they know better than their subjects.

The Court, and other bodies dealing with human rights in the context of European integration, might well find themselves in difficult policy dilemmas in trying to reconcile these conflicting purposes of a higher law of human rights in the EEC. The ECJ might find this particularly painful since it has been one of the champions of the process of European integration, taking an active role in its furtherance by adopting a teleological approach to the interpretation of the Treaty—an approach which has greatly favored the process.

There were good legal and policy reasons for the Court to take this approach, but this does not remove the potential dilemma. On the one hand, in terms of its own values and policy preferences—crucial factors in the operation of any superior court—the ECJ might be reluctant to undermine an important Community policy by favoring an individual whose rights were allegedly violated. The ECJ may be even more reluctant, given the growing difficulties of the Community legislature composed of the governments of the Member States, to reach the compromises necessary for legislation. Community legislation is the outcome of so tortuous a process that the Court might be loath to overturn it unless absolutely compelled.

14. *See generally* Frowein, Schulhofer & Shapiro, *The Protection of Fundamental Human Rights as a Vehicle of Integration*, in 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986).

The Court has of course struck down numerous legislative measures violative of the Treaty, but many of these were of a rather technical nature, or at least not touching on fundamental Community policies. On important issues one can often identify other direct Community interests at stake which favored striking down the legislation.[15]

What is at stake then, is not the fear of excessive zeal in asserting individual rights but fear of the opposite: a reluctance of the Court to exercise a sufficiently robust individual protection policy. If there is distrust it is not a distrust of a Court overreaching itself in protecting the individual, but of a Court not reaching far enough. This is what I mean by the credibility issue. The matter is especially acute if one accepts the Court's jurisdictional denial of Member State review of Community legislation.

I would emphasize here that mine is a heretical rather than a critical approach to the Court and the debate surrounding its activities. I feel comfortable within the "Church of European Integration," and if I point out some dangers, they are intended not to undermine the credibility of the Court but to raise some doubts which, if not faced, may in fact lead to that result.

The second issue which I shall raise which has rarely been treated in literature, will be familiar to an American audience. To the outsider, the most dramatic development of American jurisprudence in the field of human rights has been the extension of federal (national) standards of judicial review to state legislative and administrative action, through the so-called doctrine of incorporation. At present in Europe human rights-based judicial review by the European Court of Justice is confined to the organs of the European Economic Community. Is there a prospect of "incorporation" in Europe? I shall end this study by examining this issue and some of its implications.

In drawing this picture I shall use two distinct methods. I shall in part use a broad impressionistic brush making a wide historical sweep of Community developments in this field; in part I shall present a very detailed analysis of one paradigmatic case, working with a magnifying glass to examine the Court's decision. Thus, I hope to combine both synthetic and analytical elements in presenting a somewhat revisionist, somewhat radical tale. I explicitly disclaim any pretension to presenting a new theory or even

15. One of the most dramatic instances is Opinion 1/76 where the court declared incompatible with the Treaty of Rome an agreement negotiated by some of the Member States with third parties. Opinion 1/76, 1977 E. Comm. Ct. J. Rep. 741. This is not a classical judicial review annulment, but it shows the strength of the Court in asserting Community law against the Member States. The cause of European integration is furthered by this type of action.

a homogeneous account of the field. Mine will be a discussion of a series of discrete issues loosely connected by the underlying theme of Eurocracy and its components—the political and judicial organs of the European Economic Community and its Member States—and the distrust among them.

A. *The Historical Dimension: Some Speculations on Why the Community Does Not Have a Written Bill of Rights*

As mentioned above, neither the Treaty of Paris nor the Treaty of Rome (which together comprise the Treaty of the EEC) contains a specific list or bill of enumerated fundamental human rights to check the Community organs and provide criteria for judicial review. The historical reasons for this omission may help explicate some current live issues.

Traditionally, resistance to enumerated constitutional bills of rights is tied to a principled resistance to judicial review as such.[16] This does not, however, explain the lacunae in the Community. In the Treaty we find well-developed systems of judicial review, particularly regarding the activities of Community organs.[17] In the absence of an authentic "legislative history" of the Treaty,[18] we must try to explain this omission by reference to the political climate prevailing at the time of their conclusion and to the original conception of the Community by its fathers. Inevitably, this analysis is speculative.

In regard to the Coal and Steel Community, several interrelated factors afford a plausible explanation for the lack of a bill of rights. Despite the overt political origin of the venture, evident both in the Schuman declaration and the preamble to the Treaty of Paris, the Coal and Steel Community was perceived as confined within limited economic parameters. The High Authority was given lawmaking powers, but the subjects of this law were conceived as primarily large industrial undertakings and the Member States themselves. The traditional concept of human rights, especially in its focus on the classical-liberal notions of individual freedom, seemed in the immediate postwar period to have little bearing on the prospective activities of the Coal and Steel Community. One must not forget that in that epoch the notion of "fundamental" social and economic rights was far less developed and in any event seemed less pressing and relevant in the wake of World

16. *Cf.* J. JACONELLI, ENACTING A BILL OF RIGHTS: THE LEGAL PROBLEMS (1980).

17. *See* Treaty Establishing the European Economic Community, March 25, 1957, arts. 169–71, 173, 175–77, 184, 215, 298 U.N.T.S. at 75, 76, 78, 86.

18. The *travaux* of the Treaty establishing the European Economic Community were not published. This is an interesting indication of the constitutional rather than international nature of the Treaty.

War II and the tasks of reconstruction. Thus, there was probably no overt intention to exclude guarantees for the individual. Indeed, it was in that very epoch that the European Convention on Human Rights was adopted, in an exemplary, perhaps unique, manifestation of national and governmental self-restraint. *Probably the very same sentiments which explain the voluntary association within the Coal and Steel Community explain the subscription to the ECHR*. The two ventures, however, must have seemed distinct rather than coextensive.

Speculation becomes more complicated in relation to the EEC. The Community, after all, is active in broad fields, albeit economic, where the need for explicit protection of fundamental rights might have been foreseen. The Treaty of Rome, which contains chapters on social policy, movement of migrants, rights of establishment, and the like, could hardly have been regarded as immune to violations of fundamental human rights, even if only the traditionally recognized rights were considered. Thus, excluding the unlikely explanation of mere forgetfulness, the possible reasons for the omission of a bill of rights, must be more subtle.

I would first return to the actual provisions for judicial review in the Treaty. It is somewhat surprising that the Treaty, influenced in its judicial and legal provisions by French law, embraces such a developed system of judicial review of legislation; such a system was long alien, even anathema, to the French tradition.[19] A closer look at these provisions reveals that their purpose was not so much to subject the Community organs to a higher law, but rather to guarantee that the Community and its organs would not overstep their jurisdictional limits. The language of these articles, principally article 173, which bases review on the grounds of "infringement of this Treaty," "misuse of power," and "lack of competence," seems to confirm this interpretation. Judicial review in the Community was thus more akin to the Canadian model of federalism in which the preservation of the distinction between central and constituent-unit areas of competence was the hallmark of the system. The judicial review provisions of the Treaty were intended in large measure to protect against encroachments by the Community of the rights of the Member State, rather than the rights of individuals. Ultra vires was to be the principal criterion for striking down legislation.

If that was the spirit of the original system of judicial review it is little wonder that a bill of rights would not have seemed particularly necessary.[20]

19. *Cf.* Cappelletti, *supra* note 1, at 3.

20. Canadian judicial review under the BNA was largely based on a similar conception. The limited measure of judicial review for infringement of fundamental rights in Canada usually turned on the jurisdictional propriety of the alleged violation rather than its substantive correctness. *See* J. WHYTE & W. LEDERMAN, CANADIAN CONSTITUTIONAL LAW (1977).

But even if not necessary what harm could be created? It may be that in the political climate prevailing in 1957 at least some of the Member States were fearful of any expansion in the powers to be granted to the Community's central organs. In ratifying the Treaty of Rome, the Member States, no longer as idealistic as in the immediate postwar era, were committing themselves to an unprecedented experiment in contemporary international history. But if they were worried about expansion of competences, would not a bill of rights offer a means of curtailing Community organs even further?

Paradoxical as it may sound, the Member States might have feared that the very listing of rights that *must not* be encroached upon might have become an invitation to extend enumerated powers and competences to the limits of those rights. We should not forget that in the proposals for the European Political Community of 1953, human rights were to have pride of place. The issue must have been discussed in the context of the Treaty of Rome and for some reason discarded.

The argument that a question of competences was one basis for rejecting a bill of rights is not as fanciful as it may at first seem. We find a clear analogue in the legislative history, and the interpretation thereof, of the Bill of Rights in the American Constitution. In trying to interpret the reason for enacting the delphic ninth amendment (providing that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people) several United States Supreme Court Justices[21] have noted the Founding Fathers' fear that:

> [T]he inclusion of a bill of rights in the Constitution would be taken to imply that federal power was not in fact limited to [those powers granted by the Constitution], that instead it extended all the way up to the edge of the rights stated in [the newly introduced bill of rights].[22]

Thus, the very listing of limitations on the authority of the central power may undermine the principle of enumeration by implying that the state—or, in our case the Community—has inherent power to the extent of those limitations.

But we might find an even more deep-rooted explanation of the omission, one that touches the very architecture of the Community legal order. Today we are habituated to thinking of the Community as the fully-fledged constitutional order which it has become. In 1957, neither the doctrine of direct effect nor the doctrine of supremacy had emerged. If they were nascent in the Treaty, as the Court later claimed, they were certainly very

21. *See* J. ELY, DEMOCRACY AND DISTRUST 34 n.83 (1980) (for example, Justice Black and James Madison).

22. *Id.* at 34. This of course is not the total explanation for the enactment of the amendment.

well hidden, and introduction of these concepts involved a series of daring acts of judicial activism. The simple fact remains that in 1957 the protection of the individual from Community measures allegedly violative of his or her fundamental rights would have seemed to rest with the national legal orders. Violations by the Community would have been judged within these national legal orders according to the yardstick provided by each Member State's system, both under national constitutional law and the ECHR. A Community measure coming into conflict with such national guarantees would be subordinated to them. An individual could simply refuse to comply with an allegedly violative Community measure and have as a valid defense the infringement by that measure of standards accepted in his or her national order. Or, at worst, the Member State concerned could enact a national statute abrogating the offensive Community measure.[23]

Finally, there is the simple but plausible explanation that in the postwar period, socioeconomic diversity had developed to such an extent that reaching a consensus on a common bill of socioeconomic rights already seemed impossible. Perhaps it was better to leave such an emotive issue outside the Treaty rather than risk national parliamentary opposition at the ratification stage. The historical speculations attain importance in the context of evaluating subsequent judicial activism.

B. The Judicial Evolution of Protection of Human Rights

Be these historical speculations as they may, we may turn now to a recapitulation of the actual evolution of legal protection of fundamental human rights in the Community order, an evolution in which the ECJ has been the major protagonist. The landmarks of this judicial itinerary are among the most famous in the contemporary history of European legal integration. In *Stork*[24] and *Geitling*,[25] decided in 1958 and 1959, the judges (but not, interestingly, the prophetic Advocate General Lagrange[26]) rejected an invitation to review and censure a Coal and Steel Community

23. This argument might seem to contradict my earlier assertion that the judicial review provisions in the Treaty were designed by the Member States to protect against the Community acting ultra vires. Would the Member States, it could be asked, not be protected by the absence of supremacy? I believe there is a difference. Were the Community to violate a Member State norm of individual rights, a national court (in a country like Germany or Italy) would have an existing national code against which to review the Community measure. It would be quite a different and less certain national judicial exercise to try and interpret the Treaty with a view to a decision whether the Community acted ultra vires in an allocational sense.

24. Stork v. High Authority, 1959 E. Comm. Ct. J. Rep. 17.

25. Comptoirs de Vente du Charbon de la Ruhr "Prasident," "Geitling," "Mausegatt" Entreprise I. Nold KG v. High Authority, 1960 E. Comm. Ct. J. Rep. 423.

26. *Id.* at 883.

measure allegedly violating a basic right recognized in one or another of the Member States.

Several reasons may explain the Court's reticence at that time. The material context of these cases—and, inevitably the outlook of the Court—was within the range of the Coal and Steel Community. To break into the emotive language of human rights and higher law might have seemed somewhat incongruous. But the issue is not merely semantic. The Treaty of Paris was much less of a *Traite Cadre* than the Treaty of Rome. The opportunity for teleological interpretation would appear to be more limited, at least within the bounds of judicial propriety.

The reasons for this judicial reticence go even deeper. The fusion of the EEC and national legal orders was limited and fragile. At that time the Coal and Steel Community was perceived by the Court as an autonomous entity. The Court's task was to protect the *separation* of the Coal and Steel Community and the Member States and to defend the High Authority's independence vis-a-vis national governments. Later, in the EEC, the main threat to the independence of the EEC Commission—the successor of the High Authority—clearly seemed to come from its sister EEC organ, the Council of Ministers. In *Stork* the major threat perceived by the Court was in forcing the High Authority to look over its shoulder at each step to ensure that it was not infringing on constitutional guarantees of the Member States. The Court, in the oft-quoted passage from *Stork,* clearly affirms the notions of separation and autonomy:

> [T]he Court is only required to ensure that in the interpretation and application of the Treaty . . . the law is observed . . . . Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that when it adopted its decision, it infringed principles of German Constitutional Law.[27]

It should not be forgotten that in the absence of a clearly established doctrine of supremacy,[28] there would be little to stop the review of Community actions under national constitutional law from expanding to *any* national norm.

Finally, the judicial reticence reflected not only the Court's perception of the Community order; it also reflected the Court's self-perception. Other cases from the same period[29] suggest that the Court saw itself much as a traditional international tribunal. The Court's self-limiting—not to say

27. *See Stork,* 1959 E. Comm. Ct. J. Rep. at 26.

28. In fact, in the *Stork* decision one finds the first indication of the subsequent supremacy decisions.

29. *E.g.,* Meroni & Co. v. High Authority, 1957 and 1958 E. Comm. Ct. J. Rep. 133; Federation Charbonniere de Belgique v. High Authority, 1954 to 1956 E. Comm. Ct. J. Rep. 245.

self-deprecating—characterization of itself in *Stork* thus typifies, in the area of human rights, an *international* phase in Community development.

Ten years later we find the same Court[30] speaking a different language. Faced with a similar dilemma of an individual's challenge to Community law on the grounds of violation of fundamental rights, the Court retracted its earlier reasoning and held that fundamental human rights did form part of those legal interests which the Court could and would protect. Moreover, the Court held that the extent of these rights was to be ascertained by a comparative distillation of the constitutional orders of the Member States, plus international treaties (notably the ECHR) which hitherto had been considered irrelevant. The result was to be a homogeneous Community body of law.[31]

The specifics of the Court's comparative-distillation method are unclear. To date, the Court has identified several sources for its norms: some rights are directly traceable to the Treaty itself;[32] some derive from the constitutional traditions of the Member States;[33] and others still come from the international treaties in which Member States have collaborated or to which they are signatories, principally the ECHR.[34] The inclusion of the ECHR is significant since it gives the Court a concrete source—akin to the American Bill of Rights—on which to build its normative base. Yet this abundance of sources serves to complicate rather than facilitate the actual process of distillation. Later I shall return to some of the problems inherent in this process.[35]

What is the source of the Court's authority to subject the Community's legislative activity to review on the basis of an unwritten higher law? Was this process legitimate or a judicial indulgence in unwarranted activism?

For opponents of judicial activism, this situation conjures up the classic risk of a *gouvernment des juges*. We can, however, understand by now why

30. Naturally the composition of both the Court and the Legal Service of the EEC Commission will have changed somewhat in the intervening period. One cannot altogether forget this personal element. *Cf.* Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

31. The Court casts its net wide by specifiying that the treaties might include ones in the elaboration of which the Member States participated even if they were not subsequently ratified. This, it is widely believed, was a result of the very late French final acceptance of the ECHR.

32. *See* Treaty Establishing the European Economic Community, March 25, 1957, arts. 7 & 119, 298 U.N.T.S. at 17, 62 (for example, some forms of nondiscrimination).

33. *See infra* discussion in text accompanying notes 63–68.

34. On the position of the ECHR and its application as EEC law, see Mendelson, *The Impact of European Community Law on the Implementation of the European Convention on Human Rights*, 3 Y.B. EUR. L. 99 (1983).

35. *See infra* discussion of Hauer v. Land Rheinland-Pfalz, 1979 E. Comm. Ct. J. Rep. 3727.

this debate, so fierce and essentially unanswerable in the national context,[36] never went far in the Community. Three reasons come to mind. First, despite the fact that the Community has seen a massive expansion of its fields of competences into areas well beyond the original common market conception,[37] community law and policy have not created *major* problems for protection of fundamental human rights. To be sure, the well-known human rights cases are a reminder that any legislative and administrative exercise of power can give rise to difficult problems concerning individual rights. Moreover, we may safely assume that the cases which have reached the ECJ do not represent the total number of potential or actual violations by the Community of individual rights. Nonetheless, it is also a relatively safe assumption that in terms of actual *violation,* the Community legislative and administrative organs of government are not cause for major concern. With possibly one exception,[38] the ECJ has simply not faced issues of the social magnitude which led in, say, the United States to the famous decisions in the fields of criminal procedure, abortion, and desegregation. This is not to imply that human rights and their protection do not count in the Community. They are simply removed from public debate.[39] The issues underlying judicial protection of human rights in the Community do however go, as we have seen, to the very foundations of the constitutional architecture of the Community and the pivotal place of the European Court of Justice in that architecture.

Second, the absence of "incorporation" (*i.e.*, the fact that ECJ review concerning human rights is limited to Community acts and not to Member State actions) is a further explanation for the lack of controversy.

Last and most important, is the political reality of the Community. Judicial activism is often characterized as subverting the principle of majoritarian decision-making. In the Community context, however, the political process is hardly majoritarian. The legislative process of the Community, influenced only slightly by the European Parliament—controlled increasingly by civil servants in the form of the COREPER, and dominated by the executive branch composed of representatives of the national governments sitting as the Council of Ministers of the Community and only notionally controllable by the national chambers—is a far cry

36. *See* Brest, *supra* note 3.

37. *See, e.g.*, Tizzano, *Lo Sviluppo delle Competenze Materiali delle Communita Europee*, 21 RIVISTA DI DIRITTO EUROPEO 139 (1981).

38. In the field of sex discrimination, see Treaty Establishing the European Economic Community, March 25, 1957, art. 119, 298 U.N.T.S. at 62.

39. Thus, most "equal protection" cases concern the relative treatment of corporations in the field of Community levies, refunds and permits. These are important to the parties involved and to economic activity in gneral, but there is an absence of media attention and social impact. They are also issues which do not usually correspond to any notable political party cleavage within European countries.

from a representative democratic process. If the new jurisprudence of the Court represents a *gouvernement des juges,* it is designed to control a *gouvernement des fonctionnaires.* The present state of the political process, with the Community suffering from a wide democracy deficit,[40] undermines the classical challenge to the ECJ.

From the Court's perspective, we have here one possible explanation of the transformation of its attitude since the days of *Stork.* The absence of a written bill of rights, coupled with a decline in the accountability of the Community and the emergence of a democratic deficit, can both explain the motive of the Court and deflect the classic objection to this type of judicial activism in the Community situation. If the Community legislature is in reality the executive branch of the Member States unimpeded by a parliamentary chamber and able to do in Brussels under a Community cloak what they might be prevented from doing back home in national capitals, there would be every incentive for the Court to increase its vigilance as protector of the interests of the individual.

It may also be significant that this very period, the late 1960's, saw both the promulgation of the two United Nations human rights protocols as well as a general challenge to the establishment by young liberal and radical elements. The established order in most European countries was coming under attack, and the Community came to be seen, to the extent that it was seen at all, not as the vehicle on which to hang postwar ideals and aspirations, but as a vehicle of industry, businessmen, capitalism, and other evils. A "human rights response," whether genuine or opportunistic or both, is not surprising in that climate.

As to the legal basis for the Court's evolution, the concept of "general principles of law" in a *Traite Cadre* is probably wide enough to lend itself to such an interpretation. There can be an attempt to find a textual basis for the Court's jurisprudence in either EEC article 173 or in EEC article 164.[41] But inevitably, although article 173 charges the Court with reviewing the legality of legislation with a reference to any rule of law relating to the application of the Treaty or, more significantly, article 164 charges the Court to ensure that in the application of the Treaty the "law is observed" (which might suggest a higher law), both routes beg the question to some extent.

40. On the democracy deficit, see generally D. MARQUAND, PARLIAMENT FOR EUROPE (1979); A. Spinelli, *Towards the European Union,* Sixth Jean Monnet Lecture, European University Institute, Florence (1983).

41. EEC article 173 mentions the infringement of any rule of law relating to the application of the Treaty as a criterion of judicial review. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. at 75–76. EEC article 164 states, "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." 298 U.N.T.S. at 73.

The Court has been content to leave the precise legal basis vague and it is more honest to recognize the new jurisprudence for what it is: a judicial leap rooted more in the political philosophy of the Community and its Member States than in strict legal grounds and influenced, perhaps, by the general concern for individual rights concretized in that epoch by the promulgation of the United Nations charters of political and civil rights.[42]

Still, if we are to seek a clue to the particular solution adopted by the Court, we may consider the following. The ambit of operation of the EEC is perceptibly wider than that of the Coal and Steel Community. The language of human rights, in a functional situation such as *Stauder*[43] does not seem so incongruous as it does in Coal and Steel Community contexts. The text of the Treaty of Rome is conducive to the type of judicial comparative technique evoked as a source of human rights. EEC article 215, to give the clearest example, explicitly refers to the comparative method and to the national legal orders as a source of law. Legally, then, there would seem to be a plausible ground for the Court's case law.

However, the justification of judicial extension as an attempt to counter the democratic deficit constitutes only part—perhaps not even a major part—of the explanation for the Court's change of heart and may even be a rationalization. The prime motivation for judicial extension was not, I believe, simply a benevolent interest in human rights, nor even in the democratic structure of the Community. At the source of the mutation one finds, in what must be one of the most curious paradoxes of a system explicable only by paradoxes, the *same* protective sentiment which induced the Court to *reject* the fundamental rights initiative ten years earlier. The difference is that in the new constitutional configuration of the Community—a configuration to the evolution of which the Court itself had contributed—the expedient reply to the question of extending the scope of the Court's review was affirmative rather than negative. For, as we know, in the intervening years, the Court had instilled the central concept of supremacy in the normative structure of the Community. Through its own decisions the "new legal order" was fashioned and the Treaty became a surrogate constitution. In the Court's own self-perception another profound metamorphosis had taken place. No longer did the Court see itself as an international tribunal determined to preserve the *autonomy* of the system it

42. The notion that the Community could not have received *competences* from its Member States to act in a manner inconsistent with their own constitutions is seductive, but must be rejected both in international legal terms and, as the Court will painfully point out, as too strict a basis for its jurisdiction. This rationale would also mean that if action were permitted by Member State Constitutions, the ECJ would be prevented from prohibiting it.

43. Stauder v. City of Ulm, 1969 E. Comm. Ct. J. Rep. 419.

oversaw, but rather a constitutional court of a supranational order determined to preserve the *integrity, unity,* and *uniformity* of the system it had evolved. The "surface language" of the Court in *Stauder* and its progeny is the language of human rights. The "deep structure" is all about supremacy. The Court anticipated the threat to the doctrine of supremacy and the integrity of the Community system (later realized by the German and Italian constitutional courts) posed by national jurisdiction over alleged human rights violations by the Community. *Stauder, Nold,*[44] and *Internationale Handelgesellschaft*[45] thus become in the political circumstances of the late 1960's and early 1970's, an inevitable sequel to *Van Gend en Loos,*[46] *Costa v. ENEL,*[47] and their progeny: an attempt to protect the concept of supremacy which was threatened because of the inadequate protection of fundamental human rights in the original Treaty system.

In this light, the Court's statements in favor of human rights must be evaluated with caution. If the Court's act of judicial protection is not motivated principally by solicitude for human rights, it may, for some Member States, result in a removal of guarantees at the national level. To allay fears of abuse, the Court will have to demonstrate that it is willing to use the new power to annul measures backed by the concerted will of the Council of Ministers. To be sure, it has done so on many occasions on lesser criteria than violation of human rights, and the Council of Ministers of the 1980's is not the fragile High Authority of the 1960's. But here lies, I submit, the unresolved issue of the credibility of this particular instance of judicial activism. If it is true that the Court developed its human rights doctrine to protect the integrity of the Community legal order rather than the individual, will it, in a case pitting human rights on the one hand against an *important* Community policy or integrational value on the other hand, be ready to prefer the individual to the Community? One may wonder first whether justice may be seen to be done in the type of conflict stipulated above when the adjudicator is so committed to European integration as to suggest a judgment *in re sua.* Second, one may wonder, and there are

44. Comptoirs de Vente du Charbon de la Ruhr "Prasident," "Geitling," "Mausegatt" Entreprise I. Nold KG v. High Authority, 1960 E. Comm. Ct. J. Rep. 423

45. Internationale Handelgesellschaft v. Einfuhr-Und Vorratsstelle Getreide und Futtermittel, 1970 E. Comm. Ct. J. Rep. 1125.

46. Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E. Comm. Ct. J. Rep. 1.

47. Costa v. ENEL, 1964 E. Comm. Ct. J. Rep. 614.

indications in the Court's jurisprudence that this question is not entirely theoretical,[48] whether justice will in fact be done.

One cannot conclude this brief historical section without a final illustration of the interaction between the various Community political actors, among which we must clearly, for present purposes, include the Court. In 1979, the EEC Commission proposed the accession of the Community to the ECHR. Various interpretations which need not concern us here have been put on this suggestion and its merits.[49] It would appear that the recommendation is for the time being unlikely to be implemented. One

48. This "charge" must be made with caution. Certainly, the ECJ is not a fragile body bowing to the EEC establishment or even the Member States. If anything it is a confident, active and courageous court which has asserted its view on the correct interpretation of the Treaty some times in opposition not only to the Council of Ministers and the Member States, but also to the EEC Commission, its usual ally in big constitutional cases. *See* Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena, 22 Recueil 455 (1976). *See generally* Stein, *supra* note 30.

There are, however, counter indications not directly in the field of human rights but of indirect relevance. Two in particular are worth mentioning. In Van Duyn v. Home Office, 20 Recueil 1337 (1974), the schizophrenia of the Court was at its sharpest. On the one hand it rendered one of its boldest (and most sensible albeit controversial) constitutional decisions declaring that Community Directives may produce direct effect—a doctrine contested in some quarters to this day. On the other hand, in that very case, the Court, in what, it is submitted, was at least a questionable interpretation, "sacrificed" the individual plaintiff—a Dutch scientologist seeking entry into Britain. The constitutional decision created a stir in legal circles but remained completely outside public debate. Had the Court mandated the entry of Van Duyn into the United Kingdom (as I believe Community law required), this decision would have attracted wide attention. The nagging suspicion (and it is no more than that) is that the Court wished to avoid this uncomfortable outcome at a very sensitive time when Britain was going through the referendum campaign about continued British membership in the Community. This was also the first reference from the British high court and it was equally clear that a decision mandating the entry of Van Duyn would have been greeted with displeasure possibly affecting future references. In a subsequent decision, in a different circumstance, the Court at least partially reversed itself. *See* Adoui v. Belgian State and City of Liege, 1982 E. Comm. Ct. J. Rep. 1665.

The second troubling example is Regina v. Henn & Darby, 1979 E. Comm. Ct. J. Rep. 3795. In this case, two British dealers in imported Danish pornography of a particularly vile type sought to overturn their conviction for violation of British customs law on the grounds that the customs law itself was in violation of EEC law. In particular they claimed that since the customs law imposed a less permissive test than that applied within the United Kingdom, it constituted arbitrary discrimination in favor of domestic pornography. It is submitted that this claim was legally valid. *Cf.* CATCHPOLE & BARAV, LEGAL ISSUES OF EUROPEAN INTEGRATION 1 (1980). This was the first reference to the Court from the British House of Lords. Again it was clearly one of those fairly rare EEC cases where a decision in favor of the individual would most likely receive public attention and be extremely unpopular in wide circles.

In a convoluted judgment, the Court managed to hold that a correct interpretation of Community law did not bring it into conflict with the British law. The irony is that the Court could have indicated that the British law was incompatible with EEC law and yet also indicate that the *conviction* of Henn and Darby was not incompatible since their brand of pornography would have violated even the more permissive domestic test. But apparently the Court did not see or want to do even this.

One should not make too much of two controversial decisions. Still, if my specific criticism of these decisions is valid, it seems as if there is a weak spot in the Court's judicial courage in those cases which pit social undesireables in sensitive societal and political settings. These, however, are precisely the situations where real protection of the individual is put to the test. Therefore, the nagging doubt might not be altogether misplaced.

49. *See supra* note 12 and accompanying text.

effect of the proposal would be to raise the European Court of Human Rights *above* the European Court of Justice in matters concerning the adjudication of Community measures allegedly violative of human rights, thus affording the individual a final guarantee by a body not belonging to the Community.

The ECJ, by its very position, had no way of commenting fully and openly on this suggestion, but in its judicial activity since publication of the Memorandum of the EEC Commission, it has striven, as I shall show below, to show its superiority as an adjudicator vis-a-vis the European Court of Human Rights in Strasbourg. Thus, although there was no explicit criticism of the Court in the Memorandum of the EEC Commission, it will indeed have had a positive effect if it induces the Court to put more substance into the framework it has created.

III. JUDICIAL ADJUDICATION OF HUMAN RIGHTS—HOW IT IS ACTUALLY DONE: THE ISSUE OF STANDARDS AND THE CASE OF *HAUER*

I do not propose to engage in a detailed case-by-case analysis of the human rights jurisprudence of the ECJ, but instead to examine one paradigmatic instance of that jurisprudence with a view to highlighting both the technique and the problems inherent in the Community jurisdiction.

Hauer v. Land Rheinland-Pfalz,[50] although not the latest in judicial pronouncements, affords indications of all the major themes and can thus serve as a useful case-study. In particular, this case deals with a subject matter—property rights—which is part of the living matrix of Community activity and may be considered more typical than the odd case on religious freedom or the like.[51]

The case came to the ECJ by way of a request for a preliminary ruling by the Verwaltungsgericht Neustadt an der Weinstrasse. The plaintiff, Hauer, appealed a decision by the German administrative authorities to deny her authorization to plant vines on a plot of land which she owned in the region of Bad Durkheim. This denial was based *inter alia* on a regulation[52] which prohibited for a period of three years all new planting of vines.

Hauer claimed that the regulation amounted to a violation of her fundamental rights to property and to her right freely to pursue a trade or

50. Hauer v. Land Rheinland-Pfalz, 1979 E. Comm. Ct. J. Rep. 3727.

51. *See, e.g.*, Prais v. Conseil des Communautes europeenes, 1967 E. Comm. Ct. J. Rep. 1589. *See generally* Mendelson, *The European Court of Justice and Human Rights*, 1 Y.B. EUR. L. 125 (1981).

52. *Hauer*, 1979 E. Comm. Ct. J. Rep. at 3732. Hauer's claim was based in part on the contention that the regulation could not apply to cases such as her own since her application was lodged before promulgation of the regulation. I shall not deal with this aspect of the case.

profession. She further contended that these rights were guaranteed by articles 12 and 14 of the Grundgesetz of the Federal Republic of Germany. This last point is of significance since, as already noted, the German Federal Constitutional Court of the Federal Republic had held that secondary Community legislation in violation of fundamental rights protected by the Grundgesetz may not apply within the German legal order.[53] Thus, potentially the case raised issues going not merely to the human rights question, but to the integrational underpinning of the Community order which, as we have seen, constituted the principal, even if not exclusive, rationale for judicial activity in this field.

A. The Principles and Method of the Court

The treatment of the question by the European Court of Justice is truly classic and worth following step by step.

Step 1 (Recital 14 of the Judgment).

In a curt opening statement the Court encapsulated some basic themes:

> As the Court declared in its judgment of 17 December, 1970, *Internationale Handelsgesellschaft* . . . the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the Cohesion of the Community.[54]

The Court affirms that the autonomy and supremacy of the Community legal order "can only be judged in the light of Community law itself"[55] and then gives the rationale: the danger of damaging first, the substantive unity of Community law; second, the efficacy of Community law; third, the unity of the Common Market; and, fourth, the cohesion of the Community. It is interesting to note, though not too much should be made of this, that the first point taken up by the Court is not the fundamental rights issue and the interest of the individual (which only comes up in the next recital of the judgment) but the constitutional-integrational issue.

The idea of uniformity of Community law runs deep in the jurisprudence of the Court; any differentiation which corresponds to national boundaries is always regarded as anathema. In the notion of substantive unity one

53. See the famous decision of May, 29, 1974, 37 Bundesverfassungsgericht 271 (1975).

54. *Hauer*, 1979 E. Comm. Ct. J. Rep. at 3744 (citation omitted) (citing Internationale Handelgesellschaft v. Einfuhr-Und Vorratsstelle Getreide und Futtermittel, 1970 E. Comm. Ct. J. Rep. 1125.

55. *Hauer*, 1979 E. Comm. Ct. J. Rep. at 3745.

might also find a commitment to equality before the law. The unity of the Common Market is a more functional and specific concern. The Court cannot, in its view, allow different economic operators, by virtue of their location in this or that Member State, to benefit or suffer from a differentiated regime affecting their activities governed by Community law. This would run counter to the notion of creating one marketplace.

The reference to the efficacy of Community law is also easy enough to grasp. Bowing to the specificities of this or that national legal order will destroy the cardinal principle of supremacy.

Finally, in the notion of cohesion of the Community, the Court may simply be summing up all earlier considerations or alluding to a wider, metalegal notion: the sense of one community which can only be instilled as a *social reality* in a system which applies equally across the board.

These principles are not, however, without their difficulties. First, although the Court boldly refers to the *Internationale Handelsgesellschaft* saga, it must be remembered that it was in that context that the German Federal Constitutional Court launched its challenge to the Community order, holding that should secondary Community law violate German fundamental human rights norms, the principle of supremacy could not apply. To be sure, in a subsequent decision the harshness of the challenge was attenuated,[56] but, strictly speaking, the German position has not changed. What has been called the problem of maximal and minimal standards (to which I shall return), namely the possibility of the Community standard "falling short" of the German one,[57] poses itself in a manner which would not arise in cases coming before most other court systems. The Court, in theory, was taking a risk (in my view justified) by postulating the very notion of Community cohesion. Since, if Hauer, unsatisfied with the Court's decision, were to appeal further within the German system—in fact she did although the case was eventually settled and never reached judgment—to the German Federal Constitutional Court, the scene would be open to a veritable constitutional crisis if the latter court were to give a wider interpretation to the rights at issue. It is partly as a result of this danger that the ECJ, in the latter parts of the *Hauer* judgment tried, unlike many other of its human rights cases, to demonstrate the method and thoroughness of its treatment, as if to give an object lesson in human rights analysis, even though at the end of the day it denied Hauer the right to plant her vines.

The question of uniformity and unity gives rise to a series of further delicate problems. First, there is the question of jurisprudential consistency

56. Decision of July 25, 1979, 52 BVerfG 187 (1980).

57. *See, e.g.*, Dauses, *supra* note 10, at 408.

by the ECJ itself. In a line of cases concerning Member State procedural law, the ECJ has allowed the application of Member State procedures in the vindication of *European Economic Community rights,* even if the result is that individuals contesting national measures as violative of the same Community law may end up with totally different results depending on the specific national procedural law setting in which the case takes place. The results might be affected by different national rules on time limitations for bringing an action (ranging in the different Member States from one month to thirty years), on quantum of damages, and on eligibility for recovering taxes unjustly imposed.[58] It is true that the origin of this differentiation is rooted in national *procedural* law, whereas in *Hauer* and other human rights cases the Court alludes to *substantive* unity, but this distinction is not altogether convincing. Rights have a meaning only in terms of the remedy available for their vindication. The substantive unity of the right, if accompanied by disunity of the remedy, becomes a hollow concept. The evils the Court lists in *Hauer* which could result from the adoption of "special criteria for assessment stemming from the legislation or constitutional law of a particular Member State"[59] would be more convincing if the Court had been as forceful in the procedural line of cases. Moreover, the Community seems to have survived despite the procedural differentiation.

A second issue related to unity and uniformity may be articulated as follows: Assume that the standard of judicial review adopted by the Court in "the light of Community law itself"[60] differs from the normal standard in the specific jurisdiction. Assume further that it is a "higher standard" (though on this issue of high and low standards I shall offer a critique below[61]) so that the type of danger possibly arising in the German, and Italian, context does not pose itself. It remains the case that two different standards will have been introduced into the *national* legal system depending on whether a specific violation emanates from the Community authorities or from Member State authorities operating within their own sphere of competences. To the extent that we regard Community law as the "law of the land" this disunity might be considered no less troubling than disunity resulting from adoption of national standards.[62]

Step 2 (Recital 15 of Judgment).

58. *See, e.g.,* Rewe-Zentralfinanz v. Landwirtschaftskammer, 1976 E. Comm. Ct. J. Rep. 1989, and its progeny. For an extensive discussion, see J. Weiler, IL SISTEMA COMUNITARIO EUROPEO Part III (1984).

59. *Hauer,* 1979 E. Comm. Ct. J. Rep. at 3744.

60. *Id.*

61. *See infra* text accompanying notes 68–70.

62. This kind of distinction exists as a matter of course in the United States with the duality of state and federal law.

In its second step the Court states both its principled commitment to the protection of human rights and, in abstract terms, the method by which it will operate in culling the rights in the absence of a written code:

> The Court also emphasized in the judgment cited, and later in the judgment of 14 May 1974, *Nold v. Commission des communautes europeenes,* 4 Recuiel 491 (1974), that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.[63]

First, in the notion of "general principles of law" which may be found in the Treaty itself, the Court provides the formal legal justification for this exercise. Courts cannot, without such a formal basis, interfere with the actions of legislatures.

Even more interesting is the outline of method. The theoretical difficulties of the Court's task are quite evident in its statement, which contains a manifest melange of imperative and facultative language: "[T]he Court is *bound* [imperative] to draw *inspiration* [facultative] from constitutional traditions . . . ."[64]

The force of the binding mandate is reduced somewhat if it is simply inspiration which is sought. We understand, however, the Court's reluctance to draw more than "inspiration"; to go further than that would indirectly contradict its earlier statement that it will not "[introduce] special criteria for assessment stemming from the legislation or constitutional law of a particular Member State."[65]

Moreover, the constitutional traditions of the Member States are the obvious place to seek this inspiration. Not simply because it will be there that one may be able to find a *European* content to human rights, but, since the legislature of the Community is a body consisting of the governments of the Member States, each one of which is committed to a respect for national standards (where those exist), the Court thus finds another legal underpinning for its exercise. Finally, from a juridico-political point of view, the Court in this statement poses itself as a guardian against abuse of the

63. *Hauer,* 1979 E. Comm. Ct. J. Rep. at 3744–5.
64. *Id.* at 3745.
65. *Id.* at 3744.

Community system by the executives of the Member States. It will not allow them to do on the European level, free of the shackles of a controlling parliamentary chamber, that which they could not do (in terms of violation of fundamental rights) in the national context.

The tension between imperative and facultative language is accentuated in the next statement. If it is only *inspiration* that the Court is committed to, how can it then state: "measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community. . . ."[66]

The Court seems to backtrack into an imperative obligation to judge each Community measure in the light of fundamental rights recognized by the national constitutions and to strike down measures which are incompatible with any of them.[67] Would this not be, *de facto,* introduction of the previously rejected "special criteria"? One is almost pushed to the conclusion that in *substance* the Court will strive to ensure that no Community measure in fact violates a constitutional guarantee in any of the Member States. (Though, this, as I shall explain below, might, at least in theory not always be possible). Its real concern is *jurisdictional.* It, the European Court of Justice, should be trusted with this charge and the national legal order must accept its interpretation of these standards (which in any event are mostly broadly stated principles open to interpretative differentiation). It is as if the Court is willing to pay a substantive price for its jurisdictional claim.

The same tensions emerge with reference to the other source of inspiration—international treaties and principally the European Convention on Human Rights. Here the Court alludes to "guidelines" offered by these instruments which "should" be followed.[68]

It is unlikely that the Court will in *substance* ever allow a Community measure to violate a provision of the ECHR, but *jurisdictionally* it insists on interpreting the instruments itself.

This melange of imperative and facultative language is a reflection of a deeper duality of discourse by the Court. The imperative discourse is an attempt to assuage the fears of Member State courts and other interested parties that the jurisdictional claim will bring about a reduction of protection. The facultative discourse is an attempt by the Court not to tie its own hands. The final resolution of this covert tension will unfold in the remainder of the analysis of *Hauer.*

66. *Id.* at 3745.

67. This is true unless we must read the Court's statement, not as referring to actual rights protected by specific constitutions, but instead as another vague reference to the constitutional "traditions."

68. *Hauer,* 1979 E. Comm. Ct. J. Rep. at 3745.

The second difficulty with the statement of method stems from the statement, "The Court is bound to draw inspiration from constitutional traditions *common* to the Member States . . . ."[69]

Once more, on a theoretical level, the problems are readily apparent: What about those traditions which are not "common"? This may be illustrated better by reference to the issue of so-called standards. Traditionally, as we saw above, the problem is posed thus: What should happen if, in its distillation of the national and international traditions, the Court should arrive at a standard which is "lower" than that prevailing in one of the Member States. It would seem that the problem would be solved if the Community and its Court would strive to pitch their standard at the highest denominator, thereby avoiding a conflict with national systems with high standards.

However, this contradistinction of "high" and "low" standards is, in my view, erroneous. The dilemma is at its sharpest where one balances conflicting individual rights. A clear example arises in the context of the abortion issue (which of course does not touch the EEC and its Court). Is there any sense in speaking of a "low" or "high" standard regarding those systems which favor in their balancing exercise the rights of the woman to autonomy and privacy versus those which favor the rights of the foetus to life? The abortion example is, however, not typical.

Almost invariably human rights issues posit a conflict between *communal*—state/local region/organization of states—and individual interests which must be balanced. In this situation it would seem that one could legitimately speak of a "high" standard: one affording the individual the largest measure of protection against society. Closer analysis reveals that even in this case the choice of the "highest" standard is unlikely to solve the problem of satisfying national sensibilities. How so?

Human rights jurisprudence typically differs in the articulation of various balancing tests. The *Hauer* case offers a useful example: the right to free use of property is always balanced by societal concerns about the use of such property. In some cases the societal interest can be so overriding as to demand the actual confiscation of the property (with varying degrees of compensation and subject to principled decisions, proportionality and so on) as in the case of compulsory purchase for major social construction work. The collective "good" of a community is acknowledged, not simply as a legitimate curb on individual rights, but as a manifestation of a value which has comparable weight. In the final analysis taxation is a manifestation of this principle.

69. *Id.*

In some societies, depending on the political and social culture, the tendency would be to favor the assertion of the individual right to property by restricting the ability to interfere with that right. In other societies there might be a tendency to favor the vindication of the societal interest by rendering interference with the use of private property easier.

The dilemma of non-"common" traditions cannot therefore be simply solved by an indication that the Community and the Court should aim for the "highest" standard. Thus, even if it is true that in most constitutional documents the *individual* right would be the value asserted, with the tendency, perhaps, to aim at a transnational protection corresponding to the "highest" level of individual protection against societal claims, such a "high" *individual* protection would signify a limitation on the assertion of the *societal* interest in, say, property control. This "high" individual protection might therefore be problematic to a state which strikes a balance that favors the collective right. A so-called "low" level of individual protection might signify a considered value choice *at the constitutional level* between collectivity and individuality with a corresponding stake in such a balance and an explicit or implicit rejection of the *values* underlying a different constitutional choice.

Thus when the Court suggests that it will exercise its review function, "so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community,"[70] unless it is construing the common tradition at such a general level as to become almost meaningless, it is operating on a heuristic assumption of constitutional commonality in Europe which is simply unfounded.[71] This statement must thus be taken as a meaningless balm which must be rejected, not only because it conflicts with the Court's earlier and justified rejection of "specific criteria,"[72] but because it cannot be achieved in many cases. There are inevitable constitutional differences among the Member States even in interpreting norms which look alike. The adoption of an outcome corresponding to a balancing choice in one Member State will be in contrast to a balancing choice adopted elsewhere.

The Court should reject, and in fact has rejected, the notion and the language of trying to adopt the maximal standard prevailing among the Member States, not simply because it will in effect subject the Community to the constitutional dictates of the different Member States, but because it is an impossible exercise.

70. *Id.*

71. *See* Bellini, *La tutela dei diritti fondamentali nell'ordinamento comunitario secondo la sentenza Hauer*, 64 RIV. DIR. INT. 318 (1981).

72. *Hauer*, 1979 E. Comm. Ct. J. Rep. at 3744.

At a theoretical level, the Court's formula engenders a variety of inconsistencies and problems, solution to which is not readily apparent. However, the life of law, we are always reminded, is not logic but experience: therefore, we now turn to the practical solution in the *Hauer* case.

Step 3 (Recitals 17–19).

In its third step the Court distinguishes between the right to property and the freedom to pursue a trade. It deals first, and extensively, with the right to property. It is not my purpose to deal with the *substantive* issues but rather with the Court's method and process.

The Court first repeats its basic philosophy and methodology in this specific context:

> The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the [ECHR].[73]

Interestingly, the Court deals first with the protection afforded through the ECHR. The Court cites article 1 of the Protocol:

> Every . . . person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[74] The Court then simply notes that the regulation would come within the right of the state "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest."[75]

Two comments are in order. First, it is clear that for the purposes of its decision the Court regards itself subject to the requirements of the Protocol despite the fact that the Community as such is not a signatory. Secondly, it is, in my view, evident that the Court regards the ECHR and its protocols as mere starting points, as the first and not most difficult hurdle which the Community regulation has to pass. The provisions in the ECHR, in the eyes of the Court, do not offer a sufficiently precise answer to the question submitted by the Verwaltungsgericht.[76]

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73. *Id.* at 3745.

74. Protocol to the Convention for the Protectionn of Human Rights and Fundamental Freedoms, March 20, 1952, E.T.S. No. 9.

75. *Hauer,* 1979 E. Comm. Ct. J. Rep. at 3746.

76. Bellini, *supra* note 71.

Much has been written and discussed regarding the relationship between the Community legal order and the ECHR. The indication in the *Hauer* case is that the European Court of Justice regards itself as able to give a protection which in substance is superior to that afforded by the ECHR. On the other hand, the Court does not make a particular effort to analyze the ECHR requirement and its surrounding jurisprudence.

Step 4: The Comparative Method—locating the general principle (Recitals 20–22).

As a fourth step, the Court establishes the basis for its comparative analysis:

> [I]n order to be able to answer [the question], it is necessary to consider also the indications provided by the constitutional rules and practices of the nine [as they then were] Member States.[77]

The reference to all Member States and to their constitutional *practices* suggests that the Court will also consider the British position where no written constitution exists, and also those constitutions which might not deal directly with the problem in a codified way.

In practice the Court gives only three textual examples (from the German, Italian, and Irish constitutions) but then goes on to declare that:

> [R]ules and practices permit the legislature to control the use of private property in accordance with the general interest. . . . In all the Member States, numerous legislative measures have given concrete expression to [the] social function of the right to property. [I]n all the Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property. More particularly, all the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines . . . [which is not] considered to be incompatible in principle with the regard due to the right to property.[78]

The conclusion of the Court, indeed the purpose of this first phase of comparative analysis, is to affirm that the *type* of legislation embodied in the regulation is known and acceptable in all Member States.

Step 5: The Comparative Method—Locating Specific Tests (Recital 23).

The Court does not stop its judicial review at this point. In its fifth step, without stating so explicitly, it culls two further principles from the constitutional practices of the Member States: (1) The measure must "correspond to objectives of general interest pursued by the Community;" and (2) in a cumulative test (though the Court uses the word "or") the measure must

77. *Hauer*, 1979 E. Comm. Ct. J. Rep. at 3747.
78. *Id.* at 3746–47.

not "constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property."[79]

These two tests of substantive and procedural policy, bona fide and proportionality, are of course known in virtually all systems of administrative and legislative review. In the common law system proportionality will often be referred to in terms of the "reasonableness" of the measure.[80] It is worth noting that in substance the Court has not really developed criteria which are in any way more precise than those enumerated in the ECHR and which it had earlier dismissed rather curtly.

Step 6: Applying the Tests (Recitals 24–30).

The Court's sixth step is to review the substance of the regulation. Since we are not interested in the substance of property law in the EEC, it is not necessary to go into the detailed assessment by the Court of the aims of the agricultural policy at the basis of the contested regulation nor its assessment of the reasonableness of the measure, save to make some general comments on the method as a whole.

First, it is clear that in assessing what is the "general interest" which the measure must serve, the Court makes reference to the *Community* general interest and *not to an aggregate or cumulative Member State interest.* In adducing the general interest the Court looks at the preamble of the regulation and at the general objectives of the Common Agricultural Policy as enunciated in the Treaty.

Proportionality is also discussed in terms of *Community* policy. The Court makes reference to the temporary nature of the regulation and the conjunctural situation of the Community as a whole suffering from a surplus in the vine sector. In the light of its analysis of these factors the Court concludes:

> [T]he measure criticized does not entail any undue limitation upon the exercise of the right to property. Indeed, the cultivation of new vineyards in a situation of continuous over-production would not have any effect, from the economic point of view, apart from increasing the volume of the surpluses; further, such an extension at that stage would entail the risk of making more difficult the implementation of a structural policy at the Community level in the event of such a policy resting on the application of criteria more stringent than the current provisions of national legislation concerning the selection of land accepted for wine-growing.
>
> [T]he restriction . . . is justified by the objectives of general interest pursued by the Community and does not infringe the substance of the right to

79. *Id.* at 3747.

80. *See* Brown, *General Principles of Law and the English Legal System,* in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 171 (M. Cappelletti ed. 1978).

property in the form in which it is recognized and protected in the Community legal order.[81] A similar, albeit more brief, analysis is utilized to dispose of the challenge based on the right to pursue a trade.

B. *Conclusions: The Functional and Principled Division of Tasks Between Community and Member State Orders*

We are now in a position to offer a brief conclusion on the resolution of the theoretical problems raised by the earlier abstract analysis of the judicial method adopted by the Court. In filling the gap created by the absence of a bill of rights in the Treaty, the Court will indeed turn to the constitutional traditions of the Member States and to the international sources alluded to above. However, the Court is not interested in an investigation of what precise answer this or that national court or transnational tribunal would give to the question posed (as in, say, some cases of private international law adjudication and establishment of foreign law). It simply wishes to establish the overall principles and the direction that constitutional review will take in these other jurisdictions. We also know from other contexts that the Court will be quite content in the case of conflicting traditions to adopt the one most suited, in its view, to the Community situation.

Implicit in its actual process of judicial review, as distinct from its statements of principles, is the knowledge that it is not dealing here with absolute values and with "high" and "low" standards but with some sort of balancing test. One does not have to be a legal realist to accept that it is quite possible, and this does not seem to worry the Court unduly, that another tribunal, seised with the same issues, may reach a different outcome. The *jurisdictional* issue becomes all important: The Court of Justice implicitly asserts that it is the only Court that can exercise the balancing test since it alone has the expertise, data and knowledge to adjudicate the double test of policy bona fide and proportionality in the Community context.

That this is eminently sensible is not difficult to see in the context of the *Hauer* case itself. It might well be that taking the German wine growing situation in isolation there would be no compelling reason to legitimate such a drastic measure as restricting Hauer from developing her land into a vineyard. But in the Community context as a whole there might be a surplus (affecting all Community taxpayers through the EEC system of subsidies) emanating from, say, France and Italy, and calling for a Community wide moratorium. Would the German supreme court really be in a position to

81. *Hauer*, 1979 E. Comm. Ct. J. Rep. at 3749.

evaluate this wide consideration and judge the standard of protection for the whole Community? And would there not be a danger of violation of equal protection before the law if different jurisdictions in the different Member States were to try simultaneously, and without a coordinating mechanism, to adjudicate the issue? It is enough to imagine a similar challenge to the same regulation occurring in Italy and being adjudicated by the norms and organs of the Italian constitutional authority—the likelihood of divergence cannot be dismissed.

A correct statement of the method adopted by the European Court of Justice is a two-phased procedure of establishing first, a constitutional principle derived from comparative analysis and then the Court's application of the principle to the *Community* context. The fundamental human rights recognized by the constitutions of the Member States are only principles, general rules and guidance. They are not predictions of adjudicatory outcomes in each Member State or in the transnational legal order.

One difficulty will always remain with this method, namely the inherent element of uncertainty in a system which does not have a written catalogue. However, since the individual may turn to an entire array of municipal and international texts as a basis for protection, the absence of a *Community* catalogue may in fact be a blessing in disguise. Likewise, the Community policy-maker should, as a minimum, try to ensure that any provision does not prima facie conflict with national principles. Given the multinational composition of all Community organs, this prescription would in fact mean a screening by reference to more than one national constitutional order.

One final point should be made regarding the possibility of review of the Court's decision by a "higher" tribunal such as the European Court of Human Rights. We already noted that the ECJ took a rather dismissive view to the utility in this case of the ECHR. It is also true that the ECJ establishes rather convincingly that it would be difficult for any *national* constitutional tribunal to better evaluate the specific regulation in the Community context. This, however, does *not,* in my view, exclude the possibility or even desirability of further review by an even higher body. The European Court of Human Rights does, after all, review the constitutional adjudication of national constitutional courts which are very well suited to understand their own national context as much as the ECJ is suited to understand the Community context.

One of the basic ideas of transnational (and federal) adjudication of human rights is its exercise by a tribunal which is at least once removed from the system in which the challenge is made. In principle this review of the adjudication of the ECJ by a higher tribunal is feasible. In practice, with the lesson offered in *Hauer* it is doubtful if the European Court of Human

Rights would find much to criticise in the approach of the European Court of Justice, but the availability of an appeal even from decisions of the ECJ has a symbolic value, the significance of which should not be underestimated.

IV. THE RELATIONSHIP OF COMMUNITY PROTECTION OF HUMAN RIGHTS TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

An immense literature has emerged dealing with this issue. It was spawned first by the ECJ's allusion to the Convention as a source which it would use in developing its jurisprudence, and then its actual use. Interest reached a peak in the wake of a EEC Commission Memorandum in 1978 advocating the adhesion of the Community to the ECHR.

I *do not* propose to give a systematic account of this relationship. Although the relationship is tantalizing for the legal theorist grappling with two different and developing transnational orders, in practice the problems which are raised are more illusory than real.

There is of course a two-way relationship between the two systems. The development of Community law is influenced by the ECHR. Equally, each time the ECJ applies—and interprets—a provision of the ECHR, there is development of that regime.

Much has been written on the legal basis for the ECJ's use of the ECHR as a source for its jurisprudence. Indeed, the EEC Commission and some of the Advocate Generals of the Court regard the ECHR's substantive provisions as binding on the Community organs; the joint declaration of the three political institutions did not go so far.[82] For some, the theory of substitution (which explains Community competences in the context of the GATT) provides a basis.[83] It is difficult to accept this given the very late ratification by France and the differentiated regime of reservations and adhesions to protocols practiced by the Member States. Another basis could be the duty enshrined in EEC article 234 that prior international duties and rights of the Member States should remain unaffected. A patently false theory is one which suggests that the Member States could not have given the Community competences to violate the ECHR to which they were bound.[84]

82. O.J. EUR. COMM. (No. C103) 1 (1977).

83. *See* Mendelson, *supra* note 34, at 156–60.

84. It is a well-known principle of international law that a State cannot, except in manifest cases, plead constitutional incompatibility as a ground for non respect of its international obligations. However, it could be argued that violation of human rights would be contrary to the notion of *jus cogens* under international law and base jurisdiction on that reasoning.

The issue today is largely moot. The Court has indicated its intention to look to the ECHR whenever an issue of human rights comes before it. The legal basis is not critical, or at least no more urgent than finding a legal basis for the entire exercise of introducing this new layer of judicial review.[85]

The procedural issues are equally intriguing theoretically. Strictly speaking, the Community as such is not a member to the ECHR. This would mean that an application to Strasbourg to overturn an act of a Community organ (assuming exhaustion of local remedies within the *Community* legal order) must fail as the applicants in the *CFDT* case[86] found out. Now that France has both ratified the ECHR and accepted the right of individual petition, the view has been put forward that the Member States might be liable jointly, under the regime of the ECHR, for violations by the Community. I cannot accept this view which depends too much on an international law vision of the Community and which disregards its internal procedures and the so-called constitutionalization of the Treaty.[87]

The net result is that the formation of the Communities and the transfer of competences to it by the Member States, created a procedural gap in the protection of the individual before the Strasbourg organs. Likewise, though of lesser import, is the fact that a Member State might in theory have to defend itself before the Commission or Court of the ECHR for actions incumbent upon it by virtue of Community membership. I think one would have to wait for an actual breach by the Community which was not yet cleansed by the ECJ before one could regard these issues as necessitating more radical action.

This being so, one may also take a position on the largely forgotten proposal of Community adhesion to the ECHR. From the substantive point of view it does not seem as if adhesion is a real necessity. The main advantage which would accrue to the Community would be the symbolism inherent in subjecting even the ECJ to a measure of scrutiny and the enhancement of the Community's international personality and stature—a further step towards the "federal-state" image. Indeed, it is probably for this reason that the Member States of the Community have shown little enthusiasm for the suggestion.

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85. Although in the *Panasonic* case, National Panasonic (U.K.) Ltd. v. Commission of the European Communities, 1980 E. Comm. Ct. J. Rep. 2033, the Court dropped in its reference to the ECHR word "guidelines" and assimilated it to the constitutional traditions of the Member States, not much turns on this semanticism. In its search for criteria it was only natural that the Court would have turned to the one text on which all Member States had agreed.

86. 2 Comm. Mkt. L.R. (CCH) 229 (1979).

87. In particular, this view would disregard the separate international personality of the Community and its ability to make a decision by the majority against the will of a Member State.

V. APPLICATION OF EEC HUMAN RIGHTS NORMS TO MEMBER STATE ACTION

I would like to conclude this essay by consideration of one highly speculative issue concerning the possible future of human rights jurisdiction in the Community legal order, namely the application of Community human rights standards to practices of the Member States rather than solely to practices of the Community organs. I use the term "incorporation" here in the sense it is understood in the constitutional and juridical history of American federalism in relation to the Bill of Rights.[88]

For the non-American reader it may be worthwhile to recapitulate the principal elements of the doctrine of incorporation. For a long period the provisions of the Bill of Rights were construed as solely a limit on the federal government without direct application to the individual states, each of which had its own constitution embodying some form of protection for individuals.[89] However, the celebrated fourteenth amendment,[90] which was introduced in the wake of the Civil War to prevent states from perpetuating the oppression of the freed slaves, was directed specifically to the states. The fourteenth amendment proscribes the states from abridging the privileges or immunities of citizens of the United States, prohibits deprivation of life, liberty or property without due process of law, and forbids a denial to any person within the state of the equal protection of the laws. It is not surprising that the broad, principled language of this amendment has made it a fountain of constitutional dispute and adjudication.

It is generally held that by 1925 the United States Supreme Court had "incorporated" the substantive rights and limitations enumerated in the federal Bill of Rights and applicable on their face to the federal government alone, into the fourteenth amendment which is applicable to the individual states.[91] The incorporated rights and limitations thereby became applicable to the legislative and administrative practices of state authorities, with the effect of curbing state practices hitherto limited only by *state* constitutional and adjudicatory norms.[92] It is important, for comparative reasons, to note that incorporation of federal rights, at least theoretically, establishes a

88 The Bill of Rights was passed by Congress on September 25, 1789, and ratified by the required three-quarter majority of states by December 15, 1791.

89. *See generally* Jacobs & Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared—A Juridicial Perspective*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 169 (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986).

90 The fourteenth amendment passed by Congress on June 13, 1866 and ratified on July 9, 1868.

91. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925).

92. The process has had opponents from judicial, political, and academic quarters. Its supporters, even within the Supreme Court, have differed regarding the interpretative analysis adopted to explain the process. Likewise, there have been debates about the utility and merits of incorporation in terms of the level of protection afforded to the individual.

"lowest common denominator"; it does not, where the nature of the right in question permits, prevent the states from adopting additional layers of protection for the individual.[93] Of course the same critique of low and high standards in the European context could be applied here. Incorporation in America in fact did mean that the Supreme Court imposed its balancing on the states.[94]

At first sight, incorporation of human rights law within the Community system appears improbable. Since the Treaty contains no explicit bill of rights, Community incorporation would entail not one, but two acts of aggressive judicial activism; first, the creation of judge-made "constitutional" law for the Community, and then its application to acts of the Member States.

The process of incorporation requires two anchors: one to define and elaborate the law of human rights at the central level, the second to project that law into state jurisdiction. In the American system these two anchors rest securely within the constitutional framework: the Bill of Rights and the fourteenth amendment, respectively. Not only does the Supreme Court have unassailable authority to engage in human rights jurisprudence, but the full-fledged federal court system with its autonomous criminal and civil jurisdictions provides a fertile ground in which human rights norms may be "tested" before their projection into the state systems.[95]

In the Community system the first anchor is far less secure. The difficulties and fictions inherent in trying to develop a "higher" law of human rights by comparative distillation were discussed in detail above.

The politics are also interesting. The Court's motivation for activism in the field of human rights was the twin threats to the uniformity and supremacy of Community law posed by the Member States' jurisdiction over alleged Community violations. The resistance of the Member States and national supreme courts to the extension of ECJ jurisdiction was based on the fear that the nascent Community law would fall below the level of protection guaranteed by national law. Essentially, the Member State courts feared that the new "higher" law would offer insufficient protection.

By contrast, resistance to incorporation is likely to spring from the opposite fear. The application to state practice of a Community criterion of individual protection—which would be the essence of incorporation—is

93. *Cf.* J. ELY, *supra* note 21, at 24.

94. A decision by a central court will obviate the necessity of fighting for the right in every single constituent unit. Naturally, this could also be a disadvantage if the right is not recognized, even though nonrecognition by the central court would theoretically not bar a state court from giving relief. *See* Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982).

95. The absence of a *separate* system of Community courts in the Member States is, of course, a major distinguishing mark from the United States system.

not likely to be problematic where the Member State's protection is similar or greater than Community protection.[96] Incorporation is likely to have its greatest effect and provoke the greatest resistance in situations where the individual receives less protection within the national system than is afforded by Community standards. The resistance here would not come from courts as much as it would from political organs.

One decided case has come close to adopting this notion of incorporation. That case illustrates the limitations of potential European incorporation and the crucial distinction between it and its counterpart in the United States.

Roland Rutili,[97] an Italian national, was barred by the French authorities on account of his trade union activity, from residing in four *departements*, one of which was his previous habitual residence. He appealed against this prohibition claiming *inter alia* that it was at variance with the guarantees afforded him under the free movement of workers regime of the Community. There was no dispute that his status was such as to afford him that protection. The French authorities relied naturally enough on the reservation elaborated in the Treaty[98] and in "secondary legislation"[99] that allows exception to the positive rules of the regime when justified on grounds of public policy (*ordre public*). The case was referred to the ECJ.

One issue which the ECJ had to answer concerned the conditions under which a limitation on the free movement regime would be justified on grounds of public policy. This necessarily involved a definition of the breadth of the concept of public policy.

Although the Court first confirmed that the Member States were "*in principle*, free to determine the requirement of public policy in the light of their national needs"[100] this determination would be subject to Community control. Community control could of course derive from the substantive requirements of primary and secondary Community law. Thus, Directive 64/221 requires, *inter alia*, consideration of the individual circumstances of the migrant. France would not be allowed to exclude or restrict movements of, say, non-French chess players merely because they were, as a

96. The national court's reasoning might be different but it would be sufficient if the outcome was largely similar.

97. Roland Rutili v. Minister for the Interior, 1975 E. Comm. Ct. J. Rep. 1219 (Preliminary Ruling).

98. Treaty Establishing the European Economic Community, March 25, 1957, art. 48(3), 298 U.N.T.S. at 36.

99. Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the community; Directive (EEC) No. 68/360 of the Council of 15 October 1968 on the abolition of restrictions on movement and residence within the community for workers of Member States and their families.

100. *Rutili*, 1915 E. Comm. Ct. J. Rep., recital 26 (emphasis added).

class, unpopular in certain areas.[101] Likewise, the directive prohibits consideration of economic factors in the determination of public policy. Thus, high unemployment in a French *departement* could not be invoked to justify the expulsion or restriction of unemployed Community migrant workers.[102]

Apart from specific secondary Community law, the freedom of the Member States to determine the scope of public policy as a ground for restricting the freedoms of the Community migrant worker is limited by more general, but explicit, provisions in the Treaty. Most important is the principle of nondiscrimination on grounds of nationality articulated in EEC article 7. Thus, even if the definition of French public policy had not been at variance with specific provisions of Community law, it could still fall foul of the Treaty regime if it involved a nonauthorized discrimination between French nationals and Community migrants.[103] Up to this point control over national law and practice involves no more than a straight application of Community law.

But what would be the situation if the state concept of public policy did not violate explicit Community law? In other words, what if the national system permitted—in a *nondiscriminatory* way, practices contrary to the standards of human rights accepted by the Court and applied to *Community actions*[104] It would seem that under these conditions the Community could not afford legal protection. Or could it?

We may safely assume, following our earlier discussion, that if *Community* secondary legislation determining the specific detailed Community concept of public policy came into conflict with fundamental human rights, these Community provisions would be reviewable by the European Court of Justice. The Court would attempt to distill an applicable norm of "higher" law from the three sources they cite and review the allegedly offending Community legislation accordingly. But could this "higher" law also become a source for adjudicating a national concept which did not violate the specific provisions of Community law? This would be the effect of incorporation. In what for our purposes must be the key recital in its judgment,[105] the Court seemed to be edging towards such a step.

101. *But see* Yvonne van Duyn v. Home Office, 1974 E. Comm. Ct. J. Rep. 1337.

102. *See generally* D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 147 (1980).

103. There are exceptions, *e.g.*, in relation to public service. In fact, France did violate, even discriminate, on grounds of nationality as well as violating specific rules. *See Rutili*, 1975 E. Comm. Ct. J. Rep., recitals 31 and 42.

104. This hypothesis is not entirely fanciful. The imagination and absence of sensitivity of public officials manages to surprise on occasion even the most hardened observers. In the United Kingdom, until a public outcry put a stop to the practice, certain classes of female immigrants were subjected to virginity tests.

105. *Rutili*, 1975 E. Comm. Ct. J. Rep. at 1232.

Having earlier in the judgment asserted that the determination by Member States of public policy was subject to Community control, the Court then expanded on the explicit provisions of Community, both general and specific, and in fact found the French practice in violation. In obiter dictum, the Court went on to suggest, in language virtually identical to that in the human rights cases, that the explicit rules of Community law limiting the power of the Member States to control aliens, by devices such as public policy, were not exhaustive. *They were a specific manifestation of the more general principle,* enshrined in articles 8, 9, 10, and 11 of the Convention on Human Rights[106] and in article 2 of Protocol No. 4 of the same Convention,[107] which provides, in identical terms, that no restrictions for reasons of national security or public safety shall be placed on the rights secured by them other than such as are necessary for the protection of those rights "in a democratic society."

If the Community law is but a specific manifestation of a general principle, it should follow that the general principle forms part of the Community regime which controls the practices of the Member States. It further follows, that a national practice which violated this general principle *without violating a specific rule of the Community regime,* would violate Community law and, by virtue of the principle of supremacy, be inapplicable. The Community higher law would have absorbed the corresponding lower national protection. Incorporation would have occurred.

This aspect of the decision is of course obiter dictum and has yet to be followed in a concrete situation. Although the point has since been argued in several cases,[108] it has not been necessary for the Court to decide whether it would follow its statement in *Rutili*.[109]

What would be the impact of this policy if it were followed? In *Rutili* the Court mentioned the ECHR and its Fourth Protocol as its normative source, emphasizing that all Member States were parties to it. This diminishes the potential importance of European incorporation by comparison to the American doctrine. Certainly, the ECJ has less scope for an entirely independent jurisprudence. Nonetheless, the impact of incorporation would not be insignificant. In the first place, so far as the ECHR is

106. Note that France at the time had not accepted the right to individual petition.

107. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, E.T.S. No. 46.

108. For example, Zuckerfabrik Franken GMBH v. Federal Republic of Germany, 1982 E. Comm. Ct. J. Rep. 681, where the Court stated that general principles may operate as an independent standard of Member State execution of Community acts, even when such principles cannot be read into a specific provision of EEC law. *Cf.* Lynn Watson and Allessandro Bellman, 1976 E. Comm. Ct. J. Rep. 1185. *See generally* Drzemczewski, *The Domestic Application of the Human Rights Convention as European Community Law,* 30 INT'L & COMP. L.Q. 118 (1981).

109. *Cf.* Regina v. Kent Kirk 1984 E. Comm. Ct. J. Rep. 2689, recitals 22 and 23.

concerned, although all Member States are signatories, the reservation regime varies from one to another. Likewise, the very protocol cited by the Court has not been ratified by Italy and the Netherlands. Even more dramatic would be the consequence in Britain, Denmark and Ireland where the ECHR does not normally form part of the law of the land, but would have to be enforced by the national courts if incorporated by the ECJ in reviewing Member State practice.

Secondly, mindful that in its jurisprudence the Court clearly designated the ECHR as a first hurdle which did not exhaust the sources of Community human rights law, one can imagine even farther-reaching implications. If in its comparative distillation the Court adopted a standard from the traditions in only some Member States, that standard would be transported into all other national legal orders. Moreover, incorporation would change not only substantive law, but procedural law as well. Although decentralized judicial review of legislation exists in only a few of the Member States of the Community.[110] The process of incorporation coupled with the systems of compliance operative under EEC article 177, would introduce Community style decentralized review in the sphere of human rights to each of the ten partners.

In *Rutili,* however, we also find the jurisdictional limitation on potential Community incorporation which crucially differentiates it from the American version. We must turn here to the second anchor of the process—that which allows transnational rights to be projected into the state systems. In the United States the rights protected by the first ten amendments, once incorporated into the fourteenth amendment, are projected in an all-encompassing constitutional jurisdiction and apply to *any* state administrative and legislative practice regardless of the division of powers between the federal and state legislatures.

By contrast, in the Community even the widest potential incorporation is limited by the division of competences under the Treaty. The ECJ has been rigorous in respecting the jurisdictional divisions of power between the Community and its Member States. Even the general prohibition against discrimination on grounds of nationality was limited by the Court, faithful to the language of EEC article 7, to *"the field of application of the Treaty."*[111] In *Rutili* this would mean that the protection afforded the Community worker could not be projected onto Community citizens not qualifying as "workers" in the Community sense of the word, and certainly

110. *See* The Protection of Fundamental Rights as Community Law is Created and Developed: Report the Commission of the European Communities, 5 BULL. E.C. 1, 33–34 (Supp. 1976).

111. *Rutili,* 1975 E. Comm. Ct. J. Rep., recital 12 (emphasis added).

not to non-Community migrants. In one of the *Defrenne* cases[112] this limitation becomes even more striking. Although the Court, using its traditional formula for protection in the field of human rights, accepted a prohibition on sex discrimination as forming part of general principles of Community law derived *inter alia* from the European Social Charter and an ILO Convention,[113] these principles could not, at the time of the decision, avail a female plaintiff who had suffered discrimination in regard to her pension rights because the second anchor, the means for projection, was at that time limited *rationae materiae,* to situations of *equal pay.*[114]

The Advocate General in this case, while accepting the protection in a particularly full-blooded version,[115] was most careful to lay down the limits of Community judicial protection: "insofar as the internal provisions [of the Member State] are not replaced by directly applicable Community provisions," the state level of protection must apply.[116] European incorporation would thus be limited in its scope to the substantive areas over which the Community has jurisdiction.

With the passage of time the effects of this limitation may be reduced. In the first place, the Court has considerable discretion in determining the scope—*ratione materiae, personae* or *loci*—of Treaty provisions. In the second place, the Community legislature itself is continuously expanding the limits of Community competences. As the boundaries extend and the Community's jurisdiction becomes more comprehensive, the effects of potential Community incorporation might become more pronounced.

Like the doctrine of supremacy, incorporation would have to be realized in a two-phase process: It must first be articulated by the Court and then, more crucially, be accepted by the national courts that would have to give it effect. I am skeptical about the prospects for the development of incorporation in the near future. The Court's pronouncements have been rather timid. More importantly, I see very little prospect of courts and governments in the Member States (especially those dualist states which have not for example "domesticated" the ECHR) accepting incorporation. Thus, I am far less optimistic than some writers who have foreseen the fairly imminent arrival of incorporation,[117] although in the long run it might occur.

112. Gabrielle Defrenne v. Societe Anonyme Belge de Naigation Aeriene Sabena, 1978 E. Comm. Ct. J. Rep. 1365.

113. *Id.* at recital 28.

114. *Id.* at recital 30.

115. The Advocate General stated: "I do not think that a lengthy consideration is necessary to show that the rule that there should be no discrimination is a general principle of the Community legal order." *Id.* at 1304.

116. *Id.* at 1385.

117. *Cf.* Drzemczewski, *supra* note 108. See also Cappelletti, *supra* note 1, for a more cautious statement.