EFFICIENCY OF PROTECTION OF HUMAN RIGHTS IN NON-UNITARY ENTITIES BY MEANS OF UNIFORMLY APPLIED SETS OF NORMS

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My parents

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ABSTRACT

This thesis attempts to deal with the question of whether the protection of the fundamental rights of the citizens of the Member States of the European Community should be entrusted to a uniformly applied set of norms. In other words, it discusses whether the legal area of human rights should be subjected to the process of integration that has been characteristic of the development of the European Community in the last fifty years. In doing so, the thesis initially introduces the principles of efficiency and uniformity and presumes that efficiency of protection of human rights exists when protection is afforded by means of uniformly applied sets of norms, whereas inefficiency exists when protection is fragmented. The validity of these presumptions is then tested on two non unitary entities, the European Community and the United States of America. This is done by means of an analysis of the whole spectrum of the protective measures available in these entities, which includes the uniformly applied sets of norms for each one of them, the European Convention on Human Rights, as regards the European Community, and the Bill of Rights of the American Constitution, as regards the United States of America. As a result of this analysis the thesis questions the validity of the two presumptions initially made. Indeed in Europe, where the protection of the human rights of the individual is significantly fragmented, there are no indications that this

protection is inefficient. In the United States of America, on the other hand, where the protection of the rights of individual is overwhelmingly bestowed upon the uniformly applied provisions of the federal Bill of Rights, efficiency problems seem to exist. At least that is what the proponents of the movement of New Judicial Federalism suggest arguing, consequently, for the decentralisation of the protection of individual rights, by entrusting it to the provisions of the state constitutions as opposed to the ones of the federal document. In its conclusion, the thesis argues that the developments in America should be seriously considered by the Europeans in any attempts to integrate in the area of human rights. Moreover, it suggests that what is of paramount importance is that the individual rights of the citizens of the Member States of the European Community are efficiently protected, irrespective of whether this protection is afforded by means of a uniformly applied set of norms, or otherwise.

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ABBREVIATIONS

AJDA	Actualité juridique-Droit administratif
Ass.	Assemblée
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen
BVerfGE	Sammlung der Entscheidungen des Bunderverfassungsgerichts
BYBIL	British Yearbook of International Law
C. A.	Cour d' appel
C.C.	Conseil Constitutionnel
C. E.	Conseil d'Etat
Cass. (Belgium)	Cour de cassation
Cass. (France)	Cour de cassation
Cass. (Italy)	Corte di cassazione
Cass. civ.	Cour de cassation, chambre civile
Cass. crim.	Cour de cassation, chambre criminelle
Cass. pen.	Sezione penale della Corte di cassazione
Cert.	Certiorari
Civ. (Belgium)	Tribunal civil
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
Corte cost.	La Corte costituzionale
DCA	District Court of Appeals
D. R.	Diário da República
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EDC	European Defence Community
EEC	European Economic Community
EHHR	European Human Rights Reports
ELRev.	European Law Review
EPC	European Political Community
EuGRZ	Europäische Grundrechte Zeitschrift
FamRZ	Zeitschrift für das gesamte Familienrecht
Fla.	Florida
Foro it.	Il Foro italiano

Giur. Cost.	Giurisprudenza costituzionale
Giust. pen.	La Giustizia penale
HRLJ	Human Rights Law Journal
J. L.	Jurisprudence de la Cour d'Appel de Liège
J. T. (Belgium)	Journal des tribunaux
J. T. (Luxembourg)	Journal des tribunaux
JCP	Juris-Classeur périodique
JurBüro	Das Juristische Büro
KCLJ	King's College Law Journal
LIEI	Legal Issues of European Integration
Md. App.	Maryland Court of Special Appeals
Md.	Maryland
Mém.	Mémorial du Grand-Duché de Luxembourg
N. Y.	New York
NJ	Nederlandse Jurisprudentie
NJCM Bulletin	Nederlands Tijdschrift voor de Mensenrechten
NStZ	Neue Zeitschrift für Starfrecht
NYIL	Netherlands Yearbook of International Law
Pas.	Pasicrisie belge
Pas. lux.	Pasicrisie luxembourgeoise
RIDU	Rivista internazionale dei diritti dell' uomo
Riv. it. dir. proc. pen.	Rivista italiana di diritto e procedura penale
S. Ct.	Supreme Court
Series A	Publications of the European Court of Human Rights-Judgements and Decisions
T. C.	Tribunal Constitucional
Trib.	Tribunale
U. S.	Supreme Court of the United States
USA	United States of America
YEL	Yearbook of European Law

INTRODUCTION

This thesis examines the issue of human rights and their protection in the European Community and the United States of America.[1] It does so from the perspective of a typology which involves the two concepts of efficiency and uniformity. It cannot be a comprehensive study of all areas of human rights law and procedure in all of the Member States of the EC and all the American states since that kind of study would be outwith the scope of any thesis. It is therefore geographically circumscribed, with study concentrated in the USA on the states of New York, Maryland and Florida and in the EC on the states which were members in1992 and which had incorporated the European Convention on Human Rights.[2]

Two hypotheses are central to this thesis. The first is a prediction that within a system of fragmented procedures for the protection of human rights (i.e. where there is a lack of uniform

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1. For the remainder of the thesis the terms EC and USA will be used to describe the European Community and the United States of America respectively. The term European Community has been preferred to European Union, because of the chronological limits set in this thesis. The term European Union has been used to describe the European integrative experience from 1992 onwards. This date is considered a cut-off date for the purposes of this study.

2. In 1992 the Members States of the EC were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom. However, Denmark, Ireland and the United Kingdom are not considered in this study because of their negative position as regards incorporation of the European Convention on Human Rights in their domestic law. The reasons that dictated in the American context the choice of states, and in the European context the designation of 1992 as the chronological limit of this study, will be explained in the following pages.

protection of the said rights) efficiency will not be achieved. Thus in Europe, where there is no central and uniform system of protection of human rights and instead the Member States, the authorities set up by the European Convention on Human Rights and the EC share the task of protecting human rights, it might be supposed that there is a lack of an efficient protection of human rights. The second hypothesis is that, where a uniform system exists there will be maximum efficiency in the protection of the rights of the individual. Thus, in the USA where there appears to be uniformity in the protection of human rights, it can be predicted that there is a very efficient protection of the rights of the individual.

At the back of these hypotheses is the question which has been raised by scholars as to the role of human rights in integration and in federal and quasi-federal structures. Can the collective protection of human rights form a vehicle for integration of nation states? Should human rights be used as such a mechanism? Cappelletti[3] argues in favour of this position. The aim of this thesis is not to reiterate what has gone before but to answer the question from a different perspective. We argue that the protection of human rights should not be seen as a vehicle for integration but as an end in itself in any state or quasi state structure. That means that when it comes to choosing between a uniform but not always efficient protection of human rights and a fragmented but efficient one, then it should be the latter which should be the preferred approach. This consideration is related, specifically within the European context, with the plans for the creation of a

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3. M. Cappelletti, M. Seccombe and J. Weiler, "Integration Through Law: Europe and the American Federal Experience" (Berlin, Walter de Gruyter, 1986) Volume 1.

catalogue of rights which will apply uniformly and will constitute the integrative attempt of Europe in the field of human rights. The conclusion of this thesis is that it is questionable that such a catalogue can contribute to the efficient protection of the European citizen. The possible side-effects of such attempt are pinpointed, by utilising the paradigm of the situation in the USA.

Some definitions are useful at this point. The concepts of efficiency and uniformity are crucial to the argument of this thesis. By efficiency is meant the existence of an adequate and sufficient legal remedy, which is based on legal norms and is provided by a court of law.[4] Admittedly, this is a fairly simple definition but is a useful heuristic device for the purpose of analysis. What distinguishes efficient norms from non-efficient ones is that the former manage to achieve the results that were intended when they were conceived, whilst the latter, for various reasons, do not. In the field of human rights protection specifically, an efficient provision is one that provides an adequate and sufficient level of protection of the rights of the individual, as opposed to a non-efficient one, which fails to do so.

Two remarks are necessary as regards efficiency. In the first place, efficiency must be distinguished from the concept of effectiveness, a concept widely utilised especially in relation to EC law. Numerous studies have dealt with the issue of effectiveness, both from the theoretical and the policy point of view. They tend in their majority to focus their attention on the examination of the issue within the ambit of EC law, and the definitions that are

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4. Snyder seems to agree with such a definition of efficiency, albeit in an indirect manner. *See* F. Snyder " The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" in "Implementing EC Law in the United Kingdom" T. Daintith (ed.) (1994), at p. 52.

provided relate effectiveness to compliance, implementation, enforcement and impact.[5] Admittedly, the characteristics attributed to effectiveness can be useful in evaluating efficiency. Nevertheless, the consideration of effectiveness, in any of its dimensions, lies outside the scope of this thesis. Its concern is the nature of efficiency.

The second point that can be made about efficiency is that more than one efficient norm may cover specific situations. In this case it must be decided which is the efficient provision that best suits the particular situation. In the field of human rights specifically, a selection procedure must take place in order for the highest level of protection of the individual to be achieved, by means of choosing the appropriate norm or set of norms. Therefore, choice of protection by means of specific norms may mean that these norms are considered to offer higher levels of protection than others which were also available but eventually not utilised.

The concept of uniformity is also central to this thesis. By uniformity is meant the existence of a single overarching authority or body of law which binds the organs of state or government and which defines the standard of protection. Uniformly applied norms then are relevant to the concept of efficiency, in that they form part of the available protective remedies. Whether they are efficient or not will depend on the quality of protection they offer. If they offer a high quality protection, then they would classify as efficient. If not, other norms may be preferred.

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5. *See* for example Siedentopf and Ziller (eds), "Making European Policies Work: The Implementation of Community Legislation in the Member States", 2 vols. (1988).

In the context of this thesis it is important to stress that the political formations which are under discussion are not simple unitary states. The USA is the paradigm of a federal structure with a single federal Constitution and 50 state constitutional structures. The EC is composed of individual Member States with an element of shared or pooled sovereignty and can be seen as a confederal or quasi-federal structure in areas where competencies are shared[6]. Efficiency and uniformity are concepts used within this context and for this reason the specific definitions given above should inform the following discussion.

One reason for choosing the thesis in this way, is to develop the debate on New Judicial Federalism in the USA and to apply some of the concepts developed in that debate to the emerging political order of Europe. As will be seen from chapter 2, ideas of New Judicial Federalism stemmed from the liberal ideas of certain influential thinkers in the USA who were fearful that reliance on central and federal protection of human rights did not in fact provide an efficient protection of the rights of the individual. They argued that the devolution of protection (i.e. fragmentation) would prove more efficient. For a European approaching these debates, this may seem that the New Federalists were advocating a system of divided responsibilities as is exactly the case in Europe. This raises questions within the debate on the protection of human

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6. *See* for example, Hunnings, "The Future of Community Law" in "Federal Solutions to European Issues" 51-61 (B. Burrows, G. Denton & G. Edwards eds, London, MacMillan, 1978); Taylor, "The Politics of the European Communities: The Confederal Phase" 27 World Pols. 336 (1975); Pentland, "Political Theories of European Integration: Between Science and Ideology, in "Les Communautés Européennes en Fonctionnement/The European Communities in Action 545, 558 ff (D. Lasok & P. Soldatos eds. Brussels, Bruylant, 1981); Wallace, "Less than a Federation, More than a Regime: The Community as a Political System" in "Policymaking in the European Community" 403 (H. Wallace, W. Wallace & C. Webb eds., Chichester, Wiley & Son, 1983)

rights in Europe and whether there should be developed a "federal" legal order in this respect given the perceived weaknesses of the US system, at least according to the proponents of New Federalism. It must also be pointed out that the aim of this thesis is not to analyse the concepts of New Federalism as such, but to use the ideas from the debates as a guide for discussion and analysis in the European context.

This thesis utilises the approach of comparative legal studies in attempting to answer the question of efficiency and uniformity outlined above. The points of comparison are the USA and the EC. The reason for this approach lies in the presumption that historical and cultural similarities exist between the two formations, similarities which suggest that, if we can presume that Europe is moving towards becoming a kind of federal entity, then the American federal experience should be seriously taken into consideration. Therefore, a comparative exercise between the two entities seems valid. It is admitted, and this will be elaborated in chapter 1 of this thesis, that there are contrasts in the integrative experiences of the two entities. There are strong historical and ideological arguments against possible modelling of European integrative attempts on the American federal structure, something that might suggest that a comparison between the European integrative experience and the American one is not appropriate, and consequently that the American human rights paradigm has no practical usefulness for Europe. We consider, however, that certain important elements, such as common cultural heritage or the definite influence on the European integration process by the interest of the Americans themselves to assist Europe into a federal experience, weigh against the above suggestion.

Within the USA only a limited number of states have been selected for comparison, namely Florida, New York and Maryland. The states chosen have been selected partly because of availability of information and partly on the basis of certain geographical and socio-political criteria. New York is a northern, wealthy, large state with a somewhat atypical history of early Dutch settlement. Florida and Maryland are both situated in the south. Florida makes an interesting subject because of its character as a retirement community and the influences of the non indigenous population mainly of Hispanic origin, whereas Maryland is a small state which maintains most of the characteristics of the old, traditional South. The reason for the use of such a small number of states lies in the fact that we intend to offer only examples of the possible influences of New Judicial Federalism, not to use these states as a sample representative of a statistical analysis. As it was mentioned before, this lies outside the aim of this thesis.

Within the geographical comparison we are comparing the method of protection of human rights rather than the protection of one specific right or group of rights although such a comparison might feasibly made in another context. This approach was considered to be more fitting to the birds-eye view that this thesis adopts in order to achieve its aim.

The study is limited in time between the two milestone dates of 1977 and 1992. 1977 is a key date in the emergence of the debate on New Federalism in the USA, with the publication of the article by Justice Brennan which opened the debate. 1992 is the key European date of the adoption of the Treaty on European Union which establishes, among other things, the European Union

itself and the concept of citizenship of that Union. The Union is the most concrete attempt to date at a federal state for Europe, which will regulate a wide variety of activities and within which citizenship constitutes an important conceptual, if not practical, development. One result of using this cut-off date is that there is no discussion within the body of the thesis of states which joined the Union after 1992. Another limitation of the thesis as regards its European consideration, is that it does not discuss the influence of the European Convention on Human Rights on the states of the Union that have not incorporated it in their domestic law, unlike the states that incorporated the Convention which are extensively scrutinised. The inability of the citizens of these states, the United Kingdom being one of them, to invoke the Convention in front of their national courts renders the concept of efficiency of law rather weaker when compared to the citizens of states which incorporated the Convention, who actually can use it locally. A sound comparison dictates that the two concepts of efficiency and uniformity should have an equal application to the states under examination.

The thesis analyses cases which have been brought before the courts of a number of states of Europe, the United States of America, the European Court of Justice, the European Court of Human Rights and the Supreme Court of the USA. Statutory and treaty interpretation is also an essential source of information and will be used where relevant. The thesis also relies on secondary materials in the form of analytical commentaries on the practice of courts. These latter commentaries are important in providing additional evidence of the manner and frequency of the applica-

tion of human rights principles to cases both in the USA and Europe.

One interesting facet about the work done for this thesis is that, in the course of assessing the evidence, it became apparent that what is needed for an efficient protection of human rights is uniformity but not necessarily in the sense of the term as it is applied in the USA. Conversely, fragmentation of procedures need not necessarily lead to inefficiency. However, if fragmentation leads to gaps in the protection of human rights, then efficiency cannot be achieved. Efficiency requires that at the interface of Member State and Community or state and federal competencies there is a mechanism for ensuring that the citizen has adequate solutions as regards the enforcement of his/her rights. Where this interface is not clearly defined then this is where problems are likely to emerge-which is a problem for Europe. Inefficiency can also arise not just out of the fragmentation of procedures, but also where the single uniform structure declines, for whatever reason, to play an active role in the protection of human rights. The withdrawal of the United States Supreme Court from the human rights arena has been seen by some to create a problem of inefficiency which could only be met by introducing a fragmented system, albeit in a limited way

Chapter 1 of this thesis discusses the historical approaches of the integrative experiences of Europe and the United States. It argues that, despite a contrast in experiences, there are enough similarities to permit a comparison between the two systems, for the benefit of evaluating whether occurrences in the American context, within the specific area of human rights, could be useful for consideration by the Europeans in regard to any relevant plans

that might exist. Chapter 2 discusses the general influence of the movement of New Judicial Federalism in the protection of human rights in the USA. Chapter 3 evaluates the concept of efficiency of the law of human rights in Europe and the United States. It does so by referring to the available legislation protecting the individual liberties of European and American citizens. Chapter 4 examines the concept of uniform application of the law of human rights in the two systems under discussion. In doing so, it examines the European Convention on Human Rights and the Bill of Rights of the Federal Constitution, which are the uniform protective pieces of legislation for European and the American citizens, respectively. Chapter 5 attempts to test the concepts of efficiency and uniformity at the European level. It evaluates the legal choices of the European states as regards protection of the rights of their citizens. The preference of the relevant uniform piece of legislation, namely the European Convention on Human Rights instead of their own national provisions or vice versa, would indicate which set of norms is considered by them to be the most efficient. For the purposes of this specific survey, it was considered appropriate to adapt and apply to the European situation two of the approaches that the movement of New Judicial Federalism has proposed in similar situations in the USA. To that effect, the primacy and interstitial approaches will be borrowed, expanded and utilised in order to demonstrate the attitudes of the courts of the European states when faced with the dilemma of entrusting the protection of the individual rights of their citizens to their national protective provisions or the parallel protective provisions of the European Convention on Human Rights. Chapter 6 is involved in a similar survey in the American context. It looks

at the situation in the selected three American states, engaging inevitably in the question of whether, and if so to what extent, the movement of New Judicial Federalism has influenced the state judiciary. That would have as a consequence that the state judges would give precedence to the protective provisions of their own state constitution instead of the respective measures of the Federal Constitution, which is the uniform piece of law in the USA. And that would mean that state judges consider the state constitutional provisions to provide a higher level of protection than the parallel ones of the federal document. In other words, they would choose one set of norms over another, because the preferred provisions are the efficient ones. On the basis of its findings, the thesis concludes by questioning the validity of the two hypotheses initially set, namely that fragmented procedures for the protection of human rights do not guarantee this protection in an efficient manner, something that occurs when a system of uniform protection exists. It then argues, taking into consideration the repercussions of the movement of New Federalism in the USA, that whether human rights could be used as a vehicle for integration in Europe and whether they should be used, are two different questions. This is exactly where the concept of efficiency comes into play. What is of paramount importance is that the European citizen is efficiently protected, irrespective of whether the protective measures are uniform or not. The protection of human rights in Europe must be seen as an end in itself.

CHAPTER 1

Europe and the United States of America: Two tales of integration

1.1. Introductory note

Following the end of World War II, a tendency developed among public figures and theorists having to do with the involvement with the problem of international political unification. They started entering into discussions regarding the possibilities of some kind of unification in Europe. The most commonly mentioned point of reference in terms of desired results and political experiences was that of the United States of America. At the time the USA seemed to be a useful alternative to the "discredited and obsolete formula of national states"[1].

The number of political scientists, lawyers and historians that studied the potential applicability of the American model to the European situation was significant. Some of them regarded the United States of America or even the Swiss Confederation as the ideal solution for the European states. Not surprisingly though, the vast majority came to the conclusion that an analogy could not be

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1. A. Spinelli, "The Growth of the European Movement since the Second World War." in "European Integration" (ed. Michael Hodges, Penguin Books 1972).

drawn between the two and that the application of an American style federal arrangement in the attempt to unite Europe was condemned[2].

According to Dusan Sidjanski two reasons justify the inapplicability of the American model to the European situation[3]. Firstly, a European Federation would have to be created out of established nations with highly structured societies, not susceptible therefore to radical transformations. Secondly, the existing federal systems, the American one included, were formulated at a time when the economies of the constituent units were less developed than those of the existing European states. These arguments were also supported by MacFarquhar[4]. He claimed that the United States was the antithesis of the European Community. The Community consisted at the time of ten different states, inhabited by old established peoples, speaking eight different languages and the collaboration of which materialised after hundreds of years of individual development. That is not the case in the United States. The element of individuality did not exist. The first stage was a confederation which was then followed by federal integration. In terms of institutions Europe has only managed to establish a weak parliament elected by universal suffrage and a weak technocratic bureaucracy. MacFarquhar further argued that, when the United States was in the making, they consisted only of three million inhabitants, with common

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2. M. Bellof, "The United States and The Unity of Europe" (Washington D.C., Brookings Inst., 1963), L. Lindberg & S. Sheingold, "Europe's Would -Be Policy: Patterns of Change in the European Community"(Englewood Cliffs, N.J., Prentice Hall 1970).

3 D. Sidjanki, "Dimensions Europeenes de la Science Politique" 122 ff (Paris, Librairie generale de droit et de jurisprudence, 1963).

4. MacFarquhar, "The Community, the Nation State and the Regions" in "Federal Solutions to European Issues" 17-24 (B. Burrows, G. Denton & G. Edwards eds., London, McMillan, 1978).

characteristics such as origin, language, culture and institutional past, as well as the same experiences of a common war of liberation against a foreign power.

Max Bellof, puts forward three reasons to which the differences between Europe and the United States are attributed.[5] Firstly, the American colonies had a common culture, origin, religion, and language, characteristics that are not shared by the different European states which, in addition, differ in terms of their systems of government and their philosophies of life. Secondly, the American Federation was preceded by a confederation. Europe on the other hand, had evolved in an entirely different manner. Finally, the American Union was formed primarily for defensive reasons. As regards Europe, the motives for the unification were primarily economic. The logic of these arguments does not seem very convincing to Greilsammer.[6] He argues that the American model represents only one possibility of the existing variety of federated states. In addition the argument that the integrative process in Europe was primarily motivated by economic reasons, does not seem accurate to him. An equally decisive factor, according to Greilsammer, was that of the defensive aspects, as expressed in the Dunkirk Pact (1947) between France and the UK, the Brussels Pact (1948) between France, the UK and the Benelux countries, and NATO (1949). Finally, he considers that the strong identities and the long history of the European nations will not to be able in the future to present an obstacle to some kind of federal arrangement in Europe.

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5. *See* note 2
6. I. Greilsammer, "Some Observations on European Federalism", in "Federalism and Political Integration" 107 (D. Elazar ed., Ramat Gan, Turtledove Pub., 1979).

The arguments of all these scholars appear basically convincing. Indeed an attempt to compare the process of unification in the two systems indicates the differences between them. However, we should not ignore the argument that the American unification experience has exerted some kind of influence on the relevant European theories and methods.

In order to be able to comprehend and pinpoint the areas and issues where similarities or contrasts exist and come to a conclusion as regards influences, if any, it is considered useful to indulge in a comparative analysis and explore, delving into history, the process of the integrative experiences of the two systems under examination. The European attempts will be explored first, followed by an examination of the developments that led to what is known as American federal democracy. The purpose of the following discussion is to establish whether the American federal experience has influenced to any degree the integrative attempts of Europe, in order to justify a comparison between the two systems in the area of human rights and this should inform the following discussion.

1.2. The integrative process in Europe

The aim that the study of regional integration attempts to achieve is, according to Haas, to "explain the tendency toward the voluntary creation of larger political units, each of which self-consciously eschews the use of force in the relations between the participating units and groups".[7] An inherent

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7. E.B. Haas, "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing", International Organisation (1970), vol. 24, pp. 607-646.

difficulty that seems to exist is to define what the term "integration" means. It has been defined as a process whereby states voluntarily give up certain sovereign powers and evolve new techniques for resolving conflict between themselves, while others consider it as the final stage of the above mentioned process, where a new entity encapsulating several previously independent units is created.[8]

Several theories have offered different definitions of what integration is. Three approaches are predominant: the federalist approach, the neofunctionalist and the transactionalist .

Federalism, according to Elazar, is the political principle that has to do with the constitutional diffusion in power so that the constituting elements in a federal arrangement share in the processes of common policy making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities.[9] Its supporters argue that it provides an arrangement that satisfies the twin criteria of efficiency and democracy, by creating a number of main, central bodies for certain functions and by allocating other activities to peripheral formations to ensure local control and autonomy. The federalist theory is regarded as a means to achieve common purposes and needs. It presupposes that a federal structure can assume these objectives at all the levels it operates, and that institutions that have been successful in countries with federal arrangements like the USA, Switzerland and Germany will also be effective in supranational formations.

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8. *see* note 1
9. *see* note 6

One important aspect regarding federalism in Europe has to do with its origins. Edouard Bonnefous called "early federalists" those who, between the fourteenth and eighteenth centuries initially believed in the idea of a united Europe.[10] According to Greilsammer,[11] the plans put forward by intellectuals, like Pierre Dubois, Antoine Marine, Emeric Cruce, William Penn and Comte de Saint-Simon could not be described as federalist in nature due to the fact that they analysed federalism from a structural and constitutional perspective and not from a socio-political one. These were rather plans of interstate co-operation than federal ones. Greilsammer then tends to agree with Denis de Rougemont,[12] that the two scholars who really talked of federalism and therefore could be considered the founding fathers of this theory were Pierre-Joseph Proudhon and Emanuel Kant.

Federalism started to have a serious impact after the end of World War II. The emergence of a new situation accentuated the problem of unity in Europe. This was fertile ground for new ideas. In the first place, there was a widespread feeling that the national state was no longer worth the absolute respect it enjoyed in the past. The work of intellectuals like Alexandre Marc and Denis de Rougemont, which was supported by various influential pressure groups that have worked since 1944 on the formulation of a federalist charter, had a lot to do with it. A number of important works were published. Among them Alexander Marc's "Le Revolution Federaliste" and "Principes du Federalisme" as well as various journals including "Le Bulletin Federaliste, Federation and

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10. E.Bonnefous, "L'idee europeene et sa realisation", (Paris, Editions du Grand Siecle, 1952).
11. *see* note 6.
12. D. de Rougemont, "Vingt-huit siecles d' Europe. La Conscience Europeen a travers les textes, d'Hesiode a nos jours", (Paris, Payit, 1961).

Liaisons Federaliste." In 1947 a European Union of Federalists was founded.

According to Spinelli[13] there were three events in 1952 that created what was called West Europe's "federalist phase". These were the establishment of the European Steel and Coal Community, the signing of the European Defence Community and the proposals for the creation of a European Political Community.

The sovereign state, however, seemed to still have an important status in Europe. The EDC proposals were rejected in 1954 by the French assembly and the EPC was consequently abandoned.

One of the reasons for the failure of the federal movements was considered to be the different approaches concerning the theory of the movement. There was an initial controversy between "minimalism" and "maximalism" federalism.

Minimalism involved a "federal pact" between governments to join in one political system. Maximalism, on the other hand, advocated a "constituent assembly" created either by the existing legislative bodies or by the people in general.

A further controversy was between "Proudhonian" or integral and "Hamiltonian" federalism. This controversy was more substantial than the previous one. The "Proudhonian" theory was conceived and developed in France between 1945 and 1948. It was popular among young people who were inspired by intellectuals of socialist background like Tocqueville, La Tour du Pin but mainly Proudhon. It advocated that the notion of the sovereign nation-state was obsolete. "Integral federalism", as it was named

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13 A. Spinelli, "The Eurocrats: Conflict and Crisis in the European Community",(John Hopkins Press, 1966).

by Alexandre Marc, concerned not only political institutions but society at large and its aim was to transform totally the societal structures. On the other hand, the "Hamiltonians" were mainly Italians influenced by the thinking of Altiero Spinelli, Mario Albertini and others. They ignored the problems of a "European society" and rejected, therefore, "integral" federalism. Their concerns were exclusively structural. According to them, the establishment of the European federal state would be feasible if the federal idea was applied to the organisational and not to the societal aspects of a democratic Europe. Their ideas were initially expressed in the "European Manifesto" which was published in 1943 by the Italian resistance fighters and in 1957 in Altiero Spinelli's "Manifesto of the European Federalists".

The failure of EDC struck a blow to the federalist ideas. And despite the fact that personalities like Spinelli, Monnet and Hallstein continued to persist that federalism was the appropriate solution for a united Europe, this movement did not have any significant impact after the late 1960s.

The "functionalist" theory of integration was based on the ideas of David Mitrany.[14] He advocated the distinction between the political and socio-economic functions of the state. According to it, a large number of international agencies and institutions with specific tasks in the socio-economic sectors would be created, upon which specific state functions would be transferred, until gradually the state's entire technical field would change hands. The desired result would be for the people to eventually transfer

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14. D. Mitrany, "A Working Peace System", (London, Royal Institute of International Affairs, 1946).

their confidence and loyalty to those organisations, forcing thus their governments to co-operate on the political level as well.

Functionalism appeared an appealing theory. However, it soon became obvious that its practical application was problematic, mainly due to lack of popular appeal for international organisations. Functionalism, consequently withered, but its theoretical premises influenced another school of thought that flourished in the 1950s, known as neofunctionalism.

The father of neofunctionalism was Ernst Haas. In his 1958 study "The Uniting of Europe: Economic, Social and Political Forces 1945-1958" he defines international integration as a process of gradual "politicisation" by which the political actors are persuaded to transfer their loyalties to central independent organisations. This process begins with the integration of limited but fundamental economic sectors and, by a spill-over phenomenon, automatically results in a "political community". There are many common features with functionalism as well as two important differences. The first one is that the neofunctionalist theory talks of supranational organisations whereas the functionalist one of international. The difference lies in the fact that a supranational organ would be autonomous, with more independent than inter-governmental powers and would have the ability to expand its activity at will. The second important divergence from the functional theory has to do with the rejection of the distinction between politics and economics. According to Haas, these two spheres of state activity are linked and the progression from the economic to the political sphere happens automatically. This "spill-over" effect from the economic to the political sphere is extremely

gradual but it has the inevitable result of the process being the creation of a political community.

In 1958, when Haas' study appeared, the facts seemed to agree with the neofunctional analysis. The first phase of integration was successful. From the Schuman Plan of 1950, which proposed the creation of a steel and coal community, to the signing of the EEC and Euratom Treaties in 1957, Haas presented evidence of spill-over resulting from the interplay of competing interests.

Even though the establishment of the EEC and Euratom Treaties seemed to confirm the neofunctional spill-over assumptions, the development of the European Communities has put many of the arguments of that theory in question. Although, such a reorientation seemed to be taking place, Lindberg came to the conclusion that the majority of interest group activity remained geared towards national goals.[15] One reason could be that these groups found it easier to turn to national solutions instead of attempting to achieve a transnational consensus on general policy issues, as distinct from an agreement on technical matters. When it comes to general policy issues, it has been easier for interest groups to operate at national level by pressurising their national governments. It is natural that the Member States of the EC will attempt to be present in Brussels with a coherent national position rendering therefore difficult any influence by interest groups operating at the supranational level.

Neofunctionalism was heavily criticised by most federalist thinkers. They felt that a Common Market strictly based on the

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15. L. N. Lindberg, "The Political Dynamics of European Economic Integration", (Stanford University Press, 1963).

economic level would never, despite Haas' predictions, grow into a political community. The so called spill-over effect was considered a myth. There could be no automatic shift from the economic to the political field.

In the end, notwithstanding the fact that neofunctionalism is a rather sophisticated theory, its major drawback is that it is "exclusively concerned with the dynamics of regional integration, not with the political community which is its outcome".[16]

Federalism, as described above, concerns itself with a specific type of legal and institutional framework. Neofunctionalism analyses the manipulation of the focus of popular sovereignty in order for a transfer from a national to a supranational government to be achieved. This process is automatic, once started, but the initiation by the national government, which is the original carrier of popular loyalty, is necessary. In contrast to both the above mentioned approaches the transactionalist one concerns itself with the conditions necessary to promote and maintain a sense of community among the population of a certain region.

The founding father of this theory is Karl Deutsch,[17] who has used the logic of cybernetics for the study of regional integration. Its basic premise is that the only way of achieving mutual relevance and responsiveness that distinguish organised groups from random formation of individuals, is communication. Integration is conceived as a process of strengthening the cohesion of such

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16. D. Elazar and I. Greilsammer, " Federal Democracy: The U.S.A and Europe Compared. A Political Science Perspective" in "Integration Through Law" Book 1, M. Cappelletti, M. Seacombe, J. Weiler eds., (Berlin, Walter de Gruyter, 1986) Volume 1.
17. K. Deutsch, "Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience" (Princeton, Princeton U.P., 1957).

transnational groups. As the flow of transactions between these groups intensifies, a mutual interdependence among the groups and the political actors occurs that promotes an integrative process. A sense of community might this way be created, a "community of security" as Deutsch called it. There are two types of such a community. The amalgamated community, which includes, confederate, federal and unitary states and is formed by a merger of two or more previously independent societies, and the pluralistic community, where the governments remain independent but initiate some forms of co-operation. When it comes to the practical level the application by Deutsch of his theory in the European context reached a result away from amalgamation and closer to a form of pluralistic society,[18] a disappointing view for the future of European integration.

The theory of transactionalism tends to ignore certain questions of actor perceptions, assuming that these will be reflected by trends in the transactions themselves, and its predictive capability seems to be limited. It considers integration to be more like a process where the incorporation of the necessary elements could be random, as long as they are all there, than a process where the sequence of stages is fixed.

1.3. The American federal experience

The contemporary model of federal democracy is the United States of America. Although the Constitution of 1787, which establishes and regulates this association of states nowhere

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18. K. Deutsch, "France, Germany and the Western Alliance" (New York, C. Scribner's Sons, 1967).

describes it as federal government or mentions the terms "federal" or "federation", federal democracy is clearly an American conception. It draws heavily from religion, specifically from the Puritan idea of "covenant", that eventually developed from the federal theology that was dominant both in the churches and the local governments in colonial America. According to federal theory every relationship, political or other, derives from the original covenant, that was agreed between God and mankind, to be bound together in a union in order to work for the redemption of the world. This is done under the condition that the respective integrities of both sides remain intact in order for their freedom to be preserved. And it can be assumed that to help mankind to connect with Him, God would have to give up a certain amount of omnipotence. Eventually the covenant idea dominated the structure of political and social organisation initially of New England, spreading gradually to every part of America.

The implementation of the theory of federal democracy took place, as soon as the United States became independent in 1776, in as much as there was a definite federal element in the declaration of independence itself since it presupposed certain actions on behalf of the representatives of the states, each state having its own voice. The federal character of the foundation of the United States is further demonstrated by the fact that, simultaneously with the declaration of independence, the transformation of the colonies into states was materialising through the actions of delegates, other than the ones responsible for the Declaration of Independence. Actually, in 1776 eight colonies adopted state

constitutions, four of them even preceded the Declaration.[19] The federation expanded and eventually resulted in what America is now. Alaska and Hawaii joined in 1959 and 1960 respectively. Earlier in 1952 Puerto Rico became the first "free associate state" and in 1976 the Northern Mariana Islands were added under the same status.

1.4. Contrasts in the integrative experiences and American influences in the European integrative attempts

It is not difficult to see from the above, that the process of integration has followed different routes in the two systems under examination. In Europe the decision to come to some kind of union, has been the outcome of the policy of highly developed, established, independent sovereign states. On the other hand the American case is different. There, the model is that of a political entity which was federal almost from the beginning. The result was that in the process of European integration, the issues that have been touched upon and the problems that had to be resolved were quite different from those which confronted the United States. An initial problem the Europeans were faced with was that of the geographic limits of the Union. A number of solutions were there to adopt. The basis for a united Europe could be political, with the inclusion of only democratic regimes. It could be a common cultural framework or an economic one, including states

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19. The adoption of national constitutions of New Hampshire, South Carolina, Virginia and New Jersey predated the Declaration of Independence. Pennsylvania, Maryland, Delaware and North Carolina immediately followed.

with a consistent economic development or a realistic one, with states that would just agree to unite.

Certain attempts have been made to use a common cultural denominator as a foundation for integration in Europe. The French political scientist Andre Siegfried asserted that such a basis indeed existed.[20] He argued that the European cultural identity is the outcome of three distinctive streams, namely Greek philosophy, Roman institutions and conception of law and Christian and Jewish religious traditions, what he called the "European spirit".

The "European spirit" might indeed exist, however it is doubtful whether these traditions could provide a basis for the foundation for European union. In addition, their capacity to prompt by themselves, with the absence of other common features the creation of a large integrated formation is highly questionable.

All these problems were non existent as regards the American states. The basis of the association has never been a problem of such controversy, as in Europe. We saw how the colonies turned into states, how the states united to form a federation and how the federation expanded as other states joined in. Common culture was not a problem either since there was only one. Politically, all the states had similar regimes with only peripheral differences and experience with federal mechanisms and arrangements of some kind. Their economic development was of the same level too. And we should not ignore the fact, that apart from the distinctive traditions the two systems were challenged by different situations. What the Americans had to face was the

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20 . A. Siegfried, "L' Ame des Peuples", (Paris, Hachette, 1950).

size of their own country as compared to its population, a situation unfamiliar to Europe.

Considering the differences in history, ideology, culture and general background which surrounded the founding and evolution of the two systems it has to be conceded that there is a gap between them that it is difficult to bridge. This does not mean however, that the developments in Europe mainly after the end of World War II were not influenced by the American experience. After all the founding of federalism represented a milestone with the inevitable result to have an impact positive or negative on every other integrative plan that followed.

We have seen already that the creation of the European Steel and Coal Community materialised through a neofunctionalist rather than a federalist process. However, the support of the federalist ideals by important personalities with participation in the conception and execution of these documents had as a result the inclusion of clauses with federal characteristics such as Articles 49-50 ECSC Treaty whereby a tax of federal character is imposed by the High Authority directly on coal and steel enterprises, and Articles 164-188 EEC Treaty regarding the Court of Justice, an institution with a lot of federal potential. Influential personalities were not though the only ones that contributed in the spreading of the federal theory. A significant number of pressure groups devoted their activities towards the application of the exact American model to Europe. These groups were international in origin and they were guided by men that had studied, explained and promoted the idea of the American federal democracy. These groups made several attempts to federalise the Community institutions but resistance from inside condemned

them to failure. Another factor, finally, of federal character that influenced the process of European integration was the interest that the Americans themselves demonstrated to assist Europe to get involved in an experience similar to theirs.

1.5. Concluding remarks

It cannot be denied that there is a definite contrast in the integrative experiences between the USA and Europe. Having said that, it is difficult to ignore that the American federal influence has been an important factor in formulating a united Europe. But in the end, can this influence justify a comparison between the two systems, to the extent that occurrences in a specific legal area in the USA, namely the field of human rights protection, should be seriously considered by the Europeans in the further development of relevant protective mechanisms? We submit that indeed that is the case. The fact that Europe and the USA did not integrate in an absolutely similar manner does not mean that in specific legal fields, certain actions would cause different reactions. In the USA, individuals are protected from breaches of their rights both by the federal Bill of Rights and its state counterparts. For reasons which will be examined in the following chapter, a certain pattern has been formulated whereby, in cases of violation, it was, and still is, the federal and not the state bills of rights that become the protective norm. This was felt by some to cause a problem of efficiency in the protection of individual rights. If we suppose that in the context of the European Union a similar plan of uniform protection of human goes ahead, what assurances are there that the same problems will not arise? We submit therefore, that a

comparison between the two systems for the purpose of the present discussion is valid, and that legal developments in certain areas should not be ignored by the Europeans in their attempts to integrate further .

CHAPTER 2

The phenomenon of New Judicial Federalism and its impact on the protection of human rights in the United States of America

2.1. Introductory note

The consideration of the movement of New Judicial Federalism is of major importance to this thesis. The consequences of its emergence and development in the field of the protection of the individual from violations of its human rights by the government have not only become the subject of immense theoretical debate but, most importantly, found the support of a significant part of the state judiciary in the USA. In essence, what New Judicial Federalism advocated, and partially achieved, was a switch as regards the protection of the rights of the individuals from the central, uniformly applied norms of the federal Bill of Rights, to the protective norms of the constitutions of the individual states. The argument was that the uniform protective provisions, and the way they were interpreted by the Supreme Court of the United States, could no longer afford the best protection to the American citizen. In other words, their efficiency had been undermined. What follows is an analysis of the circumstances that led to the birth of the New Judicial Federalism.

The influence it has had on the theoretical as well as the practical level will also be considered. Finally, an evaluation of its future perspectives will conclude this chapter.

2.2. The emergence and development of New Judicial Federalism

When nineteen years ago, Justice Brennan of the Supreme Court of the United States wrote an article in which he invited state courts to "step into the breach"[1] left by what he conceived to be a retreat of the country's highest court from its commitment to protect individual rights, and urged them to seize control of that protection by looking at their own state constitution instead of the federal one as interpreted by the Supreme Court led by Chief Justice Burger, he could hardly have imagined the impact his message would have in the American legal world. This article has been named the "Magna Carta" of state constitutionalism, earning him the title of "patron saint" of state constitutional law and gave birth to the movement of "New Judicial Federalism".[2]

New Judicial Federalism, in legal jargon, describes the growing awareness in the state courts of the United States of America of the importance of state law, specifically state constitutional law, as the basis for the protection of individual rights against violations by the state governments. It depicts the desire of the state courts to become the final arbiters when it comes to

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1. W. J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights"", 90 Harvard Law Review 489, 503 (1977); also W. J. Brennan, Jr., "The Bill of Rights and the States: The Revival of State Constitution as Guardians of Individual Rights", New York University Law Review 535 (1986).
2. The name "New Judicial Federalism" distinguishes this movement from "New Federalism", which was the name given to a legislative program put forward by the Reagan administration.

their citizens' individual rights, by relying on their own law, in this case the state constitution. New Judicial Federalism is based in the assumption that the federal Constitution provides minimum rather than maximum protection of individual rights and liberties and that in appropriate circumstances state courts should apply their own constitutional law to ensure adequate protection of their citizens' rights within the state jurisdiction. Its origins are rooted in the simultaneous occurrences of the liberal reaction to the Burger Court change of jurisprudencial attitude in the 1970s as regards constitutional protection of individual rights, and the dormancy of state courts when it came to the development of vigorous and independent bodies of state constitutional law detached from the character of the jurisprudence of the United States Supreme Court.

It might be helpful to state some principles of the American system of government dwelling a little in history. It is a fact that before the enactment by Congress on September 25, 1789 and ratification by the states on December 15, 1791 of the first ten amendments to the United States Constitution, commonly known as the Bill of Rights, fundamental liberties such as freedom from unreasonable searches and seizures were guaranteed by state constitutional provisions. Moreover, the federal Bill of Rights protected, as legal theory advocated and the Supreme Court of the country decided in 1833 in the case of *Barron v. Mayor of Baltimore* [3] those liberties from federal breach only, rendering the state constitutions guards against encroachments by state governments.

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3. 32 U.S. (7 Pet) 242 (1833).

It was the post-Civil War amendments to the Constitution, namely the Thirteenth, Fourteenth and Fifteen Amendments, which brought about new guarantees of equality and liberty whereby the federal government committed itself to protect citizens against violations by the states. Despite the fact though that the Fourteenth Amendment imposed immediate federal restrictions on state interference, decades passed before these restrictions were actually applied against the states. It was not until 1925 in the case of *Gitlow v. New York*,[4] that the federal Supreme Court declared that the First Amendment guaranteed the freedoms of speech and press against violations by the states and until 1949, in *Wolf v. Colorado*[5], that the Court applied the Fourth Amendment against unreasonable searches and seizures by state officials. The consequence of this jurisprudencial stance of the Supreme Court was, that for almost one and a half century of the history of the United States of America, until *Gitlow* was decided, it was the states' bills of rights and not the federal one that protected citizens in their relations with the state governments.

After *Gitlow* the federal Supreme Court started filling the gaps, by adopting the rationale that because certain parts of the federal Bill of Rights were indispensable to an ordered scheme of liberty, there was reason to encompass them in the Fourteenth Amendment, thereby rendering them applicable to the states. Consequently, the relevant process, described in the legal jargon as incorporation of the Bill of Rights, began. Between 1925 and 1970, but predominantly during the 1960s, the United States Supreme Court led by Chief Justice Warren, by using the

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4. 268 U.S. 652 (1925).
5. 338 U.S. 25 (1949).

Fourteenth Amendment to impose national standards of fair procedure and equal treatment in the states, made the vast majority of the provisions of the Bill of Rights applicable to the state constitutions.

Following the expansion of the federal constitutional guarantees by the Warren Court, the protection of individual rights by the state constitutional provisions lost its usefulness. Not inclined to take the lead, state courts followed the steps of the United States Supreme Court. That was the trend between lawyers, academicians and state court judges. They neglected to examine the state constitutions in order to determine whether it possibly afforded the same or even greater protection. The emphasis was concentrated in the federal government.

Things started to change in the 1970s. The new Judges appointed to the Supreme Court brought with them a more conservative legal thinking. As a result, their decisions as regards federal protection of individual rights reflected this. And that was exactly the incentive for Justice Brennan, writing in the Harvard Law Review in 1977, to observe significant changes, for the worse, in the Supreme Court's attitude towards individual rights. Primarily, he and others detected a retrenchment of the Supreme Court, then led by Chief Justice Burger, from its previous favourable position of protecting the rights of American citizens against both federal and state breaches. Secondly, they saw a deliberate barring of the door to the federal courthouses by means of procedural devices, to limit adjudication of claims against state action. Thus, Justice Brennan urged state courts to look into their own constitutions, and become thereby a new fountain of individual liberties.

This is how the movement of New Judicial Federalism was born. The early literature was mainly devoted to criticising state court decisions for what New Judicial Federalism proponents described as sloppy or inappropriate constitutional decision making practices. These practices included avoiding reliance on state constitutions at all,[6] inadequate interpretation of the latter with the consequence that poor guidance was offered to litigants and judges[7], and finally inappropriately relying on federal rules as tools of construction of state constitutions.[8] As the movement grew, its followers started to argue that state constitutional jurisprudence should be considered as something more than a vehicle for re-litigating individual rights cases lost in the federal courts. An overwhelming consensus has been created within the movement opposing the so-called "reactive" state constitutional jurisprudence, whereby state rulings reject federal constitutional decisions only on the basis of the state court's disagreement with the outcome.[9] Instead, state constitutional law should follow its own particular way on the strength of it being an independent body of law.

New Judicial Federalism supporters use a variety of arguments in favour of state constitutional independence. Some claim historical reasons based on the fact that state constitutions

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6. *See* for example C. G. Douglas, III, "State Judicial Activism-The New Role for State Bills of Rights", Suffolk Law Review 1123, 1144 (1978; S. S. Abrahamson, "Reincarnation of the State Courts", 36 Southwestern Law Journal 951, 957-58 (1982); S. Mosk, "State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow" in "Developments in State Constitutional Law" 201 (Bradley D. McGraw ed., 1985).
7. H. Linde, "First Things First: Rediscovering the States' Bill of Rights"" 9 University of Baltimore Law Review 379, 390 (1980).
8. E. B. Spaeth, Jr., "Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law", University of Pittsburgh Law Review 729,736-37 (1988).
9. *See* for example P. J. Galie, "The Other Supreme Courts: Judicial Activism Among State Supreme Courts", 33 Syracuse Law. Review 731, 779, 786 (1982).

predated their federal counterpart, serving therefore as models for the drafters of the latter and the federal Bill of Rights.[10] Others point to the differences between the state and the federal constitutions and argue that the reason for the creation as well as the differences in text, completely distinguish each one from the rest of them.[11] Additionally, state courts are institutions significantly distinct from the federal courts in both their authority and the way this authority is exercised. These differences necessarily define an independent body of law. Finally, the argument is put forward that a vigorous and independent body of state constitutional law is not only contemplated but demanded by the American federal system. In a federal structural framework the constituent entities are supposed to act as counterweights to the central power, an arrangement designed to protect liberty. A strong, independent state constitutional jurisprudence is a necessary aspect as well as a condition of a healthy federalist construction.[12]

State constitutionalism has developed to the point where different methods of analysing constitutional claims have emerged. The models that are proposed have generally been identified as the primacy, the interstitial and the dual sovereignty ones.

The primacy model, most eloquently supported by Justice Hans Linde of the Oregon Supreme Court has also been called the self-reliant approach.[13] It considers the state constitution as an

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10. *see* note 7.
11. B. Newborne, "Forward: State Constitutions and the Evolution of Positive Rights", 20 Rutgers Law Journal 881, 893-901 (1989).
12. S. S. Abrahamson, "Homegrown Justice: The State Constitutions" in "Developments in State Constitutional Law" at 306, 314.
13. This method has also been supported by Abrahamson, Douglas, Folk, Collins and other distinguished judges.

independent source of rights and relies on it as the predominant, fundamental law. Because under this model federal law and analysis are not presumed correct, even when a developed federal precedent or doctrine is available, state courts are urged to examine the state provisions and the state history, doctrine, text and structure first. Only if the result sought falls below the standards set by the federal Constitution should the state court decide the case on the basis of the federal law. The state courts have an obligation to look into their own constitution the way the United States Supreme Court would with the federal document. According to the primacy model then, federal law is limited to a secondary position.

The interstitial model[14] dictates that the state courts should recognise the federal doctrine as being the minimum protective provision and inquire whether the state constitutional provisions could supplement or amplify the federal rights. It advocates that state courts should look into the federal constitution first and only if the federal document approves the challenged state action or is ambiguous should the state court turn to the state constitution. The most articulate defender of this approach is Justice Stewart Pollock of the New Jersey Supreme Court.[15] The advantage of this approach lies in its acknowledgement of the role of the United States Constitution as the basic protector of individual rights and consequently to the placement of the state constitutional law in a more modest position than the one the primacy model advocates.

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14. "Developments in the Law: The Interpretation of State Constitutional Rights", 95 Harvard Law Review 1324, 1330-1331 (1982).
15. S. G. Pollock, "State Constitutions as Separate Sources of Fundamental Rights", 35 Rutgers Law Review 707 (1983).

Finally, the dual sovereignty model analyses both the state and the federal constitutions. For many years this was the approach of many state courts. The tendency was, however, that state courts, after this initial analysis, simply applied the federal construction to the state constitutional provisions. In recent years though, some courts have developed a state constitutional analysis that is independent from the federal one, without at the same time ignoring the federal counterparts. Simultaneous evaluation of both state and federal provisions is the feature of courts applying the dual sovereignty model, even when the decision rests firmly on state grounds.[16] This kind of analysis reflects the policies of the American federal system by making available to the citizens the whole spectrum of protection that both levels of government have to offer.

Mention should also be made, to a certain method of interpretation of state constitutional provisions which discourages the development of an independent state analysis. When state courts, in situations where litigants raise both federal and state constitutional claims, hold that the analysis and the result are the same under both constitutions on the facts of the case, then the two documents have been interpreted in what is called "lockstep".[17] The lockstep approach is seen as anathema by the proponents of New Judicial Federalism and as a blessing by its opponents. It discourages litigants from making clear state constitutional arguments because in the end, even where the wording of the two provisions is not similar, the court will nevertheless look into the

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16. R. F. Utter, " Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds", 63 Texas Law Review 1025 (1985).
17. *See* note 1, at 550-551.

federal law for guidance and apply an analysis used by federal courts under the federal Constitution.

The proponents of New Judicial Federalism were encouraged, in 1983, by the United States Supreme Court by means of its judgement in the case of *Michigan v. Long*.[18] There the Court reformed its prior rulings as regards the doctrine of adequate and independent state grounds, according to which it would not review a state court decision based on state grounds even if the state decision also rested on federal law grounds, for which a federal appeal would normally be available. It said that, because state law is unreviewable by federal courts, a Supreme Court decision on the federal issue could not affect the outcome of the case and would, therefore, simply be an advisory opinion beyond the Court's jurisdiction. Therefore, the Supreme Court now requests that the state courts say explicitly when their decisions rest on state grounds if they want to insulate their decisions from federal review. The importance of this decision then for the future of state constitutionalism can easily be comprehended.

New Judicial Federalism, however, also has fierce opponents. They consider this movement to be a vehicle through which a bunch of liberal judges and academics are attempting to promote their personal ideas about federalism. The number and variety of arguments put forward is indeed abundant. The most common reference regards the infrequency of decisions by the state courts based on the state constitutions. Even when the state courts attempt to do so, they usually fail to specify whether the ruling was based on the state or the federal provision. This may be due to the fact that the federal and the state documents have been

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18. 463 U.S. 1032 (1983).

interpreted as having the same meaning, the "lockstep" analysis, discussed above. The opponents of New Judicial Federalism have even reached the point of considering it a danger to the fundamental values of the American federalist structure.[19]

In the end, those who argue in favour of New Judicial Federalism seem optimistic about the prospect of the movement. They base this optimism on the fact that state courts have decided more than five hundred cases so far relying on state constitutions as opposed to the federal document. A large amount of state constitutional law literature has emerged with titles such as "reincarnation", "revival", even "revolution".[20] A new journal called "*Emerging Issues in State Constitutional Law*", has even been established to provide a forum for such commentary. Whether such optimism is justified is a question that has no easy answer. The literature on the New Judicial Federalism puts forward a dual argument for the state court judges to develop state constitutional law. The first one is to avoid conservative federal judicial rulings and pursue liberal decisions instead. The second one is to enhance the existing system of judicial federalism without taking substantive results into consideration. A number of studies has been undertaken as an attempt to discover whether state courts faced up to those challenges. It is useful to consult the most influential ones.

One of the most comprehensive is the survey conducted by Barry Latzer,[21] in which almost every state high court criminal

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19. J. A. Gardner, "The Failed Discourse of State Constitutionalism", 90 Michigan Law Review 761, 827 (1992).
20. *See* for example A. E. Dick Howard, "The Renaissance of State Constitutional Law", 1 Emerging Issues In State Constitutonal Law 1, 12-13 (1988).
21. B. Latzer, "The Hidden Conservatism of the State Court "Revolution"", 74 Judicature 195 (1991)

procedure decision was analysed. It must be indicated in the first place, that this study has certain limitations, the most important of which is its confinement to criminal justice cases, omitting state constitutional rulings on issues such as freedom of speech, religion, abortion and race discrimination. This is justified by the argument that criminal cases constitute the majority in state court workload and for this reason are good indicators of state court activism. The author himself concedes though, that, if decisions in these areas were taken into consideration, a different picture of New Judicial Federalism would emerge. The method used for the study dictated the collection of all of the state high court criminal procedures cases between the late 1960s and the end of 1989. The cases then were grouped by state, and within each state, by conformity or non conformity with the U.S. Supreme Court. Florida and California were treated differently from the rest of the states because of the anti-exclusionary rule amendments to their respective constitutions.[22] Latzer's findings indicate, in the first place, that state supreme courts based relatively few of the examined decisions on their own state constitutional provisions. Only slightly more than one in five decisions (22%) relied on state law. Out of these decisions, 98% defer to precedents established by the U.S. Supreme Court. Additionally, even when state courts based their decisions in state constitutional law, the latter provisions were not developed enough to became viable alternatives to federal law. Almost three quarters (70%) of the decisions that are based on state law rely on state court precedents, and of these decisions, fewer than a third are based on state constitutions, statutes, or

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22. Cal. Const. art 1 para. 28(d); Fla. Const. art. 1 para. 12.

common law doctrines.[23] These findings indicate, according to Latzer, that state supreme courts were not committed, at least during the first years of the movement of New Judicial Federalism, to developing state law.

Two useful studies were conducted by Fino. In the first one, all the decisions of six state high courts for the year 1975 were analysed.[24] She found that only 17% of all the cases dealing with state constitutional matters were decided on the basis of state constitutional law. This percentage fell to 8% when issues of criminal procedures were involved.[25] In the second one, constitutional issues that raised equal protection claims before the 50 state supreme courts between 1975 and 1984, were considered. It was found that fewer than 7% of all cases were decided on state constitutional law, a percentage that dropped to 5% for criminal cases raising equal protection claims.[26]

Emmert and Traut, in an important study which considers the full range of decisions of the state supreme courts, found[27] that, between 1981 and 1985, not more than 16% of all state supreme court cases that involved state statute challenges were decided on the basis of state law. [28] In order to come to this conclusion, the authors grouped the 50 state supreme courts into four categories depending on the percentage of their decisions which relied on federal law. The courts that based at least half of their decisions on state law were characterised as "highly support-

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23. Latzer, *see* note 21, at 28.
24. Fino, "The Role of State Supreme Courts in the New Judicial Federalism" 70 (1987); Fino, "Judicial Federalism and Equality Guarantees in State Supreme Courts", 17 Publius 53 (1987).
25. Fino, The Role of State Courts, *see* note at 142.
26. Fino , Publius, *see* note 24, at 6.
27. Emmert and Traut, "State Supreme Courts, State Constitutions, and Judicial Policymaking", 16 Justice System Journal 44, Table 2 (1982).
28. *Ibid* at 44.

ive". Eight state supreme courts (16% of the total) fall in this category. These were the courts of Alaska, New Jersey, New York, Texas, South Dakota, Tennessee, Florida and Arkansas. Surprisingly enough, the courts of California, Oregon and Washington which are considered leaders in state constitutional jurisdiction were not included in this category. "Moderately supportive" courts based less than half, but more than one-fourth of their decisions on state law. Eleven courts (22% of the total) fall in this category. As courts of "low support" were classified the ones that based no more than one-fourth of their decisions on state law. Seventeen courts (34% of the total) fall in this category. Finally, as courts of "zero support" are described the ones that did not rely on state law in any of their decisions. Fourteen courts (28% of the total) fall in this category. It becomes evident, that most of the state supreme courts, do not often rely on state constitutional law.

Finally, one last study to be mentioned is the one conducted by James Gardner, a fierce opponent of New Judicial Federalism, as a part of an article that caused a lot of theoretical controversy.[29] He examined the decisions of the highest courts of a sample of seven states, namely New York, Massachusetts, Virginia, Louisiana, California, Kansas and New Hampshire. This selection was justified by reasons of size, age, history and continuity of constitutional traditions. The survey was also limited chronologically, since it considered cases decided during a single year, 1990. In total, Gardner claims to have examined a total of more than 1200 cases. His first observation is that state courts construe

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29. *See* note 19.

their state constitution with remarkable infrequency.[30] He then, by using as an example cases decided in the New York courts, discovers a general unwillingness among state supreme courts to engage in state constitutional legal analysis.[31] Additionally, obscurity concerning the basis of the rulings as well as silence on state constitutional history and adherence to lockstep analysis further contribute, according to Gardner, to the failed discourse of state constitutionalism.[32] Having arrived at these conclusions, Gardner reluctantly admits that there are exceptions, and these consist of state courts that actually diverge from federal law and engage frequently in true independent analysis of their state constitution. Surprisingly enough, these exceptions concern four out of the seven states he uses as his sample, namely New Hampshire, Louisiana and New York and to a large extent California.[33] Despite that, one of Gardner's final conclusions is that state courts by and large have shown little interest in contributing to the formulation of an independent body of constitutional law.[34]

2.3. Concluding remarks

It has to be admitted, that the conservatism of most state political systems as well as legal and institutional barriers do not favour the widespread development of state constitutional law. The fact that four out of five decisions decided by state supreme courts rely on federal law is a testimony to that. Having said that, the movement towards increased development and reliance on

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30. *Ibid* at 780.
31. *Ibid* at 781.
32. *Ibid* at 785, 793, 789.
33. *Ibid* at 795, 799, 800, 801.
34. *Ibid* at 804.

state constitutions is still young and the supporters of New Judicial Federalism have reason to be optimistic for the future. Established institutional and legal barriers might not fall easily but they are not immutable. Law journals and other publications as well as the inclusion of state constitutional courses in law curricula can play an important role in the promotion of the ideas of New Judicial Federalism. If courts continue to produce more state constitutional law and insist that lawyers actually use the state constitutional rulings in the cases they present, as they are expected to do in the late 1990s, other state courts might follow. When courts in particular states base more decisions on state law, other claims based on state law could be put forward. Therefore, it could be the case that institutional pressures play a crucial role in developing principles of state constitutional law.

CHAPTER 3

Efficiency of protection of fundamental rights in the European Community and the United States of America.

3.1. Introductory note

This chapter will concentrate on the concept of efficient protection of fundamental rights and individual liberties in the two formations under examination. In order to do so, it will consider the whole spectrum of the available protective mechanisms for the citizen that regulate the relevant area, both at the national and European level for the EC, and at state and federal level for the USA, and test them for their compliance with the efficiency criteria, as defined in the introduction to this thesis. Following that, it will try to offer an opinion on why one efficient measure is preferred over another which was also deemed to be efficient. It should be remembered, that a norm or set of norms will classify as efficient if they achieve an adequate and sufficient remedy which is based on legal norms and is provided by a court of law. Among the norms that will be considered for their compliance with the efficiency criteria, albeit briefly in this instance, are the uniformly applied protective norms for each formation, namely the European Convention of Human Rights and the Bill of Rights of

the American Constitution. The outcome of this specific part of the analysis will be important in deciding whether the uniformly applied norms for each formation can be a part of the mechanism of the efficient safeguarding of the rights of the individual. Initially the situation in Europe will be looked at. Following that, the attention will be focused on the relevant area in the USA.

3.2. Efficiency of protection of fundamental rights in the European Community

When considering the protection of fundamental rights in general, the initial question that has to be answered is whether the classical fundamental rights have been subjected to any process and evolution. The basic concern of fundamental rights has always been the protection of individuals from inappropriate intrusion by state authority in their personal autonomy.

It has to be noted, in the first place, that the term "fundamental rights" does not include social fundamental rights. According to Van Boven "fundamental human rights" should be distinguished from "other human rights".[1] The former represent rights which lie at the foundation of the international community, are backed by a real consensus and are valid under all circumstances, irrespective of time and place with no possibility for derogation. The latter represent disputed rights, certain programmatic social and economic rights, as well as collective rights and are not included in the classic catalogue of fundamental rights. It should be noted that the catalogue of the French Declaration of

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1. T. C. Van Boven, "Distinguishing Criteria of Human Rights' in K. Vasak (Ed.), "The International Dimensions of Human Rights" (Greenwood Press, Westport/Unesco, Paris, 1982) pp. 43-59.

1793 included public welfare as well as the duty of society to support those who needed help, something that led to the incorporation of the rights to work and social protection in numerous constitutions. On the other hand, social fundamental rights have been mentioned sporadically in western constitutions. The reason for that seems to be that their protection has been ensured outside the catalogue of fundamental rights, both at national and international level.

There are indications, however, suggesting that the consideration of fundamental rights is nowadays more strongly connected to overall democratic demands than it used to be. In a discussion of the protection of fundamental rights in the EC, the consideration of this tendency is necessary. Should only the classical fundamental rights be protected and strengthened or should social and democratic rights enjoy such privileges? There are strong arguments for both positions. This discussion, though, will be conducted from the point of view of the former. The reason for that has to do with both the limited capability of social and democratic rights to be formulated in a clear and unequivocal manner, and their limited susceptibility to direct application and enforcement by the courts.

The limiting of the state authority by means of fundamental rights is one of the most important achievements of the modern constitutional state. The differences in traditions and the influence of history have contributed to the variations of protection of fundamental rights from state to state. Both at national and international level, the efficiency of the protection of human rights is a major concern. One of the areas where these aspects have been discussed is EC law.

Despite the fact that the Treaties of the European Community contain individual provisions and make reference to the protection of the rights of the individual, no collective protection of all fundamental rights exists. That, of course, does not mean that the fundamental rights of the EC citizens remain unprotected. Protection is provided by the legal systems of the Member States as well as in international law, in particular the European Convention on Human Rights. Additional protection is afforded by means of the already existing written Community law and the decisions of the Court of Justice. The question, though, that has to be answered is whether the above mentioned remedies can safeguard the rights of the individual within the EC, in the absence of a catalogue of fundamental rights. In other words, is the protection of the fundamental rights of the EC citizen efficient? In order to attempt to provide a solution to the dilemma it is suggested that an analysis of each of the available protective mechanisms mentioned is conducted. Initially, the remedies available to the Community citizen at the domestic level will be considered. It is suggested that the analysis should consider both remedies available in the national law of the Member States, as well as those available in the field of Community law. Within this context, the issue of the judicial protection against action by the Community itself will be dealt with separately, since its particular characteristics seem to differentiate it from the other forms of protection. It will then be followed by an analysis of the available protective measures as regards fundamental rights at the European level, with specific mention of the European Convention on Human Rights.

3.2.1. Efficiency of protection of fundamental rights of the European citizen at the national level

3.2.1.1. The domestic law of the Member States

One initial remark that has to be made, is that the consideration of fundamental rights in all Member States has inevitably been influenced by the historical development of fundamental rights as well as by an understanding of them as rights protecting the individual against undue infringements by the state. In the United Kingdom for instance, the experience of centuries of constitutional struggles has a continuing effect in the field of fundamental rights. In France, the contemporary guarantee of fundamental rights in the national Constitution is closely linked with the French Revolution, by references to the Constitution of 1946 and the Declaration of Human and Civil Rights of 1789. The provisions in the constitutions of other European states, such as the Belgian Constitution also, date back to the first half of the last century. Constitutional re-formulations of fundamental rights, as in Germany, Italy and Luxembourg, contain as a rule, no fundamental changes compared with the past. It could be said, overall, that in terms of constitutional history the protection of fundamental rights within the Member States of the European Community demonstrates similar concepts and basic structures.

In the Member States, the protection of fundamental rights is judicially secured to different degrees. All European states accept the principle of judicial control as regards the legality of executive action. Some states are in favour of the position that administrative acts can only be challenged in court in the cases pro-

vided for by law. This is known as the principle of enumeration. Other states provide for judicial review of all executive actions by means of a general provision. The judicial control of the executive, taken with the requirement of legality in administrative action, seems to be in principle undisputed and a common element in the legal thinking in the Member States. This is not the case, however, when it comes to control over the legislature in relation to respect for fundamental rights. The theoretically absolute power to review legislation of the Bundesverfassungsgericht in Germany differs from the position in other states, where the courts are bound constantly by the law and have no right to contradict its constitutionality. This is the position under UK constitutional law as well as in the Benelux countries and France. In Italy, contrary to the above, the Corte Costituzionale is a court of final instance that also controls in an effective manner what the Parliament does.

There are more differences in the way that fundamental rights are protected in the Member States. The United Kingdom does not possess a list of fundamental rights at all. Protection of particular rights must be based on various instruments, statutes and recognised principles of law. In France consideration must be given, apart from basic constitutional provisions, to the Declaration of Fundamental Human and Civil Rights, the fundamental laws and the general principles of law, evolved mainly by the Conseil d'Etat. The rest of the Member States have also a comprehensive list of fundamental rights in their constitutions. A complete examination of the separate catalogues of fundamental rights of all the Member States would certainly be more indicative of the different situations, but this is a huge task and is outwith the limitations of this study. In general, though, it can be said that

certain rights such as freedom from arbitrary arrest, freedom of expression, freedom of communication are, as a rule, guaranteed. When the rights of the individual are likely to conflict with the interests of the community, the discretion to the legislature to elaborate, is greater. That can be achieved either under an express provision in the catalogue of fundamental rights or under a general power of the legislature to draw the line in a manner exempt from judicial control between the individual and the interests of the community. This is the case, for instance, for the protection of property, where no legal system can dispense with some provision for expropriation, and the freedom of trade and occupation, which can not have the same general meaning for every occupation, and which is closely linked to the economy of the relevant state.

Can it then be said that the fundamental rights of the citizens of the Member States of the EC are efficiently protected at the domestic level? It is safe to suggest that this is so. The criteria of efficiency set earlier are, in this occasion, complied with. All the Member States, possess mechanisms, usually in the form of lists of the rights guaranteed, which ensure that adequate and sufficient remedies are provided for their respective citizens by a court of law. The fact that the protection of fundamental rights has been secured in different degrees in the Member States does not detract from the fact that these rights are, at the domestic level of the Member States, efficiently protected.

3.2.1.2. The Treaties of the European Community and the Court of Justice

As is known, there is no catalogue of fundamental rights in the treaties relating to the EC. This, however, does not mean that in the framework of Community law the rights of the individual remain unprotected. Various EC provisions exist which cover nearly every area of economic life. Thus, the prohibition of discrimination between Community citizens because of their nationality is part of the basic principles of the Treaties, as presented in Articles 7, 40, 45 and 95 of the EC Treaty. The provisions on competition (Articles 85 *et seq.*), deal with prohibitions of discrimination, having, thus, an impact on the principle of equality. The provisions of Article 48 *et seq.* and 52 *et seq.* and 59 *et seq.* on the freedom of workers, establishment and services respectively, deal with the freedom to practise a trade or occupation. Article 119 advocates equal pay for men and women dealing, thus, with an extremely important problem touching upon fundamental rights and the relations between individuals. In addition, Article 220 providing for negotiations to secure for Community citizens equality of treatment in other areas and Article 222, whereby the Treaty shall not prejudice the rules in Member States governing the system of property ownership, should also be considered.

A discussion of the issue of the protection of fundamental rights in EC law, must inevitably consider the relevant jurisprudence of the Court of Justice. The way the Court has handled the

problem has been the object of many studies[2] and the background is well known. Despite the fact that proposals for insertion of a provision guaranteeing fundamental rights were turned down when the EC Treaties were drafted,[3] the Court has incorporated certain aspects of the protection of fundamental rights as general principles of EC law. The reason for that was the attitude of the Constitutional Courts of Italy and Germany, which suggested that they might at a certain point put their national human rights legislation above EC provisions.[4] In the *Stauder* case the Court decided that "...the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court". In the *Second Nold* case[5] the Court went as far as declaring that:

"In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those states. Similarly, international treaties for the

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2. N. Foster, 'The European Court of Justice and the European Convention for the Protection of Human Rights' HRLJ (1987) 245; J. Weiler, "Eurocracy and Distrust: Some Questions Concerning the European Court of Justice in the Legal Order of the European Communities" Washington Law Review (1986) 1103-42; M. Mendelson, 'The European Court of Justice and Human Rights' YEL (1981) 121.

3. L. Betten, 'The Right to Strike in Community Law" (Amsterdam, Elsevier Science Publishing 1985).

4. Frontini case (No. 183) Corte Costituzionale 27 Dec 1973 (1974) 2 CMLR 386; German Handelgesellschaft case Bundesverfassungsgericht 29 May 1974 (1974) 2 CMLR 551. This danger appeared not to apply to Germany as a result of the Solange II decision of 22 Oct 1986 Re Wünsche Handelgesellschaft (1987) 3 CMLR 225, where the Constitutional Court declared that as long as the protection of human rights in Community law was considered adequate by German standards, it would not review secondary Community legislation for compatibility with German human rights provisions. Recently, however, the Constitutional Court seemed to return to its previous attitude when in its Brunner decision [Brunner v E. U. Treaty (1994) 1 CMLR 57] , it said that at a certain point it would put the German human rights legislation above the EC provisions.

5. Case 4/73 Nold v Commission (1974) ECR 491.

protection of human rights on which the Member states have collaborated or of which they are signatories, can supply guidance which should be followed within the framework of Community law."[6]

Another important case which came before the Court was the *Hauer* case[7]. There the Court dealt with the right to property. It stated that such a right is protected in the Community legal order. The Court also referred to Article 1 of the First Protocol to the European Convention on Human Rights. The Court has also referred in other cases regarding the right to an effective remedy,[8] to the European Convention and Constitutional traditions common to the Member States.

In two later cases the Court reiterated its intention to ensure the protection of fundamental rights and draw its inspiration both from constitutional traditions common to the Member States, as well as from international instruments concerning human rights on which the Member States have collaborated or of which they are signatories. It continued:

"The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of these rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate

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6. Case 4/73 (1974) ECR 491 at 507.
7. Case 44/79, Hauer v Land Rheinland-Pfalz (1979) ECR 3727.
8. Case 222/84, Johnston v Chief Constable of the Royal Constabulary (1986) ECR 1651.

and intolerable interference, impairing the very substance of those rights."[9]

The Court then imposed an obligation on the Member States to interpret the EC regulation in such a way as to ensure that the protection of fundamental rights in the Community legal order is ensured. According to the Court there is a large margin of appreciation left by the regulation for its appropriate application by the national authorities.

It should be noted that this formulation of the Court of Justice has sometimes caused adverse reactions by the courts of the Member States. The Irish Supreme Court, for instance, declared in its decision in the *Grogan* [10] case that it could not put the freedom to provide/receive services provided for by Article 59, as interpreted by the Court of Justice, above the right to life as protected in the national legal order.

One remark that has to be made, is that the Court does not consider the European Convention on Human Rights to be the absolute authority on fundamental rights, as it was made clear in the *Hauer* case. There the Court mentioned Article 1 of the First Protocol of the European Convention on Human Rights which protects the right to property but it seemed to be more interested in the rules and practices in the Member States. The Court also referred to its decision in the *Nold* case, where the fact that the freedom to pursue trade or professional activities is a fundamental right protected in the Community legal order was confirmed. The importance lies in that this right is not included in the

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9. Case 5/88, Hubert Wachauf v Federal Republic of Germany (1989) ECR 2609. Also Case 265/87, Hermann Schräder HS Kraftfutter GmbH and Co. KG v Hauptzollamt Gronau (1989) ECR 2237.
10. SPUC v Grogan (1990) 1 CMLR.

European Convention. This demonstrates that the protection of fundamental rights in the Community is capable of going further than that afforded by the European Convention on Human Rights.

When it comes to the status of the European Convention in the Community legal order, it can be considered as supporting the general principles of law which can already be found to exist in the constitutional traditions of the Member States. The development of fundamental rights within the Community has not been dependent on the European Convention. Parties to an action cannot be sure how a claim based on a provision of the Convention will be handled by the Court. A clearer position as regards the status of the European Convention in the EC would promote legal certainty to the benefit of all the interested parties. The question that has to be asked is, whether this is going to be achieved through the decisions of the Court of Justice or through other means.

The Court of Justice itself does not seem to wish to clarify the situation. In its Opinion of March 28, 1996,[11] at the request of the Council of the European Union for an opinion on the accession of the EC to the European Convention of Human Rights, the Court declared that the Community has no competence to accede to the European Convention, as Community law now stands. This opinion of the Court means that the status of the European Convention remains unchanged within the EC legal order. At the same time the questions regarding its usefulness are left unanswered.

Are the fundamental rights of the EC citizen, then, efficiently protected at the Community level? In the absence of an express catalogue of fundamental rights in relation to EC, it would seem

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11. Opinion 2/94 (1996) ECR I-1.

that one of the conditions of efficiency, as defined earlier, that of the existence of legal norms on which a sufficient and adequate remedy is based, is not met. It is suggested, however, that the use by the Court of Justice of the general legal principles of the Member States and of international treaties, remedies this problem. These norms are more than able to regulate issues of fundamental rights. Therefore, taking into consideration that within the EC context a court-the Court of Justice-can provide adequate and sufficient remedies based on legal norms-the general legal principles of the Member States and of international treaties- it can be assumed that the EC citizens are efficiently protected at the Community level.

3.2.1.3. Protection of fundamental rights against action by the European Community

One remark that has to be made, in the first place, is that an infringement of fundamental rights by the EC or its agents is more a theoretical than an actual problem. The vast majority of fundamental rights lie outside the fields in which the EC operates, because the sovereign powers of the EC are limited to specific subjects. Most intrusions of fundamental rights are more likely to be made by the states than by the EC. However, the powers of the EC are constantly increasing and they tend to cover fields where fundamental rights come into play. There have been occasions, in practice, where citizens have claimed before the European Convention authorities that their fundamental rights have been infringed by the EC. In 1977 the French Union CFDT argued that its absence from the Consultative Committee of Article 18 of the

ECSC Treaty was an infringement of Article 11 of the European Convention on Human Rights.[12] In the cases of *Dufay*[13] and *C. M. & Co* [14] a breach of the right to a fair process, incorporated in Article 6 of the European Convention, was alleged. Nevertheless, it has been a common practice that whereas scrutiny as regards measures for human rights compliance can take place either at national level or under the European Convention machinery, action taken by EC organs can only be reviewed by the European Court of Justice. The European Commission of Human rights has rejected applications against the Community stating that the Community is not a party to the Convention.[15] Claims directed against the Member States jointly and the individual Member States have also been dismissed.

The only case that almost succeeded before the European Commission of Human rights, was actually the one by Ms Dufay mentioned earlier.[16] This case was declared inadmissible for non-exhaustion of domestic remedies.

Frowein is not very optimistic as regards the possibility of the Community being brought before the European Court of Human Rights:

"One may conclude that the European Community is, at present, not subject to the control of the supervisory organs set up by the European Convention on Human Rights. The responsibility of individual Member States under the Convention for acts of the

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12. Confédération Française Démocratique du Travail (CFDT) contre Communautés Européennes, nr. 8030/77, DR 13, p. 231.
13. Dufay contre Communautés Européennes, Application No. 13539/88.
14. C. M. & Co. v Federal Republic of Germany, Application No. 13258/87, Council of Europe Press Communiqué C (90) 19, of 13 Feb. 1990.
15. Re the European School in Brussels: D v Belgium and the European Communities (1986) 2 CMLR 57.
16. *See* note 13.

European Community could be engaged only in rather exceptional cases. It does not seem likely that this gap could be bridged by the jurisprudence of the European Convention of Human Rights."[17]

Consequently, it is the Court of Justice which is exclusively responsible for the safeguarding of the fundamental rights of the individual from breaches by the EC. The Court has examined the action of the Community organs with the rights incorporated in the European Convention, staff regulations and fundamental rights existing in EC law. Of particular importance here is the Joint Declaration of the European Parliament, the Council and the Commission of April 5, 1977, that stresses the importance which these institutions attach to fundamental rights as found in the constitutions of the Member States and the European Convention on Human Rights. That does not mean however, that the Court of Justice does not offer any protection at all against the action of Community institutions. In a 1987 judgement[18] the Court went beyond the Constitutions of the Member States and the European Convention and incorporated the right for a company not to incriminate itself in questioning by the Commission, even though this right existed neither in the constitutional orders of the Member States nor in any international instrument.

The European Convention has been mentioned by the Court of Justice as well in cases dealing with questions of religious discrimination, (Article 9),[19] due processes (Article 6),[20] and

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17. J. A. Frowein, S. Schulhofer, and S. Shapiro "The Protection of Fundamental Human Rights as a Vehicle of Integration" in M. Cappelletti, M. Seccombe and J. Weiler (eds.) "Integration Through Law: Europe and the American Federal Experience", (Berlin, Walter de Gruyter, 1986) Volume 1.
18. Case 374/87, Orkem v Commission (1989) ECR 3283.
19. Case 130/75, Prais v Council (1976) ECR 1185.
20. Case 209-215 and 218/78, Landewyck et al (1980) ECR 3125; also cases 100-103/80, Musique Diffusion Française v Commission (1983) ECR 1825.

invasion of privacy under Article 8.[21] Attention should be paid to two specific cases. In the *Fedetab* case[22] the EC Commission was accused of infringing Article 6(1) of the European Convention which protects the right to a tribunal for the determination of one's civil rights and obligations. The Court rejected the argument arguing that the Commission was not a tribunal. However, closer examination of the case-law of the Court of Human rights would have demonstrated that if the disputed right is a civil right, then the Member State is obliged to ensure that a tribunal is available. Whether the body already responsible is a tribunal or not, is irrelevant. The other case is *Hoechst AG v Commission* [23] where the plaintiff company argued that the Commission, by carrying out a search of its premises, invaded its privacy and accordingly breached Article 8 of the European Convention. The Court of Justice pointed to the divergences in the Member States concerning protection of fundamental rights in connection with commercial premises, and denied the protection of Article 8 of the European Convention to Hoechst AG. This decision could be open to criticism, as in an earlier case[24] the European Court of Human Rights, albeit without discussing whether strictly commercial premises were covered by Article 8, considered that the case did fall within Article 8.

In order then for the situation to be clarified, closer co-operation between the two Courts is required. However, the differences in approach are obvious. This is natural, since the one Court is charged with furthering the objective of the Community when

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21. Case 136/79, National Panasonic (1980) ECR 2033.
22. Cases 209-215 and 218/78, Fedetab (1980) ECR 3125.
23. Cases 46/87 and 227/88 Hoechst AG v Commission (1989) ECR 2859.
24. Chappell v United Kingdom, Judgement of March 30, 1989, Series A, Vol. 152.

the other is solely concerned with the protection of fundamental rights. The relationship of the two Courts could suffer more drawbacks, after the negative opinion that the Court delivered, at the request of the Council of the European Union, in regard to the accession of the EC to the European Convention of Human Rights mentioned earlier.[25] In the text of the opinion, the observation of the Belgian Government about "...the lack of any personal and functional link between the Court of Justice and the organs of the Convention,"[26] accurately reflects the situation as is at present.

When it comes to the question of whether the EC citizen is efficiently protected from possible encroachments by the Community organs, the answer should be no different than the one suggested earlier in the case of general protection at the EC level. The Court of Justice can provide sufficient and adequate remedies to the EC citizens, in case of breaches of their fundamental rights by the Community organs, by utilising, in the absence of express provisions in the Treaties of the Community, the general principles of the Member States and international treaties.

3.2.2. Efficiency of protection of fundamental rights of the European citizen at the non-national level

For our purposes, it is the European Convention for the Protection of Human Rights and Fundamental Freedoms that is of particular significance. It is indeed considered to be the major contributor to human rights, not only regionally but at a global

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25. *See* note 11.
26. *Ibid*

level. The Convention was first signed in 1950 and is now in force to some extent or another in all the members of the European Community.

More than 450 million persons in Europe, among them all of the citizens of the Member States of the EC, may bring before the European Commission of Human Rights allegations that their rights have been violated. Such applications will be considered by the Commission and well-founded ones will be passed to the Court of Human Rights or the Committee of Ministers of the Council of Europe for a decision on violation.

The guarantees of the European Convention can be regarded as a system complete in itself and comprehending all the important rights of the individual organised convincingly and coherently. It incorporates predominantly the classical rights against particularly grave intrusions by state authority. The list begins with the right to life in Article 2, followed by the prohibition on torture, slavery and forced labour, and the right to freedom from unjustified arrest and imprisonment. These mainly deal with the protection from arbitrary measures of a police state. Article 6 guarantees rights concerning legal proceedings and Article 7 declares that no punishment will be imposed if it is not provided for by law. Article 8 protects the right to respect for the privacy of the individual, which includes postal secrecy (Article 9), the right to free expression of opinion (Article 10), freedom of assembly and association (Article 11) and the right to marry and create a family (Article 12). Prohibitions on discrimination are contained in Article 14. The First Additional Protocol has complemented the rights of the Convention, by adding the protection of property, the right to education and the guarantee of free and secret elections.

The Fourth Additional Protocol guarantees, *inter alia* , the freedom of establishment and the freedom of movement. Most guarantees of fundamental rights in the Convention and the additional Protocols are accompanied by possible derogations. In this regard the respective paragraph 2 of Articles 8 to 10 of the Convention are of special importance.

The proposition then, that state authority is in principle subject to no constraint under international law in relation to domestic acts and its exercise of power in relation to its own nationals is now a thing of the past. To that effect the contribution of the European Convention has been paramount.

To conclude, the question must be asked whether the European Convention can classify as an efficient set of norms for the protection of the EC citizens. It is suggested that the answer should be positive. All the efficiency criteria are met since a court-the European Court of Human Rights-exists, which can provide adequate and sufficient remedies, based on legal norms-the provisions of the European Convention.

3.3. Efficiency of protection of fundamental rights in the United States of America

Following the attempt to tackle the question of efficient protection of fundamental rights and liberties for the European citizen, it is proposed that the same course of analysis is maintained as regards individuals in the United States. American citizens enjoy double protection as far as their fundamental rights and liberties are concerned. This is afforded from the bills of rights that are included in their separate state constitutions as

well as the Bill of Rights which is part of the federal Constitution. What follows is an attempt to demonstrate the means through which this protection materialises. Initially the case of the state constitutions will be dealt with. For the sake of the discussion, specific attention will be paid to the Bill of Rights of a specific state, Texas, as an example of a state bill of rights. The choice of the specific state was random. It simply met the criterion of not being one of the three states analysed later in this thesis, namely Florida, Maryland and New York. Then this discussion will proceed with reference to the protection of individual rights and liberties provided for by the Federal Constitution of the United States.

3.3.1. Efficiency of protection of fundamental rights of the American citizen at state level

Protection of individual rights by a formal constitution starts with the state constitutions, which predate the Federal Constitution. Between 1776 and 1784 each of the original thirteen states adopted its own constitution, which incorporated the principle that individual liberties were to be protected against government action. Formal bills of rights were part of many of the colonial charters and revolutionary declarations and constitutions.[27] During the months preceding independence, uniformity of state constitutions was debated but rejected in order for the states themselves to draw up constitutions appropriate to their particular needs. The realistic answer was diversity.

Historically speaking, state constitutions are extremely significant. They were used as models for the federal Constitution.

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27. J. B. Schwartz, 'The Bill of Rights; A Documentary History" 49-379 (1971).

Strangely enough, the states formed after the drafting of the federal Constitution did not model their constitutions on the federal document. They looked to their individual framework of government or to the constitutions of their sister states. Thus, the Wisconsin Constitution, which is Wisconsin's first and only constitution, was patterned after the New York Constitution, because the Wisconsin Constitution was adopted by a convention in which New Yorkers were prominent. The present Texas Constitution dates back to 1876 and is the eighth constitution of the state. The 1876 Texas constitution was based on the 1845 constitution and the constitutions of other states, particularly Pennsylvania and Louisiana.

State constitutions and consequently state bills of rights are both similar to and different from the federal Constitution. Actually, while there are differences among the states, state bills of rights on the whole are more similar to each other than to the federal Bill of Rights. In order to evaluate the protection afforded as regards individual rights it is proposed examine the provisions of a state bill of rights, that of Texas. It is reminded, that the reason why the specific state was chosen for consideration is simply to provide information on a state bill of rights, other than the ones of Florida, Maryland and New York, which are analysed later in this thesis.

The Texas Bill of Rights appears at the beginning of the constitution as article I and its importance in the Texas constitutional scheme is borne out by several provisions, including article XVII, adopted in 1972. That article called for a constitutional convention in 1974,[28] expressly providing at the same time that "[t]he

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28. TEX. CONST. art. XVII, para. 2(c).

Bill of Rights of the present Texas Constitution shall be retained in full."[29]

Unlike the federal Bill of Rights, its Texas counterpart consists of thirty-three sections,[30] which may be divided into three general categories. Some provisions are identical to the federal ones or very nearly so.[31] Others parallel federal amendments, but use different language.[32] Others, finally, have no parallel at all.[33] Additionally, provisions in other parts of the Texas Constitution seem to be concerned with individual rights and liberties.[34] Whether they should be considered the equivalent of provisions of bill of rights is debatable.

The important issue, though, is how closely the state courts should follow federal precedents in applying their states' provisions. Glancing through the Texas Bill of Rights, it is easy to see the complications. Article I, section 1, which has no actual federal parallel, provides that "Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of he Union depend upon the preservation of the rights of local self-government, unimpaired to all the States." It is important to evaluate the significance of this section. Is it simply rhetoric or is it an argument for taking the Texas Bill of Rights seriously? Is the argument for attaching added meaning to the Texas Bill of Rights not strengthened by Article I, section 29, the final provision of the Texas Bill of Rights, a section that has no federal counterpart?

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29. *Ibid* para. 2(g).
30. TEX. CONST art I.
31. *See* e. g., ibid paras. 9, 25, 27.
32. *See* e. g., ibid paras. 6, 8.
33. *See* e. g., ibid paras. 1, 18
34. *See* e. g., TEX. CONST. art V, para. 10; ibid. art. XVI, para. 49.

"To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."

On the other hand, it could be argued that sections I and 29 do nothing more than declare explicitly what is implicit in the federal constitution. And it is true that little can be gained on this particular point by looking to federal cases.

· Sections 3 and 3a of Article I are analogues of the equal protection clause of the federal fourteenth amendment, but only to a degree. Section 3, entitled "Equal Rights", uses language that is not at all like that of the fourteenth amendment.[35] Section 3a, entitled "Equality Under the Law," is similar to the proposed equal rights amendment, which the states failed to ratify.[36] Texas actually went well beyond the ERA and included "race, color, creed, or national origin" as protected categories in addition to sex.

Article I, section 8, the free-speech provision, has received considerable judicial attention. The language of section 8 differs considerably from the first amendment to the federal Constitution. The Texas version reads:

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35. Compare TEX. CONST. art. I, para. 3 ("All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.") with U. S. CONST. amend. XIV ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").
36. Compare TEX. CONST. art. I, para. 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.") with H. R. J. Res. 208, 92d Sess., Stat. 1523 (1972) (adoption of propose amendment stating that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex"). The Equal Rights Amendment fell short of the thirty-eight states required for ratification.

"Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."[37]

This section can be broken down into several parts. The clause "and no law shall ever be passed curtailing the liberty of speech or of the press" is fairly similar to the first amendment. The second and third sentences, dealing with libels and criticism of government, are consistent with the United States Supreme Court's holding in *New York Times Co. v Sullivan*.[38] These two sentences reflect the early hostility to seditious libel laws evident in many state constitutions.

The first clause of section 8, on the other hand, is very different from the first amendment. The former, unlike its federal counterpart, speaks not of a limitation on government, but of an affirmative liberty: "Every person shall be at liberty to speak, write or publish his opinions on any subject ...."[39] Similar provisions appear in thirty-eight other state constitutions.

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37. TEX. CONST. art I, para. 8. Compare this with the First Amendment's bare "Congress shall make no law ... abridging the freedom of speech, or of the press."

38. 376 U. S. 254, 279-280 (1964) (prohibiting public officials from recovering damages for a defamatory falsehood relating to his official conduct unless he proved that the statement was made with knowledge of its falsity or reckless disregard of whether it was true).

39. TEX. CONST. art. I, para. 8.

Most of the provisions between article I, section 8 and article I, section 14 of the Texas Constitution seem to be parallel to federal provisions, except for the open courts provision[40] and the use of the term "due course of law' instead of 'due process of law."

The rest of the Texas Bill of Rights (other than the previously mentioned section 29) is similar to the federal constitution; most differences deal with fairly discrete areas of law.[41] Provisions in other articles of the Texas Constitution could be discussed here, even though they do not fall within the traditional barriers of the Texas Bill of Rights. One such provision is article VII, section 1, which makes it the legislature's duty "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Other provisions that may be considered with the Bill of Rights are found in article XVI, entitled "General Provisions." They deal with matters such as free suffrage,[42] the right of women to sit on juries,[43] exemptions from public duty,[44] and the protection of personal property and homesteads from forced sales.[45] Finally, an important provision from the environmental point of view, is that of article XVI, para. 59(a)

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40. TEX. CONST. art. I, para. 13.
41. *See* e.g., TEX. CONST. art. I, para. 15 (providing for temporary commitment of the mentally ill without jury trial); *ibid* para. 15-a (establishing procedures or "commitment of persons of unsound mind"); *ibid* para. 17 (providing more specific protection against the taking of the property for public use than does the federal fifth amendment); *ibid.* para. 18 (forbidding imprisonment for debt); *ibid* para. 20 (forbidding outlawry or transportation out of the state for an offence committed in the state); *ibid* para. 24 (declaring the military at all times subordinate to the civil authority); *ibid* para. 26 (forbidding perpetuities, monopolies, primogeniture, or entailments); *ibid* para. 28 (stating that "[n]o power of suspending laws in this State shall be exercised except by the Legislature").
42. TEX. CONST. art. XVI, para. 2.
43. *Ibid* at para. 19.
44. *Ibid* at para. 43.
45. *Ibid* at paras. 49, 50.

which declares that "[t]he conservation and development of all of the natural resources of this State are public rights and duties."

One other provision should be considered. Article II of the Texas Constitution provides in its only section that:

"The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Thus even though judges have many sources of power and the duty to exercise that power on behalf of the people, they must also remember that the two other branches of government are entitled to respect. These duties are paradoxical and not easily resolved but this is not an excuse to turn the state constitution into a dead letter. Constitutional rights are the special concern of courts, and numerous provisions in state constitutions affect individual and group rights.

The above analysis of the Texas constitution is important in answering the question of whether the American citizen is efficiently protected at state level. In Texas, as in every state in the USA, the protection of the fundamental rights of the citizens can be entrusted to the provisions of the state bill of rights. These provisions are detailed and seem to be able to adequately and sufficiently remedy the vast majority of the situations where breaches of the rights of the individuals can occur. These remedies are provided by the state courts. Therefore, the conditions of the

definition of efficiency which demand the existence of adequate and sufficient remedies, based on legal norms and provided by a court, are met. It can be suggested, then, that the American citizen is efficiently protected at state level.

3.3.2. Efficiency of protection of fundamental rights of the American citizen at the federal level

The second layer of provisions concerning individual rights which is provided by the US federal Constitution and specifically the federal Bill of Rights. It has been mentioned earlier that this has not always been the case. Indeed, when the federal Constitution was initially drawn up, a Bill of Rights was not considered necessary, mainly because state constitutions afforded efficient protection as regards the rights of the citizens. And later when a Bill of Rights was added, it was considered to be applicable only against the power of the federal government and not against that of the states. That meant that the American citizens at the time, could avail themselves only of their state constitutional provisions, but not of the federal ones. This was made clear by the Supreme Court in 1833, when in *Barron v. Baltimore*,[46] it held that the Bill of Rights was not applicable against intrusions by the states. It stated that the federal Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states".[47]

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46. 32 U.S. (7 Pet.) 243 (1833).
47. *Ibid* at 247.

It was the enactment of the Fourteenth Amendment that changed things and banished the spectre of arbitrary state power. The Amendment reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process; nor deny to any person within its jurisdiction the equal protection of the laws."[48] The demand of national protection of individual rights against the abuse of state power, arose only after the Civil War. It was made clear, at the time, that states were not able to protect individual rights. Actually, the initial impetus to the adoption of the Fourteenth Amendment was the fear that the former Confederate states would deny newly freed persons the protection of life, liberty and property formally provided by the state constitutions. Nevertheless, the goals of the Amendment were framed in terms of more general application.

Following its initial enactment, the Fourteenth Amendment served to protect the excesses of expanding capital and industry from even limited control by the government. The Supreme Court rejected the argument that any of the guarantees of the Federal Bill of Rights were included in the "privileges or immunities of citizens of the United States."[49] However, as Justice Brennan observed, the Court had not "closed every door in the Fourteenth Amendment against the application of the Federal Bill of Rights to the states."[50] The Court used the Due Process Clause to apply certain safeguards in the first eight amendments to the states. The

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48. U.S. CONST. amend. XIV.
49. Slaughter House Cases, 83 U.S. (16 Wall) 36, 79-81 (1873).
50. W. Brennan, "The Bill of Rights and the States", 36 N. Y. U. L. Rev. 761 (1961) at 769.

Court however, expressly rejected any suggestion that the Fourteenth Amendment advocated absolute application of any of the first eight amendments to the states. The Court held instead, that certain protections in the Bill of Rights were "of such nature that they are included in the conception of due process of law."[51] In a way the Court gave the due process clause of the Fourteenth Amendment a meaning independent of the liberties safeguarded by the Bill of Rights by pinpointing the rights it regarded to be "of the very essence of a scheme of ordered liberty."[52]

In the end, the question has to be asked whether the existence of the Bill of Rights of the federal Constitution contributes to the efficient protection of the rights of the American citizen. In order for this to be the case, the terms of the definition of efficiency must be met. It is suggested that, in the specific situation these terms are complied with. The specific set of norms legislates for adequate and sufficient remedies for breaches of the fundamental rights of the American citizen and the state and federal courts can provide these remedies when this is asked from then. The federal Bill of Rights, then, is an efficient set of norms fore the protection of the American citizens

3.4. Concluding remarks

It can be seen from the above analysis, that there is a number of layers of efficient measures available for the protection of the individual from violation of its human rights by the state, both in the EC and the USA. What is noticeable, though, is that this

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51. Twining v. New Jersey, 211 U.S. 78, 99 (1908).
52. Palko v. Connecticut, 302 U.S. 319, 326 (1937).

protection materialises in a different way in the two formations under examination. In the context of the EC, the citizen is protected in a fragmented way. The relevant provisions can be found in the domestic law of the specific citizen's state, EC law and the European Convention on Human Rights. Any of these provisions can be used in order for the protection of the European citizen to be ensured. The situation in the USA is more clear cut. The relevant provisions are included in the individual state constitutions or their federal counterpart, and the citizens, theoretically, have a choice between the two. The difference between methods of protection, however, does not mean that efficiency is undermined, as long as there is a judicial remedy for every breach of individual rights. Therefore, if it can be presumed that the norms exist for the efficient protection of the human rights of the individual in both the EC and the USA, the choice as regards which one is going to be utilised will depend on the level of efficiency that this norm is offering, according to the opinion of the user. Conversely, the non-utilisation of a certain norm, could insinuate a distrust on behalf of those who do not elect to use it, a distrust that could be attributed to hesitations regarding the level of its efficiency. On the other hand, any problems that might arise following the actual application of the norms that are selected as the most appropriate to provide a satisfactory solution to a problematic situation could mean one of two things. Either that the inappropriate norm was chosen, by inappropriate meaning that the protection level of the norm was not the highest available, or that the appropriate norm was elected, but for a number of reasons its efficiency level is not as high as it used to be. In the end, these two presumptions could be considered as two sides of the same

coin, to the extent that an appropriate norm with lowered levels of efficiency is rendered, as to its result for the protection of the rights of its user, inappropriate. As far as the USA is concerned, this is exactly the point on which the arguments of the proponents of New Judicial Federalism are based. The claim that, opting for the individual rights protection afforded by the federal Constitution instead of the one afforded by the state constitutions compromises the efficiency of this protection, reflects, according to them, specifically the problem of the different levels of efficiency outlined above. What they argue then, is that the uniformly, commonly applied set of protective provisions has ended up, for a number of reasons, offering to the American citizens a lower level of efficiency that the individually applied ones. Consequently, the inappropriate set of norms is being used, and this trend has to be controlled. Such problems have not arisen in Europe as yet. Whether there is a possibility for this to happen, and if so, the measures that could be taken in order for the problem to be resolved, is a speculation with which this thesis will be preoccupied in its final stages.

CHAPTER 4

The evolution of uniform protection of fundamental rights in the European Community and the United States of America

4.1. Introductory note

Following the general consideration of the available efficient protective measures for the European and the American citizen at all levels, this discussion will now concentrate on those measures which possess one further characteristic, that of being uniformly applied to all of the subjects of each one of the two entities under examination. A uniformly applied norm or set of norms, in non-unitary entities, is considered one which binds the organs of all the constituent states and which defines the standard of protection. As regards the EC, the European Convention of Human Rights is the set of norms which comes closer to be considered as uniformly applied. It is the overarching authority in the area of human rights in the specific formation, it is binding on all the signatory states and defines the standard of protection, to the extent that it sets the minimum standards beyond which the organs of the signatory states cannot go. The fact that the European Convention is simply a treaty does not detract from its

ability to be the uniformly applied set of norms on human rights in the context of the EC.

The discussion concerning the USA will concentrate on the Bill of Rights of the federal Constitution. This set of norms qualifies as being the uniformly applied set of norms in the specific formation, since it complies with the characteristics of the definition of uniformity utilised in this thesis. It is the overarching authority in the area of human rights in the USA, it became binding to all the states through the process of incorporation and, at the same time, it sets the minimum standard of protection.

One advantage of this comparison is the opportunity to detect any similarities or differences between the two sets of norms. Especially as regards the European situation, the evaluation of the functioning and efficiency of a uniformly applied human rights instrument of constitutional status in the context of a federal formation like the USA, could produce some very interesting observations as regards any attempts to proceed to similar federal methods of uniform protection of the individual rights of the European citizen, in the near or far future.

It must be pointed out that there are inherent difficulties in engaging in a comparative exercise regarding these two sets of rules, stemming from the differences in their characteristics. The federal Constitution, part of which is the federal Bill of Rights, enjoys a non-negotiable superior status than its state counterparts, unlike the European Convention, the status of which in the domestic law of the member states, varies considerably. After all, the federal Bill of Rights is a set of constitutional norms, whereas the European Convention is just an international treaty, with all the advantages and disadvantages this might have.

However since, as regards the EC and the USA, these are the only two sets of rules that have the characteristic of being efficient at a level higher than the national or state one, a comparison between them is deemed appropriate. Most importantly, it will be interesting to see whether the uniformly applied set of norms in the USA could serve as a model for any European attempts to institute a uniformly applied set of norms for the protection of the rights of the European citizens. Initially the European Convention will be discussed, followed by a general reference to the Bill of Rights of the American federal Constitution.

4.2. Uniformly applied protective norms in the European Community

When it comes to the protection of individual liberties in the European context, the European Convention for the Protection of Human Rights and Fundamental Freedoms is the closest an instrument could get to the concept of a common pan-European protection of the human rights. Its contribution towards the improvement of human rights both at the regional and global level has been major. At the moment more than half a billion individuals, citizens of thirty European countries have the ability to lodge a complaint before the European Commission of Human Rights to the effect that their rights are breached.

The original idea behind the European Convention actually considered it as an initial step of a grand plan for the unification of Europe. Mention of a common list of Human Rights in Europe, was first made in 1948 in the Political Resolution which was the outcome of a Congress of the International Committee of the

Movements for European Unity, a collective organisation formed in the early post-Second World War years. Soon after the creation of the Council of Europe in 1949, a proposal regarding the creation of an instrument, within the Council, to guarantee human rights was put forward. It advocated the creation of a court and a commission of human rights composed of lawyers which would deal with relevant complaints.

The main problem that had to be resolved regarded the content of the rights and freedoms to be protected. This was a task for the Committee on Legal and Administrative Questions which, after overcoming innumerable disagreements, came up with a draft resolution of a Convention to the Committee of Ministers. This draft included, in Article 2, twelve rights. It also established, in Article 8, a European Court and a European Commission of Human Rights.

The draft was rejected by the Committee of Ministers, mainly due to the dilemma having to do with the level of detail in the definition of the rights included in the Convention. In February 1950, the Legal Committee met again and produced another draft attempting to overcome the shortcomings of the previous unsuccessful one. It was not until November 4, 1950, that eventually the Convention was signed. After that, it became open for the signatory members to ratify. It took quite a while for the signatory states to engage in the ratification procedure, something that could be attributed to the importance that the Convention would have, not only concerning human rights specifically, but also as regards its perception as a step towards European unification in general. The first state to ratify the Convention, on March 8, 1952 was the United Kingdom, followed by Norway, ten months later.

Ratifications followed regularly from then on, and on September 3, 1953, Luxembourg became the tenth signatory state to ratify, something that allowed the Convention to come into force. Eight months afterwards, the First Protocol which had been signed on March 20, 1952, was also ratified and came into force.

Since 1963, eight more Protocols have been concluded, and a further one, Protocol 10 is awaiting signatures.[1] Sweeping amendments to the Convention are contained in the latest of its additions, Protocol 11. It substitutes the Commission and the Court with a new permanent Court which will undertake the whole spectrum of the functions of the "old" institutions. Therefore, the measures taken on the basis of the Convention will now be of an exclusively judicial nature, as opposed to the mixture of judicial and political procedures which was the case before the addition of the new Protocol. Protocol 11 requires ratification by all Member States before entering into force.

The European Convention on Human Rights, guarantees mostly civil and political rights. These have been discussed earlier in Chapter 3. In order for the protection of these rights to be guaranteed, the Convention established the Commission of Human Rights and the European Court of Human Rights. The role of these organs is defined by Articles 24 and 25 of the Convention. They are meant to deal with applications originating from a signatory

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1. Protocol 10 deals with the reduction of the two-thirds majority provided for in Article 32. Protocol 4, signed in 1963, adds four new rights and Protocol another seven. Protocol 6 abolishes the death penalty, complementing thereby the right to life contained in Article 2 of the Convention. These Protocols are now in force. Protocol 3 abolishes the Sub-Commission and Protocol 5 regulates the election of Commissioners and Judges. Protocol 8 provides *inter alia* for the formation of chambers and Protocol 9 gives the applicants the right to invoke the Court. Finally, Protocol 2 give the Court the power to provide advisory opinions, at the request of the Committee of Ministers. This protocol remains unused.

state directed against another signatory state alleging breach of provisions of the Convention (Article 24), or applications from individuals regarding any alleged violation by one of the signatory states.

The importance of Articles 24 and 25 is easily understood. One particular characteristic of Article 24 which constitutes a remarkable novelty in the context of international law, is the concept of "collective interest" on the part of the signatory states. This means that the member states have a common interest in human rights and, therefore, a state invoking Article 24 is not even required to prove legal interest in the proceedings. The right enshrined in Article 25 concerning the ability of individuals directly to allege violations of the Convention before international organs is even more innovative.

The Convention therefore, has attempted to become the European means of uniform application of the legal protection of human rights. It is considered to be the most advanced system of such protection in the world and it has become the model for a number of consequent conventions and charters of similar nature.[2] The Convention is considered to be a great success, not only in that it creates a catalogue of substantive rights that are protected, but also that procedural provisions instituting a mechanism for the consideration of complaints have been secured. The rights in Section I of the Convention along with the ones included in the Protocols, have acquired substance. It can easily be said that in its existence of only under half a century, the Convention could pride itself for its huge achievements.

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2. The American Convention on Human Rights of 1969, for instance, was modelled after the European Convention. It was also consulted during the creation of the African Charter on Human and Peoples' Rights.

4.3. Uniformly applied protective norms in the United States of America

The individual freedoms of the citizens of the United States are guaranteed, apart from their own constitutions, from the ten amendments to the Federal Constitution. The Bill of Rights outlines what is considered to be one of the most, if not the most, comprehensive protection of individual freedoms ever written. Mention of the Bill of Rights has been made earlier in this work, but it is considered appropriate at this time to look at it from a historical point of view and refer briefly to its content.

The Bill of Rights originally was not a part of the Constitution. After the Revolution, the states formed their own constitutions, many of which actually incorporated Bills of Rights. But the desire for the creation of a central government for the new nation remained alive. The Articles of the Confederation were adopted in 1777 by the Continental Congress and were ratified by 1781. According to the Articles, the states retained their "sovereignty, freedom and independence," unlike the federal government. In time it was realised that this system of government could not face up to the challenges of settling and maintaining the frontiers, regulating trade currency and commerce and merge thirteen states into one union. Consequently, in 1787, delegates from twelve states-Rhode Island was absent-met in Philadelphia with the aim of drafting a new Constitution. The proposal was for a strong national government which would replace the states in many of their previous competencies.

It was only natural that this proposal would be severely criticised and opposed by the states when the document was submitted to the state legislatures for approval. People were preoccupied because of the lack of protection by the Constitution of the liberties they had fought for in the Revolution. The federal government could very easily disregard them. Those who were against the wide grant of powers to the new federal government were called Anti-Federalists; its supporters were called Federalists. The Anti-Federalists advocated another convention which would draft a Bill of Rights before the actual Constitution was approved. The Federalists on the other hand, fearing that this would have a detrimental effect on the whole process, insisted on immediate ratification, with the drafting of a Bill of Rights following afterwards. Eventually, the Federalists prevailed. By 1788, the Constitution had been ratified by eleven states, more than the three quarters needed. However, six states proposed amendments which were principally modelled on their own state constitutions and were designed to protect the rights of the individuals.

It was James Madison who, in 1789, having realised that the public desire for a federal Bill of Rights could not be ignored and after reviewing the state proposed amendments and state Bills of Rights, proposed nine amendments to be considered by congress for insertion into the text of the Constitution. After consideration, debate and further alterations, the House and Senate voted for the addition of twelve amendments at the end of the Constitution and sent them to the states for ratification. Only ten went through the process, the ones we collectively know as the Bill of Rights.

As ratified in 1791, the Bill of Rights protected the rights of individuals from violation only by the federal government. For

instance, the First Amendment begins, "*Congress* shall make no law...". Madison's original draft had contained a proposal that would have also impeded the state governments from breaching the Bill of Rights, but it was deleted by the Senate.

Therefore, it was not until the post-Civil War enactment of the Thirteenth, Fourteenth and Fifteenth amendments that the federal government started to protect individuals against the states. The principal means by which this protection was achieved has been the Fourteenth Amendment. As it will be remembered, the jurisprudencial attitude of the Supreme Court of the USA for almost one and a half century, dictated that what protected citizens from breach of their rights by their state governments was the state bills of rights and not the federal one. Things started to change in 1925, when the Supreme Court in *Gitlow*[3] adopted the rationale that parts of the federal Bill of Rights were important enough to be encompassed in the Fourteenth Amendment and consequently become applicable to all states. The Fourteenth Amendment which reads, in part, "No *State* shall...deprive any person of life, liberty, or property, without due process of law", has been interpreted by the Supreme Court as an obligation on the state governments to embrace and protect the fundamental liberties in the Bill of Rights to the same extent as the federal government. This is what has been called the process of incorporation. Essentially, the application of the provisions of the federal Bill of Rights to the states meant that the federal provisions became the uniformly applied set of norms which guaranteed the protection of the fundamental rights of all the citizens of the USA. A second layer of protection of the rights of

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3. Gitlow v New York, 268 U.S. 652 (1925).

the American citizens was, thus, created, the first being the state provisions. There has been an ongoing debate within the Supreme Court about the scope of incorporation, and whether the entire Bill of Rights, or only some of its guarantees, should be incorporated against the state.

The process of incorporation did not begin until the beginning of the twentieth century. The majority of the rights were not incorporated until the 1960s, something that explains why most constitutional litigation has taken place within the last quarter of the century. The few rights that are not incorporated include the Second Amendment right to keep and bear arms, the Fifth Amendment right to grand jury indictment, the Sixth Amendment requirement of twelve jurors on a criminal jury, and the Seventh Amendment right to a civil jury. All the remaining fundamental freedoms enshrined in the Bill of Rights have been incorporated and should not be violated either by the federal government or by the states.

When it comes to the content of the rights protected, the Amendments without being extremely detailed, ensure that no misunderstanding can take place. The First Amendment protects the free exercise of the freedoms of religion, speech, press and assembly. The controversial Second Amendment guarantees the right of the people to keep and bear arms. The Third Amendment, which is commonly referred to as the forgotten amendment due to the infrequency of its invocation, prevents the government from quartering troops in privately owned homes without the consent of the owner. One of the most heavily litigated amendments is the Fourth which protects people from unreasonable searches and seizures without the appropriate procedures. The Fifth

Amendment, which has not been incorporated in the Fourteenth Amendment, protects the right to have one's case screened by a Grand Jury along with the very important guarantees that no person will be in jeopardy for the same offence twice and that no person can be forced in a criminal case to testify as a witness against himself. The amendment ends with a further guarantee of no deprivation of life, liberty or property without due process of law. The Sixth Amendment guarantees the rights of the accused, in criminal prosecutions, to a speedy trial, by an impartial jury, to be able to confront the witnesses against him, to have compulsory process and last but not least, the right to have an attorney. The Seventh Amendment advocates the right in suits at common law of trial by jury and the Eighth prohibits the imposition of excessive bail and fines as well the infliction of cruel and unusual punishment. The Ninth Amendment is the one that speaks of "other" rights that are to be protected against governmental violation. This has been considered to refer to the right to privacy. However, due to the fact that the protection of the said right has been interpreted to be guaranteed by other amendments, the Ninth Amendment appears, for the moment at least, to have no role to play. Finally, the Tenth Amendment allocates the rights not delegated to the federal government, to the states or to the people.

4.4. Concluding remarks

The comparison between the two uniformly applied sets of norms in EC and the USA leads to certain interesting observations. The European Convention of Human Rights and the Bill of Rights of

the American Constitution are different in some respects and similar in others. In the first place, there is a diversity between the two sets of norms in terms of status. The American Bill of Rights has constitutional status. The European Convention on Human Rights is a treaty concluded under public international law, the status of which varies in the domestic law of the signatory states that incorporated it from superiority over constitutional provisions to equality with normal law.

A second difference between the two sets of norms is that whereas the American Bill of Rights has been in a continuous state of development for almost two centuries, the European Convention has only been in force for less than half a century. The role, also, of the Supreme Court of the USA has been much more significant in the development of the American document, whereas the European Court of Human Rights has only lately indicated that it can adopt a dynamic approach to the interpretation of the European Convention

There are also textual differences in the two documents, at least superficially. In the Bill of Rights, rights typically are stated briefly. The rights in the European Convention are first stated broadly and then qualified by restrictive clauses.

The two uniformly applied sets of norms are similar as regards the contents of the rights protected. Article 2 of the European Convention, for example, guarantees the right to life in the same context as the Fifth Amendment to the federal Constitution. The guarantees of Articles 3 and 4 roughly assimilate the protection provided by the Seventh amendment, albeit on a wider scale. The protection of personal liberty advocated by Article 5 of the Convention is also the object of the Fourth

Amendment to the federal Constitution, and the right to a fair trial enshrined in Article 6 is roughly covered by the Sixth Amendment. Article 8 protecting privacy and family life corresponds with the interpretations provided for the Ninth Amendment. Finally, Articles 9, 10, and 11 guaranteeing freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association respectively, are the mirror provisions of the European Convention to the First Amendment of the federal Constitution.

Not surprisingly, there are differences as well, such as the Second Amendment to the American document guaranteeing the right of the people to carry and bear arms, a provision which probably will not be found in any other document protecting human rights. However, the differences in approach are understandable and are due to the contrast of experiences in the integrative courses of the two formations, the diversities in the historical development, as well as the attempt to respect and at the same time preserve the particular characteristics of the constituent parts of each one of them.

Having observed the above, and without prejudice to the definite differences between the various aspects of the two documents, it would be interesting to ask the question of whether the uniformly applied set of norms for the protection of the rights of the citizens in the USA, the American Bill of Rights, could serve as a model for any European attempts to further integrate in the field of human rights by creating a uniformly applicable list of guarantees, provided such an attempt is considered necessary. There is no easy answer to this question, simply because this is not a simple question. First of all we will have to decide whether a

set of norms which will bind the Member States of the EC and define the standard of protection, is in this case necessary, taking into consideration factors such as the efficiency of the already existing norms, and then decide on the set of norms that this new European instrument will have to be modelled on. It might be that certain rules stemming from the constitutions of the Member States might be more appropriate than the American model, taking first of all into consideration the proximity of experiences. On the other hand, there is no guarantee that a set of rules deriving from one or even more European constitutions will be the solution to the problem. These problems are inherent in a situation where an integrative exercise is attempted. However, if any such attempt is to go ahead, something that is questionable, it could not afford to ignore, among others, the American Bill of Rights, with its two hundred years of experience of resolving human rights issues.

CHAPTER 5

The European Convention on Human Rights as a choice for the efficient protection of the EC citizen: A test utilising the New Judicial Federalism approaches

5.1. Introductory note

This part of the thesis will attempt to put to the test the concepts of uniformity and efficiency as regards the law protecting the human rights of the citizen in the EC. In order to do so, it will borrow two of the approaches suggested by the proponents of New Judicial Federalism in their analysis of state constitutional law in the USA, namely the primacy and the interstitial approaches. These will be applied to a country by country survey, conducted in 1991 by Polakiewicz and Jacob-Foltzer,[1] of the impact of the European Convention and the judgements of the European Court of Human Rights on national legislation, in the countries where the Convention is formally incorporated in their national law. The advantage of utilising the methods of state constitutional analysis proposed by the New Federalists in the

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1. J. Polakiewicz & V. Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect is Given to the Convention" 12 HRLJ 65-85, 125-143 (1991).

USA, is, in the context of the above mentioned survey, that they offer a useful comparative tool for the detection of the attitude of the European states towards both the European Convention and their own relevant constitutional provisions. For example, the adoption by a European state of the primacy approach in the way it considers the protection of the individual rights of its citizens, would indicate a preference, in terms of that protection, towards its own constitutional provisions over the ones contained in the European Convention. This choice of protection is closely connected with both the concepts of efficiency and uniformity. Its connection with the former stems from the logical presumption, that a norm or set of norms is preferred over another because it offers higher levels of protection. The latter is relevant because the European Convention, which is examined in this survey, is the legislation that comes closer to be considered as uniformly applicable in Europe in the field of human rights.

Certain remarks have to be made in relation to the application of the American model to the European survey. These have to do with both the nature of the New Federalist approaches and the information supplied by the specific research as regards the European situation. In the first place, a straightforward transfer of the American methods of interpretation to the survey is unattainable. As mentioned earlier in the thesis, the approaches that the New Federalists propose advocate the active participation of the state constitutional provisions in the protection of the rights of the citizens of the specific states. The primacy approach supports the view that, when the rights of the individuals are breached, the provisions of the state constitutions must be examined first. If the remedy provided is not efficient, then the provisions of the

federal Constitution come into play. The interstitial approach dictates that the federal document is examined first. If the remedy provided falls below the state standards, then the state constitutional provisions must be relied upon. The dual sovereignty approach advocates an analysis of both the state and federal constitutions and the provisions that best protect the citizen are relied upon. Finally, the lockstep approach dictates that the state constitutional provision is given the same meaning with its federal counterpart, even when the wording of the two provisions is different. Eventually, the federal provision is relied upon.

In order, therefore, to be able to evaluate the application of the New Federalist approaches in any case of breach of the rights of the individual, it is necessary to follow all the stages of the specific judicial procedure and to consider them in connection with the final outcome. It is only then that it will become possible to come to a conclusion as regards the method that has been utilised to reach a specific decision. Information relating only to the decision, without reference to specific procedural aspects, makes it impossible to decide on the preferred approach.

The above mentioned absence of judicial thinking in respect of the decisions taken by the national courts, when considering the provisions of the European Convention, is an understandable limitation of the Polakiewicz and Jacob-Foltzer survey. They are only concerned with decisions by European courts which were influenced, in various ways, by decisions of the European Court of Human Rights and the provisions of the European Convention. Whether the national provisions were considered before those of the European Convention, after them, or whether an analysis of

both sets of norms took place before the decision was made, was a preoccupation outwith the scope of their research. This presents a problem for the purposes of the proposed test, which is dependent on the knowledge of the procedure that lead to the specific decision. In order to overcome this obstacle, it is proposed to utilise an expansive interpretation of the New Federalist approaches. They could describe not only the priorities of the judges as regards the provisions of his/her national constitution and the uniformly applied norms when considering a claim, but they could also represent the final outcome. Thus, for the purposes of this test, a European court would follow the primacy approach if it decided a case relying exclusively on its national constitution, ignoring the provisions of the European Convention on Human Rights, or if it made a passing reference to it. A court which decides a case on the basis of the provisions of the European Convention and/or the judgements of the European Court of Human Rights, or it refers extensively to them when deciding a human rights case, would follow an interstitial approach. The latter approach will also characterise, for the purposes of this test, any decisions of the national courts which indicate compliance with the provisions of the European Convention and the practice of the European Court of Human Rights.

One consequence of such outcome oriented interpretation of the New Federalist approaches in the European context, is that only the primacy and the interstitial approach are utilised. The dual sovereignty and lockstep ones are not. The former, because it is a procedure oriented approach, the adoption of which by a court could lead to a decision based either on state, or federal law. The

lockstep approach is not utilised because its adoption leads to the same outcome as the interstitial approach, namely a decision based on the provisions of the European Convention.

This expansive interpretation of the New Federalist approaches is considered to be the most constructive, and possibly the only, way to approach and evaluate the concepts of efficiency and uniformity within the context of the Polakiewitcz and Jacob-Foltzer survey.

One final point that has to be made, is that the proposed test takes into consideration only the cases mentioned in the Polakiewicz and Jacob-Foltzer survey. It, therefore, runs the risk of overlooking other, relevant case-law which the latter does not analyse. Indeed, in certain occasions, the cases mentioned are only examples of the situation in a specific Member State. Most importantly, in a significant number of Member States the cases analysed represent the exceptions to the situation regarding reliance of the relevant national courts on, either the national provisions, or the ones of the European Convention for the protection of the rights of their citizens. Therefore, in certain occasions, conclusions as regards the favourite New Federalist approach of the court of a Member State are based not on specific case-law, but on any information provided by the authors of the survey to that effect. As regards the situation in Greece, for example, the authors of the survey provide evidence which might lead to the conclusion that the favourite approach of the Greek courts is the primacy one. No decisions of Greek courts are utilised to come to that conclusion. Instead, this is achieved by means of references to the opinions of Greek scholars. The case-law utilised, regarding the specific Member State, only supports the findings of

the authors that, occasionally, the interstitial approach is preferred. In spite of these limitations, it is suggested, that the information provided by the survey can, in general, be indicative of the attitude of the Member States towards the European Convention of Human Rights. It is, therefore, appropriate for the purposes of this test.

This chapter will initially consider the status of the Convention in the hierarchy of national law. It will then be followed by the application of the New Federalist approaches to the Polakiewicz and Jacob-Foltzer survey.

5.2. Impact of the European Convention and the case-law of the European Court of Human Rights on Member States

5.2.1. BELGIUM

5.2.1.1. Status of the European Convention in the hierarchy of national law

Belgium became a signatory to the European Convention on Human Rights on November 4, 1950 and ratified it on June 4, 1955. After publication in the Official Gazette (Moniteur Belge), the Convention and the First Additional Protocol were automatically incorporated into the domestic legal system. Belgium made the declarations pursuant to Articles 25 (right of individual petition) and 46 (compulsory jurisdiction of the Court) on July 5, 1955 and has renewed them ever since. It has also ratified Protocols Nos. 2, 3, 4, 5 and 8 to the European Convention.

When it comes to the question of precedence among legal rules, the Belgian Constitution is silent. However, the precedence of treaties over all provisions of domestic law is undisputed and that was confirmed by the Court of Cassation in a judgement of May 27, 1971, where it ruled that:" When the conflict is one between a rule of domestic law and a rule of international law having direct effects..., the rule established by the treaty must prevail..."[2] From then on national courts are required to suspend the application of national law when it contradicts the European Convention of Human Rights.

5.2.1.2. Impact of the European Convention and the judgements of the European Court of Human Rights on national jurisdiction

The provisions of the European Convention and their interpretation by the European Court of Human Rights play an important role in the decisions of the Belgian courts and detailed references to both are the rule rather than the exception. The case-law of the Belgian courts has been influenced by a number of judgements of the European Court. One of them is *Le Compte, Van Leuven* and *De Meyere*,[3] where the European Court revised the earlier case-law of the Court of Cassation that held that Article 6 para. 1 of the Convention, incorporating the right to a fair and public hearing did not apply to disciplinary proceedings. The applicants in the case claimed that their right to a public hearing in accordance with the guarantee of Article 6 para. 1 of the Convention was breached, when their right to practice medicine

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2. S.A. Fromagerie Franco-Suisse "Le Ski", J. T. 1971, 460 Common Market Law Reports 1972, 330.
3. Judgement of 23/6/1981, Series A No. 43 2 HRLJ p. 349 (1981).

was suspended. The European Court's reaction was that the words "determinations of his civil rights and obligations" covered all proceedings that were decisive for private rights and obligations. Earlier in 1978 as a result of the *König* case,[4] the Court had ruled that for a doctor, a right to continue his professional activities was a civil right within the meaning of the Convention and that as a consequence the proceedings before a disciplinary tribunal fell within the ambit of Article 6 para. 1, when the penalty imposed was either a suspension or the exclusion from the right to exercise a profession.

When the Belgian Court of Cassation was called, in the cases of *Guchez*[5] and *Simmons*[6], to decide on the issue of the right to be heard, it stated that "it follows ... both from the letter and the spirit of the notion of disputes in the determination of civil rights and obligations that by the very nature and purpose of disciplinary proceedings, the authors of the Convention ... could not have intended such proceedings to be heard publicly in accordance with Article 6 para. 1 of the Convention". The Court in this situation relied on the national provisions, but it also entered into a discussion regarding the relevant provision of the European Convention. The New Federalist approach that would best describe the attitude of the Belgian Court of Cassation in this case, is the interstitial one.

The interstitial approach was followed again by the Court of Cassation in its judgement in the *R. v. Ordre des Architectes*[7] where it stated, after analysing both the national law and Article

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4. Judgement of 28/6/1978, Series A No. 27.
5. Guchez v Ordre des Architectes, 21 January 1982, J. T. 1982, 438.
6. Simmons v Ordre des Médecins, 21 January 1982, R. G. A. R. 1982, No. 6458.
7. J. T. 1983, 607 Pas. 1983 I, 903.

6 para. 1 of the European Convention, that "Article 6 para. 1 of the Convention is applicable in disciplinary matters ...". In January 27, 1986[8] the Brussels Court of Appeals followed the path of the Court of Cassation. It said that "The European Court of Human Rights had held on several occasions that disciplinary proceedings do not normally lead to a dispute over 'civil rights and obligations' although this does not mean that the position may not be different in certain circumstances, and that disciplinary proceedings as such cannot be characterised as "criminal": nevertheless this may not hold good for certain specific cases (*Le Compte, Van Leuven and De Meyere* Judgement, 23 June 1981, series A No. 3, para. 42); further, the European Court had held again in 1983 that «disciplinary proceedings do not ordinary lead to a dispute over 'civil rights and obligations', but that, however, the position may be otherwise in certain circumstances» (*Albert and Le Compte* judgements, 10 February 1983, Series A No. 58, para. 25), referring to the Court's view expressed as early as 1976 (*Engel and others* Judgement, 8 June 1976, Series A No. 22, pp. 33-36, para. 82-85)."

The Court of Cassation followed a different path when it decided the case of *Van Horn v. Ordre des Médecins.*[9] This case involved the imposition of a three month suspension on a doctor, who afterwards considered that he was not judged impartially, because certain members of the tribunal had personally investigated the case before judging it. The Court of Cassation found in favour of the appellant, without, however, basing its decision on Article 6 para. 1 of the European Convention. The Court in this

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8. J. T. 1987, 9.
9. Cass. 29/5/1985 (2 Judgements), J. L. 1985, 541 and 543; Cass. 9/10/1985 J. T. 1986,39.

situation chose to follow the primacy approach, since it relied on domestic law, completely ignoring the relevant provision of the European Convention.

In the *Marckx* judgement,[10] the European Court ruled that the distinction in Belgian law between legitimate and illegitimate children breached Articles 8 and 14 of the Convention. The Court of Cassation in a judgement of October 3, 1983[11] held that Articles 331 and 335 of the Civil Code, whereby an illegitimate child can not be recognised without prior authorisation from the courts, were not contrary to Article 8 and 14 of the Convention. The Court did not mention *Marckx*. The approach of the Court in this situation is not clearly defined. The lack of mention of the *Marckx* ruling could indicate that the Belgian court favoured the primacy approach. On the other hand, the fact that some reference to the provisions of the Convention was made, could suggest that the chosen approach was the interstitial one. It will all depend on whether the reference to the Convention was superficial or substantial. If the former applies, then the primacy approach should describe the attitude of the Court of Cassation in the specific case. If the latter is true, the Court has favoured the interstitial approach.

5.2.1.3. Summary

It seems, a common practice for the Belgian Court of Cassation not to rely solely on its national constitutional provisions in order to remedy breaches of the individual rights of its citizens.

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10. Judgement 13/6/1979, Series A No. 31.
11. Cass. 3/10/1983, R. C. J. B. 38 (1984), 605 Pas. 1984 I 108 J. T. 1984, 648.

Rather, the latter are usually accompanied by references to the provisions of the European Convention and analysis of the decisions of the European Court of Human Rights. In only one case, according to the findings of this survey, did the Belgian Court clearly ignore the provisions of the European Convention, and remedied the situation on the basis of the domestic law alone. Therefore, it can be said that its favourite approach is the interstitial one. The following Table 1 demonstrates the attitude of the Belgian courts, in the cases analysed in this survey, towards the European Convention on Human Rights seen through the prism of the New Federalist approaches:

Table 1

Preferred Approach	Case Examples	Other Approaches	Case Examples
Interstitial	Guchez v. O. des Architectes (Court of Cassation, 1982)	Primacy	Van Horn v O. des Médecins I (Court of Cassation, 1985)
	R. v. O. des Architectes (Court of Cassation, 1983)		Van Horn v O. des Médecins II (Court of Cassation, 1985)
	Simmons v O. des Médecins (Court of Cassation, 1982)		

5.2.2. FEDERAL REPUBLIC OF GERMANY

5.2.2.1. Status of the European Convention in the hierarchy of national law.

The Federal Republic of Germany became a signatory to the European Convention on Human Rights in November 4, 1950. This was subsequently approved by means of a federal law (Zustimmungsgesetz) pursuant to Article 59 para. 2 of the Basic Law (Grundgesetz) in August 1952, rendering thereby the Convention part of the domestic federal law of the Federal Republic of Germany. The Ratification extended to the First Additional Protocol and Protocol Nos. 2, 3, 4, 5, 6 and 8 to the European Convention. After the accession of the German Democratic Republic in accordance with Article 23 of the Basic Law in October 3, 1990, the Convention became part of the law of the new Länder of Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen, as well as in East Berlin.

The fact that the Convention was incorporated into German domestic law through a federal law, necessarily means that the former has the status of federal law. Consequently it is not awarded priority or even equality with the Federal Constitution, something ascertained both by judicial practice[12] and legal doctrine,[13] and it is subjected to the *lex posterior derogat legi priori*

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12. Federal Supreme Court (Bundesgerichtshof), Judgement of 12/7/1966, BGHSt 21, 81 (84); Berlin Higher Regional Court (Kammergericht), Decision of 1/9/1981, FamRZ 1982, 95, (96); Federal Constitutional Court (Bundesgerichtshof), Decision of 26/3/1987, EuGRZ 1987, 203 (206).
13. G. Ress, "The ECHR and States Practices: The Legal Effect of the Judgements of the European Court of Human Rights on the Internal Law and before Domestic Courts of the Contracting States", in I. Maier (ed.), Protection of Human Rights in Europe (1982), p. 209 (255); M. Hilf, "Rang der EMRK im deutschen Recht", in Mahrenholz/Hilf/Klein, "Entwicklung

rule.[14] However, up to now, there seems to be no ruling by a German Court, which, based on the *lex posterior*, accorded priority of later law over the Convention.

In fact, the German Courts seem to be favourable towards two other rules of interpretation that have a mitigating effect on the *lex posterior* rule. In the first place, the courts attempt to interpret German statutes, in accordance with the Federal Republic's international obligations, when that is possible. There is a presumption that the legislature does not intend to infringe international obligations when enacting new legislation. The Constitutional Court has expressly stated that international liability of the Federal Republic of Germany arising from breach of rules of public international law must be avoided,[15] reserving thereby the power to scrutinise the interpretation and application of the treaties by judicial decisions, something already applied as regards the Convention.[16] In a decision of March 26, 1987, it ruled that the provisions of the European Convention on Human Rights should be given priority even over subsequent legislation unless a contrary will of the legislator may be established.[17] Secondly, German courts see the European Convention, due to its nature as an instrument for the protection of human rights, as *lex specialis*, with the consequence that even later laws need not take precedence over the Convention.

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der Menschenrechte innerhalb der Staaten des Europarates" (1987), p. 19 (39).

14. Higher Regional Court Berlin (Kammergericht), Decision of 1/9/1981, FamRZ 1982, 95 (96). The *lex posterior* rule did not apply in this case, since it was found the relevant domestic legislation (Art. 1705 of the German Civil Code) not to be in violation of Art. 8 or Art. 14 ECHR.

15. Decision of 23/6/1981, BVerfGE 58, 1 (34); 10/11/1981, BVerfGE 59, 63 (89).

16. Decisions of 11/10/1985 - Pakelli -, EuGRZ 1985, 654; 26/3/1987, EuGRZ 1987,203.

17. BVerfGE 74,358 EuGRZ 1987, 203 (206).

5.2.2.2. Impact of the European Convention and the judgements of the European Court of Human Rights on national jurisdiction

The protection of fundamental rights and liberties is in the Federal Republic of Germany, entrusted to the Federal Constitutional Court. Consequently, its stance towards the Convention is particularly important. Through the procedure of constitutional complaint, any person who considers any of his/hers fundamental rights violated by the public power can seize the Court (Article 93 para. 1 No 4 (a) of the Basic Law [Grundgesetz]). Pursuant to that procedure, the Court has consistently decided that the complaint cannot be based directly on an alleged violation of the European Convention.[18] In spite of that, it managed to find a way to take indirectly into consideration the rights incorporated in the Convention. A constitutional complaint can be based on the alleged violation of the plaintiff's fundamental rights under Article 3 para. 1 of the Basic Law by arbitrary misapplication or arbitrary non-application of the Convention.[19] Frowein has suggested that the Court should consider the Convention as part of the "constitutional order" in the sense of Article 2 para. 1 of the Basic Law.[20] This would allow individuals to rely for complaints on the articles of the Convention in combi-

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18. Decisions of 14/1/1960, BVerfGE 10, 271 (274); 14/3/1973, BVerfGE 34, 384 (395); 13/1/1976, BVerfGE 41, 126 (149); 17/5/1983, BVerfGE 64, 135 (157); 13/1/1987, BVerfGE 74, 102 (128).
19. Decisions of 17/5/1983, BVerfGE 64, 135 (157); 13/1/1987, BVerfGE 74, 102 (128). Art. 3 para. 1 ("All men shall be equal before the law") is interpreted as a fundamental right protecting against unreasonable (arbitrary) distinctions. The Court has brought arbitrary misapplication of law by courts under this constitutional provision.
20. J. A. Frowein, "Das Bundesverfassungsgericht und die EMRK", in "Festschrift für Wolfgang Zeidler", Vol. 2 (1987), pp. 1763 (1768-1772).

nation with Article 2 para. 1 of the Basic Law. This suggestion has not been followed by the Court so far.

Despite the above, the latter has considered the case-law of the European Court on a number of occasions. In a decision of December 21, 1977,[21] having to do with obligatory sexual education in public schools, the Court used a reasoning very similar to that of the European Court of Human Rights in its decision in the *Kjeldsen* case.[22] Just like the European Court, the German Court emphasised the duty of the school to respect the religious and philosophical convictions of the parents and to refrain from any attempt aimed at advocating a specific kind of sexual behaviour. The fact remains, however, that an express reference to the jurisprudence of the European Court of Human Rights or the provisions of the European Convention was not made in this case. The Constitutional Court relied exclusively on the national provisions. Therefore, its attitude here should be described as primacy.

In other cases, mainly in the field of criminal law, it is the interstitial approach that seems to describe the attitude of the German Constitutional Court. A three-judge panel (Vorpufungsausschuß) of the Federal Constitutional Court referred to the *Eckle* case[23] in its decision of November 24, 1984.[24] It ruled that criminal courts may only draw conclusions from a delay of criminal proceedings if they expressly state the violation of the obligation to have a speedy trial and clearly determine the extent to which this circumstance is to be taken into account. In its decision of May 12, 1987,[25] the Court ruled that the eight years resi-

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21. BVerfGE 47, 46 EuGRZ 1978, 57.
22. Judgement of 7/12/1976, Series A No. 23.
23. Judgement of 15/7/1982, Series A No. 51 3 HRLJ 303 (1982).
24. EuGRZ 1983, 371.
25. EuGRZ 1987, 449.

dence requirement for the spouse to be joined in the Federal Republic of Germany complied with Art. 8 of the European Convention, referring to the ruling of the European Court in the *Abdulaziz* case.[26] In another case, the Court declared that the right of everyone charged with a criminal offence to be assisted by an interpreter at least during oral proceeding if he/she cannot understand or speak the language used in court is a universally recognised principle of international law in accordance with Art. 25 of the Basic Law.[27]In this last instance the European Convention was not specifically mentioned. It can be seen, though, that an analysis of provisions other than the national ones was conducted, in order for the Constitutional Court to reach a decision. It is suggested that in this occasion adopted an interstitial approach.

As interstitial can be described the attitude of the Constitutional Court in its decision of March 26, 1987.[28] There the complainant had alleged the violation of the principle of presumption of innocence because he was charged with costs and expenses, although his guilt had not been proven. The Court found a violation of Article 2 para. 1 of the Basic Law read together with the principle of the rule of law. It stated expressly that there should be an interpretation of the Basic Law in the light of the European Convention. Consequently, the practice of the European Court of Human Rights could play a role as a supplementary means of interpretation in order to determine the scope of the

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26. Judgement 28/5/1985, Series A No. 94.
27. Decision of 21/5/1987, NJW 1988, 1462.
28. BVerfGE 74, 358 EuGRZ 1987, 203; confirmed by Decision of 29/5/1990, EuGRZ 1990, 329.

fundamental rights incorporated in the Basic Law. It referred *inter alia* to the *Minelli* case.[29]

Other German courts seem also to prefer the interstitial approach. The field where the influence of Strasbourg case-law has been particularly significant is that of criminal procedure (Article 5 and 6 of the European Convention). When it comes to Article 6 para. 3 (c), a number of German courts had referred to the reports of the European Commission of Human Rights in the case of *Luedicke, Belkacem and Koç* [30] After the interpretation of the Commission had been confirmed by the European Court of Human Rights, its ruling was relied upon by other courts when interpreting the appropriate provisions of the European Convention.[31] Despite that judgement, the Higher Regional Court (Oberlandesgericht) at Hamm, has at least once ignored the provisions of the European Convention and the specific decision of the European Court of Human Rights, following, thus, a primacy approach.[32]

The right of everyone with a criminal charge against him to be judged within a reasonable time (Article 6 para. 1 of the European Convention), concerned a significant number of cases. Even before the Court's ruling in the *König* case,[33] the German Courts considered that an infringement of this right because of prolonged legal proceedings should only contribute to the

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29. Judgement of 25/3/1983, Series A No. 62 4 HRLJ 215 (1983).
30. Regional Court (Landgericht) Frankfurt, JurBüro 1987, 1687; Regional Court (Landgericht) Bonn, JurBüro 1978, 1849; Lower Regional Court (Amtsgericht) Berlin-Tiergarten, NJW 1978, 2462, Comp. Ress (note 6), p. 260.
31. E.g.. Higher Regional Court (Oberlandesgericht) Düsseldorf 21/3/1985, NStZ 1985, 370.
32. Decision of 16/6/1978-1 Ws 26/78.
33. Judgement of 28/6/1978, Series A No. 27.

mitigation of the punishment.[34] This practice was criticised by the Federal Constitutional Court in its ruling of November 24, 1983.[35] The Court found that there may be an obligation to discontinue proceedings under the principle of the rule of law, especially when the guilt of the accused is only of minor importance. Following this decision and the judgement of the European Court of Human Rights in the cases *König, Eckle and Zimmermann and Steiner,* [36] the Regional Court (Landgericht) of Düsseldorf in a recent ruling actually quashed proceedings in accordance to Article 6 para. 1, following, thus, an interstitial approach.[37] This was not the case for the Federal Supreme Court which, in its decision of December 9, 1987,[38]followed the primacy approach by not referring expressly to Strasbourg case-law. In its judgement of March 15, 1988, the Federal Supreme Administrative Court cited the *Dudgeon* case[39] in order to demonstrate that certain restrictions on homosexual behaviour are admissible in a democratic society.[40] In this situation the interstitial approach was followed.

5.2.2.3. Summary

It can be said that references to judgements of the European Court of Human Rights and to decisions of the European Commission of Human Rights have become more frequent. The

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34. Federal Supreme Court (Bundesgerichtshof), BGHSt 24, 239. Also Judgements of 20/1/1987, JZ 1987, 528; 6/9/1988, NStZ 1988, 552.
35. EuGRZ 1984, 94.
36. Judgement of 13/7/1983, Series A No. 66 4 HRLJ 363 (1983).
37. Decision of 26/8/1987, NStZ 1988, 427.
38. BGHSt 35, 137.
39. Judgement of 22/10/1981, Series A No. 45.
40. JZ 1988, 209.

fact, however, that the German Constitution contains a detailed list of fundamental rights and freedoms seems to prevent a wide consideration of the rights contained in the Convention. It is mainly the field of criminal law that the case-law of the European Court of Human Rights has had a significant influence on German judicial practice. There, the interstitial, seems to be the approach that both the Constitutional and the other German Courts seem to favour. The preferred approaches of the German courts when deciding the cases mentioned in the Polakiewicz an Jacob-Foltzer survey are demonstrated in Table 2:

Table 2

Preferred Approach	Case Examples	Other Approaches	Case Examples
Primacy	Decision of 21/12/77 (Constitutional Court)	Interstitial	Decision of 1978 (Regional Court of Bonn)
	Decision of 16/6/1978 (Higher Reg. Court of Hamm)		Decision of 24/11/1983 (Constitutional Court)
	Decision of 9/12/1987 (Federal Supreme Court)		Decision of 24/12/1984 (Constitutional Court)
			Decision of 1987 (Regional Court of Frankfurt)
			Decision of 26/3/1987 (Constitutional Court)

Decision of
12/5/1987
(Constitutional
Court)

Decision of
21/5/1987
(Constitutional
Court)

Decision of
15/3/1988 (Fed.
Supreme Admin.
Court)

5.2.3. FRANCE

5.2.3.1. Status of the European Convention in the hierarchy of national law

France ratified the European Convention on May 3, 1974 and recognised by declaration the right of individual petition in 1981. These declarations relate to all the rights guaranteed in the Convention and the Protocols No. 1, 4 and 6.

The Convention was incorporated *ipso jure* into the domestic legal system following publication in the *Journal Officiel.* In Article 55 of the Constitution of October 4, 1958, it is provided as regards the status of treaties in domestic law that:

"Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party".

The expression "authority superior to that of laws" has caused numerous problems, as to the power of the French courts not to apply legislation contrary to the Convention if the provision is more recent than the Convention. The Conseil Constitutionnel does not examine laws for their conformity with treaties, leaving it for other courts to decide. When, for instance, it was asked to judge on the conformity of the Voluntary Termination of Pregnancy Act with the European Convention,[41] it ruled that:

"... though [the] provisions [of Article 55 of the Constitution] accord to the Treaties ... an authority superior to that of laws, they neither prescribe nor imply that this provision should be enforced as part of the supervision of the conformity of laws with the Constitution...; ... the fact that a law is contrary to a treaty does not necessarily mean that it is to the Constitution; ... thus the supervision of compliance with the principle set out in Article 55 may not be exercised as part of the examination provided for in Article 61, on account of the difference in nature between the two supervisory procedures; ... this being so, it does not lie with the Conseil Constitutionnel, when a case is referred to it in pursuance of Article 61 ... , to consider the conformity of a law with the provisions of an international treaty or agreement...".

The Court of Cassation on the other hand, does not seem to share the opinion of the Conseil Constitutionnel, as its decision in the *Société des Cafés Jacques Vabre*,[42] a case having to do with the EEC Treaty, indicates.

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41. Decision No. 74-75 DC of 15/1/1975, Reccueil des décisions du C. C. 1975, 19.
42. Cass. Chambre mixte 24/5/1975, Dalloz 1975, 497, submissions of Mr Touffait JCP 1975 ii, 18180 AJDA 1975, 567, with note by Boulouis

" Whereas the Treaty of 25 March 1957 when by virtue of the above mentioned Article of the Constitution had an authority superior to that of laws, instituted a legal order of its own integrated into the orders of the member States, and as, therefore, the legal system it had set up was directly applicable to the nationals of those States and was binding on their courts, the Court of Appeal had acted correctly and within its powers in deciding that Article 95 of the Treaty should be applied in the case under consideration, to the exclusion of article 265 (c) of the Customs Code, even though the latter text was more recent". The attitude of the French court here, despite the fact that the case did not involve the European Convention on Human Rights, reveals definite interstitial elements.

This case law has been consistently followed by trial judges. One example, is the judgement of January 27, 1987 of the Paris Regional Court in the *Laboratories Galeniques Vernin v. Assedic de Paris* [43] case where it was held that a subsequent provision (Article L.122-14-4 of the Labour Code) was inapplicable because of incompatibility with Articles 6, 7 and 14 of the Convention and Article 1 of the First Protocol. The New Federalist approach followed here was again the interstitial one.

The Conseil d'Etat, on the other hand, has declined for a long time the precedence of Community Law over French law, as its judgement of March 1, 1968 in the case of *Syndicat General des fabricants de semoules de France*[44] indicated. The problem regarded a legislative order of September 19, 1962 which kept in force for a provisional period between France and Algeria the

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43. Tribunal de grande instance Paris 27/1/1987, Droit social 1987, 469.
44. C. E. Section 1/3/1968, Dalloz 1968, 235, submissions of Mrs. Questiaux.

customs arrangements that had been applicable prior to the latter's independence. This order was in conflict with Regulation No 19 of the Community. The Conseil d'Etat found in favour of the national law, implicitly, declaring inapplicable Article 55 of the Constitution:

"... for the court may engage in any assessment of the constitutionality of the act declaring it inapplicable in favour of a Community provision."

This position of the Conseil d'Etat was confirmed in two Assembly judgements of October 22, 1979[45], which held that in the event of a conflict between a treaty or an international agreement and a subsequent law it would afford precedence to the law, since to do otherwise would be to judge the law's conformity with the Constitution.

The Conseil d'Etat only departed from that case law in an Assembly judgement of October 20, 1989[46] having to do with electoral litigation. The Court was asked if citizens from Overseas Departments and Territories had the right to vote and to be elected to the European Parliament in the June 1989 elections. By declaring that the 1977 law concerning the elections to the European Parliament was not incompatible with the 1957 Treaty of Rome, the Conseil d'Etat affirmed its authority to examine the compatibility of a law with a previous treaty, thereby acknowledging that an international treaty may overrule a posterior internal law which opposes it. Although this case has been decided with regard to the Treaty of Rome the submissions of the

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45. C. E. Ass. 22/10/1979 - UDT, AJDA 1980, 39 RDP 1980, 541, submissions of Mrs. Hagelsteen, and C. E. Ass. 22/10/1979 Election des représentants à l' Assemblée des Communautés européennes, AJDA 1980, 40 RDP 1980, 541, submissions of Mr. Morisot.
46. C. E. Ass. 20/10/1989 - Nicolo, JCP 1989 II, 21371 RUDH 1989, 262.

Commissaire du Gouvernement, Mr Frydman, clearly indicate that the same reasoning would apply to other international agreements, the European Convention of Human Rights included.

One last thing that has to be mentioned is that the French courts have recognised the direct applicability of the provisions of the Convention and the protocols, even though this is not always the case. For example, the Paris Court of Appeal considered on February 29, 1980, that:

"... such provisions [Articles 6,13 and 14 of the Convention], which are very general in their wording, are merely guidelines for the legislation of the various signatory States."

This judgement disagrees with the case-law of the criminal chamber of the Court of Cassation which, on June 30, 1976,[47] and, on December 5, 1978,[48] examined the provisions of Articles 6 and 13 of the Convention.

5.2.3.2. Impact of the European Convention and the judgements of the European Court of Human Rights on national jurisdiction

The provisions of the Convention and of the Protocols were held in low esteem by French judges. In 1987, for instance, a Court of Appeal denied that the European Convention had any direct applicability in French law, a decision though, which did not have further consequences.[49] In this case, the Bordeaux Court of Appeal, held in its judgement of March 27, 1987, that Article 55 of the Constitution did not confer on international conventions concluded by the French State an authority superior to that of

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47. Cass. crim. 30/6/1976 - Glaeser-Touvier, JCP 1977 II, 12 18435.
48. Cass. crim. 5/12/1978-Baroum Chérif, Dalloz 1979, 50.
49. C. A. Bordeaux 27/3/1987, Gaz. Pal. of 11/7/1987.

domestic laws unless each one was applied by the party; this was not the case with the European Convention of Human Rights, which constituted only a declaration by the States of their intention to bring their domestic legislation into line with the Convention's general principles.

The Court of Cassation, in the first place, still takes little consideration of the law of the Convention. Very often, the judges will consider a purely formal reference to the Convention adequate and make very little reference to the specific judgements of the Court or the reports of the Commission. Its preferred general approach, then, could be described as being the primacy one.

However, in connection with disciplinary proceedings against lawyers, the first Civil Chamber of the Court expressly referred on January 10, 1984 to the *Le Compte* judgement of June 23, 1981[50] in order to justify the interpretation of a provision of the Convention relied upon before it:

"... although Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by a judgement of the European Court of Human Rights of 23 June 1981, accords a lawyer against whom disciplinary proceedings have been brought before the Court of Appeal the right to have his case heard publicly and to have the judgement in the case delivered at a public hearing, this is on condition that the said right has been claimed before the court."

This was the first time that a French court of last instance had expressly referred to the case law of the European Court of Human Rights. Subsequently the first Civil Chamber has reaffirmed that Article 6 para. 1 could be applicable in disciplinary

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50. Cass. civ. 10/1/1984, JCP 1984 II, 20210, submissions of Mr. Gulphe.

proceedings concerning lawyers, officially-appointed members of certain professions (officiers ministeriels) and legal experts.[51] In these instances the French court clearly followed an interstitial approach.

The interstitial approach was again followed by the Court of Cassation in its judgement of May 18, 1989. There it held that judicial impartiality according to Article 6 para. 1 of the European Convention has to be established objectively.[52] Thereby the Court of Cassation complied with the practice of the European Court of Human Rights.[53]

In its *Kruslin* judgement of June 23, 1985,[54] the Criminal Chamber clearly followed an interstitial approach when it found, that telephone tapping carried out at the request of the investigating judge was legal, and dismissed the appeal in so far as it claimed a breach of Article 8 of the Convention. It argued that under the provisions of that article only a law which meets the requirement of being necessary for the prevention of disorder or crime could justify interference by a public authority with the exercise of the right of every individual to respect for his private life and correspondence. Pointing out that Article 81 of the Code of Criminal Procedure authorises telephone tapping and that Article 151 of the same Code sets certain limits on such a practice the Criminal Chamber distanced itself from the interpretation of Article 8 as given by the European Court which, equating a telephone communication with correspondence, insisted that such a

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51. Cass. civ. 10/3/1987, Gaz. Pal. of 10-11/6/1987; Cass. civ. 10/12/1985; Gaz. Pal. of 4-5/5/1986; Cass. civ. 20/1/1987, Gaz. Pal of 20-21/5/1987.
52. Cass. civ. 18/5/1989, Dalloz 1990, 113.
53. Piersack case, judgement of 1/10/1982, Series A No. 53 = 4 HRLJ 207 (1983); De Cubber case, judgement of 26/10/1984, Series A No. 86.
54. Cass. crim. 23/7/1985, Dalloz 1986, pp. 61.

communication should not be intercepted in the absence of a law free from obscurity and carrying conditions designed to reduce the effect of the measure to a minimum.[55]

" Whereas, secondly, it follows from Article 81 and 151(c) of the Code of Criminal Procedure that an investigating judge may not call for telephone tapping unless there is presumption of a specific offence which has led to the opening of the investigation he is conducting, and that these measures may not be aimed at a whole category of offences;

whereas, moreover any tapping that is ordered must be carried out under the supervision of the investigating judge, without the use of any artifice or stratagem and without prejudice to the exercise of the right to a fair hearing;

whereas these provisions governing recourse by an investigating judge to telephone tapping, from which no departure has been shown to have occurred in the present case, meet the requirements of Article 8 of the European Convention of Human Rights and Fundamental Freedoms; accordingly the claim put forward must be rejected."

This reasoning did not, however, convince the European Court of Human Rights. In its *Kruslin* judgement, the Court found that there had been a violation of Article 8 of the Convention. According to the Court, French law on telephone tapping did not provide adequate safeguards against possible abuses because the scope and manner of exercise of the relevant discretion conferred on the public authorities had not been proved with reasonable clarity.

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55. Klass case, judgement of 6/9/1978, Series A No. 28; Malone case, judgement of 2/8/1984, Series A No. 82 5 HRLJ 319 (1984).

For the first time a judgement has precisely defined the distinction between the term "reasonable time" appearing in Article 5 para. 3 of the Convention, concerning the length of judicial investigations, and the term "speedily" used in Article 5 para. 4 which refers to the examination by the court of the lawfulness of detention. The judgement in question, of September 29, 1988,[56] reads as follows:

"The concept of "reasonable time" within which an individual has the right to be tried under Article 5 para. 3 of the European Convention of Human Rights is necessarily indissociable from the overall context of the case being tried and depends mainly on an objective examination of the facts of the case.

The requirement in Article 5 para. 4 of the European Human Rights Convention that a request for release should be decided "speedily" means that the time taken to reach such a decision should not exceed the time strictly necessary for submitting the request to the competent court, independently of investigation pending on the charges concerned."

The approach that was followed here, seems again to be the interstitial one.

The Conseil Constitutionnel adopted interstitial thinking when it ruled, on October 21, 1988, on the compatibility of the voting system in use regarding the elections of 5 and 12 June 1988, with Article 3 of the First Protocol. It said: [57]

"Whereas under the terms of Article 3 of the above-mentioned Protocol, 'the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions

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56. C. A. Paris 29/9/1988, Dalloz 1986, 43.
57. Decision No. 88-1082, 1117 (21/10/1988), Recueil des Désicions du C. C. 1988,183.

which will ensure the free expression of the opinion of the people in the choice of the legislature'; whereas the provisions of Act No. 86-825 of 11 July 1986, which determine the voting system used for the election of deputies to the National Assembly, are not, taken as a whole, incompatible with the provisions of Article 3 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Whereas it consequently lies with Conseil Constitutionnel to apply the above-mentioned Act."

The Conseil d'Etat seems to follow the interstitial approach, in its decisions regarding the application of Article 6 para. 1 of the European Convention to disciplinary proceedings against doctors, architects, dentists and pharmacists. In its *Debut* decision,[58] after analysing its national law, decided that the above mentioned Article only applied to civil and criminal courts, disciplinary tribunals excluded. Subsequently this position has been applied to disciplinary tribunals of every profession.[59] During the *Subrini* case the Commisaire du Gouvernement asked the Conseil d' Etat to abide by the European Court's case law regarding application of Article 6 para. 1 of the Convention to disciplinary proceedings regarding doctors. The Conseil d' Etat, however, reconfirmed its earlier case law and decided that the provisions of Article 6 para. 1 of the European Convention did not apply to disciplinary tribunals. It said:

"Whereas on the one hand, by finding that the fees charged by Mr. Subrini were excessive and that he failed in his obligation to set them in a tactful and moderate fashion, the disciplinary

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58. C. E. section 27/10/1978, Rec. 1978, 395.
59. C. E. 3/4/1980 (Ordre des Architectes), Rec. 1980, 181; C. E., 14/1/1981 (Ordre des Pharmaciens), JCP 1981 II, No. 19650; C. E. 28/1/1981, No. 55.

section of the National Council of the Medical Association gave adequate grounds for its decision on this matter; whereas, on the other hand, although Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by France by virtue of the Act of 31 December 1973 and published in the Journal Officiel by decree of 3 May 1974, provides that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', disciplinary tribunals do not determine disputes (contestations) concerning civil rights and obligations; whereas, therefore, the above mentioned provisions of Article 6 para. 1 of the said European Convention do not apply to them."[60] The approach, then, adopted by the Conseil d'Etat was again the interstitial one.

5.2.3.3. Summary

The Polakiewicz and Jacob-Foltzer survey indicates that the French judges have started to change their opinion about the role that the European Convention of Human Rights can play in the protection of the rights of the French citizens. Proof to that is, that references to the Convention and the decisions of the European Court of Human Rights have become more frequent. It must be conceded, that the law of the Convention usually takes second place to the national protective provisions, something indicated especially by the practice of the Court of Cassation. It should be noticed, however, that there is utilisation, on a regular basis, of

60. C. E. Ass., Rec. 1984, 259 Dalloz 1985, 150, submissions of Mr. Genevois.

the interstitial approach by the Criminal Chamber of the latter, as well as the Conseil Constitutionnel and the Conseil d'Etat, by means of references to the Convention, in regard to specific kinds of cases. This suggests that the provisions of the Convention have started to gain the trust of the French courts.

The following Table 3 summarises the New Federalist approaches adopted by the French courts when deciding the cases mentioned in this survey:

Table 3

Preferred Approach	Case Examples	Other Approaches	Case Examples
Primacy	Decision of 27/3/1987 (C.A. Bordeaux)	Interstitial	Decision of 10/1/1984 (Court of Cassation)
			Decision of 10/3/1987 (Court of Cassation)
			Decision of 18/5/1989 (Court of Cassation)
			Decision of 23/7/1985 (Court of Cassation)
			Decision of 29/9/1988 (C. A. Paris)

Decision No. 88-1082 of 21/10/1988 (Conseil Constitutionnel)

Decision of 27/10/1978 (Conseil d'Etat)

Decision of 3/4/1980 (Conseil d'Etat)

Decision of 14/1/1981 (Conseil d'Etat)

Decision of 28/1/1981 (Conseil d'Etat)

Rec. 1984 (Conseil d'Etat)

5.2.4. GREECE

5.2.4.1. Status of the European Convention in the hierarchy of national law

The Convention was signed by Greece on November 28, 1950. It was approved by Parliament and brought into force domestically by means of Act No. 2329 of March, 18 1953. It was first ratified together with the First Protocol on March 28, 1953. During the Colonels' dictatorship, the country resigned from the Council of Europe and denounced the Convention.[61] Following the restoration of democracy, Greece reratified the Convention and the First Additional Protocol on November 28, 1974. The compulsory jurisdiction of the European Court of Human Rights under Article 46 of the European Convention was accepted on January 30, 1979 but the competence of the Commission to receive individual petitions under Article 25 of the European Convention, did not become a reality until November 20, 1985. From that point onwards, both have been renewed. Protocols Nos. 2, 3, 5, 7 and 8 to the Convention have also been ratified by Greece.

The Greek Constitution incorporates in Article 28 para. 1 an express provision regarding the relationship between international and domestic law:

"The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein

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61. See H. D. Coleman, "Greece and the Council of Europe", Israel Yearbook on Human Rights 2 (1972), pp. 121 ff.

shall be an integral part of domestic Greek law and shall prevail over any contrary provision of law."

This provision institutes a practice that contradicts previous behaviour dictating that international agreements could only have the same legal force as of that of regular acts of Parliament. This necessarily meant that the rule *lex posterior derogat priori* was in principle applicable to these agreements with all the implications connected to the above rule.[62] Under the new Constitution, the substantive provisions of international treaties such as the Convention are given precedence over domestic legislation enacted both prior and subsequent to the entry of the force of the Treaty.[63] Under Article 28 para. 1 of the Constitution, Greek judges faced with situations relating to conflicts between domestic and international law should expressly apply the latter. When it comes to the Convention, its primacy over domestic law has been explicitly confirmed by Greek courts, the Court of Cassation *(Areios Pagos)* included.[64]

5.2.4.2. Impact of the European Convention and the judgements of the European Court of Human Rights on national jurisdiction

Despite the fact that all substantive provisions of the European Convention on Human Rights were guaranteed superior-

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62. A. A. Fatouros, "International Law in the New Greek Constitution", AJIL 70 (1976), p. 492 (501); A. Cannone, "L' adattamento di diritto interno al diritto internazionale nella Costituzione greca del 1975", RDI 65 (1982), p. 288 (295).
63. Fatouros *ibid.* p. 503; Cannone *ibid.*.
64. Court of Cassation, Decision No. 967/1982, Poinika Chronika 33 (1983), 289; Council of State, Decision No. 1802/86, To Syntagma 13 (1987), 341; Council of State, Decision No. 5040/87, To Syntagma 13 (1987), 727; Permanent Court Martial of Thessaloniki, Decision No. 38/1987, To Syntagma 13 (1987), 744.

ity over domestic law by the Constitution, Greek Courts have not, until recently, demonstrated a willingness to award full effect to them.[65] This attitude was described by Vegleris as a *corps étranger*: "Ignored if its existence is not recalled to the judges, misunderstood and inoperative if it is".[66] It seems though, that the situation is slowly but steadily improving. Following the recognition by Greece in 1985 of the right of individual petition, the judges, fearing challenges to their decisions before the Commission, started to pay more attention to the provisions of the Convention.[67] Notwithstanding this development, express references to either decisions of the Commission or judgements of the Court are still not common. Therefore, from the New Federalist point of view, the approach that the Greek courts favour is the primacy one.

The interstitial approach was utilised by the Court of Cassation *(Areios Pagos)* in Decision No. 427/86. What was under consideration was whether the exclusion of the accused from the court hearing of a cassation appeal in the interest of the law was compatible with Article 6 para. 1 of the European Convention.[68] The Court insisted on the fact that this appeal could not have any detrimental consequences for the accused. It decided that Article 6 para. 1 could only be applied in appeal procedures that brought

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65. P. Vegleris, "Statut de la Convention des droit de l'homme dans le droit grec", in Mélanges dédiés à R. Pelloux (1980), pp. 299-318.
66. *Ibid* p. 318.
67. A. Yotopoulos-Marangopoulos, "The Hellenic experience concerning the protection of human rights and particularly the implementation of the rights and freedoms embodied in the European Convention" in "The Implementation in National Law of The European Convention on Human Rights, Proceedings of the Fourth Copenhagen Conference on Human Rights" (28 and 29 October 1988) (1989), pp. 62-66.
68. To Syntagma 13 (1987), 528.

the case into a new instance and could lead to a new decision that may rebound on the position of the person concerned.

The Greek Military Criminal Code does not provide for the suspension of pre-trial detention on condition that other guarantees are available that will ensure the appearance of the accused for trial. The Permanent Court Martial of Thessaloniki, in its decision No. 38/87, applied the general Code of Penal Procedure, in order to fill the vacuum.[69] In justifying its decision the court said that the Military Penal Code was significantly limited as regards the rights of the accused, something that had to be remedied by means of this analogous application, as commanded by Article 5 para. 3 of the European Convention. It should be noted however, that the subsidiary application of the provisions of the Code of Penal Procedure is provided for by the Military Criminal Code (Article 434). Despite, this last remark, the Greek court seemed in this case to adopt an interstitial approach instead of the primacy one.

It is not a common occurrence that Greek courts find national law to contravene the European Convention of Human Rights. A rare example, which at the same is an adoption of the interstitial approach, is Decision No. 1802/86 of the Third Chamber of the Council of State*(Symvoulio tis Epikrateias)*,[70] the highest administrative court of the country which is very similar, as far as functions and organisation are concerned, to the French Conseil d'Etat. Certain disciplinary regulations of the Greek air-force prohibiting servicemen from making statements to the press or publishing anything without the prior consent of the Ministry

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69. To Syntagma 13 (1987), 744 Poinika Chronika 37 (1987), 472.
70. To Syntagma 13 (1987), 341.

of Defence, were declared to violate both the Greek Constitution and Article 10 of the European Convention.

The interstitial approach was also adopted in the decision of the Council of State on another occasion, when it considered whether the legislation establishing a State monopoly on broadcasting and television enterprises (Law No. 23/75) was in compliance with the European Convention. A decision given by the Assembly of the Council of State[71] had decided that the situation regarding whether broadcasting and television enterprises should be public or private entities or whether there should be one or more of these enterprises, was not regulated by Article 10 of the European Convention. Regulation in this area was left to the discretion of the national legislator, therefore Law 230/75 was considered to contradict neither the Constitution nor the European Convention on Human Rights. There was one dissenting voice, declaring that the last sentence of Article 10 para. 1 of the European Convention expressly indicated that the maximum State intervention allowed under the Convention was a licensing system, something that rendered a rigid State monopoly inadmissible.[72]

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71. Decision 5040/87, To Syntagma 13 (1987), 727, *See* also the previous Decision 990/87 [To Syntagma 13 (1987), 730] by the Fourth Chamber of the Council of State which came to the same conclusions.
72. The practice of the European Court of Human Rights also points towards that direction. In the Autronic AG case (Judgement of 22/5/1990, Series A No. 178, para. 61), it held that State interference with the exercise of the rights and freedoms guaranteed in Art. 10 para. 1 of the European Convention is subject to a strict supervision by the Court.

5.2.4.3. Summary

The provisions of the European Convention and the decisions of the European Court of Human Rights have started to be seriously considered by the Greek judges only after 1985. Until then, the primacy approach characterised their attitude towards the law of the Convention. Whereas, though, primacy is still the favourite approach of the Greek judges, there are indications that interstitial thinking is creeping into the decisions of the Greek courts as the survey indicates. Table 4 summarises the attitude of the Greek courts when deciding the cases mentioned in the survey:

Table 4

Preferred Approach	Case Examples	Other Approaches	Case Examples
Primacy		Interstitial	Decision 427/86 (Court of Cassation)
			Decision 1802/86 (Council of State)
			Decision 990/87 (Council of State)
			Decision 38/87 (Perm. Court Martial of Thessaloniki)
			Decision 5040/87 (Council of State)

5.2.5. ITALY

5.2.5.1. Status of the European Convention in the hierarchy of national law

Italy signed the European Convention on Human Rights on November 4, 1950 and ratified it on October 26, 1955 together with the First Protocol to the Convention. However, the right of individual petition before the Commission and the compulsory jurisdiction of the European Court of Human Rights were not accepted until August 1, 1973. The declaration under Articles 25 and 46 has been renewed ever since. Italy has also ratified Protocols No. 2,3,4,5,6 and 8 to the European Convention.

The European Convention on Human Rights on was incorporated into Italian domestic law by Act No. 848 of August 4, 1955. The rights guaranteed by the Convention on Human Rights was incorporated through an ordinary law, the judicial practice of both the Constitutional Court[1] and the Court of Cassation[2], as well as one legal opinion[3] have accorded it the force and status of an ordinary law. However, certain judicial decisions and a number of legal writers ascribe constitutional or quasi-constitutional weight

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1. Corte cost. 22/12/1980, No. 188, Giur. Cost. 1980, I, 1612; 14/4/1986, No. 91, Giur. cost. 1986, I, 518.
2. Cass. pen. 9/7/1982, Giust. pen. 1983, III, 461; 9/7/1982-Signiorelli, Cass. pen. 1984, 1463; 3/12/1982-Strapolatini, Cass. pen. 1984, 1464; 27/10/1984-Venditti, Giust. pen. 1985 III, 601; 13/7/1985-Buda, Giur. it. 1986, II, 72.
3. A. Nocerino Grisoti, "Valore ed efficacia della CEDU nell' ordinamento italiano", in: G Biscottini (ed.), "La CEDU nell' applicazione giurisprudenziale in Italia" (1981), p. 123 (129).

to the Convention by reason of the terms of Article 10 para. 1 of the Italian Constitution:

"The Italian legal system shall conform to the generally recognised principles of international law."

The theory that the rules of the Convention are "constitutionalised" by virtue of Article 10 para. 1 of the Italian Constitution and the principle *pacta sunt servanda* has been upheld by the Court of Audit[76], and by certain judgements of the Court of Cassation[77] as well as by some lower courts.[78] The Constitutional Court, on the other hand, has always denied that the Convention has any constitutional status. Consequently, the rules of the Convention have abrogatory force only in respect of domestic legislation enacted prior to its ratification.[79]

5.2.5.2. Impact of the European Convention and the judgements of the European Court of Human Rights on national jurisdiction

The case-law of the Italian courts contains so far, few references to decisions of the European Court of Human Rights. Some Italian writers have even spoken of a certain "case-law absenteeism" concerning the international obligations of the Italian State.[80] This attitude is now slowly changing.

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76. Corte dei Conti, sezione riunite 27/3/1980, Foro it. 1980 III, 352.
77. E.g.. Cass. pen. 23/3/1972, Giust. pen. 1973, III, 259.
78. *See* for example: Trib. Roma 28/2/1974, Riv. it. dir. proc. pen. 1975, 586, with note by Mazzacuva; Pret. Ragusa 10/7/1975, Giur. Cost. 1976, II, 339.
79. Consiglio Superiore della Magistratura, sezione disciplinare 5/7/1985, Foro it. 1986, III, 43, with note by Pizzorusso.
80. P. Mori, "CEDU, Patto delle Nazioni unite e costituzione italiana", RDI 66 (1983), p. 306, with further references. *See* also D. Rinoldi, "La CEDU nell' applicazione giurisprudenziale in Italia: in margine ad un recente raccolta di decisioni", Diritto comunitario e degli scambi internazionali 21 (1982), p. 790.

The Constitutional Court, in the first place, does not accord constitutional rank to the European Convention on Human Rights, it does not seem possible to base a plea of unconstitutionality on a breach of the Convention. Hitherto the Constitutional Court has resisted all attempts by legal writers to "constitutionalise" the rules of the Convention. It has, for example, maintained that the provisions of the Convention could acquire constitutional status by the operation of Article 10 para. 1 of the Italian Constitution and by virtue of the principle *pacta sunt servanda.* However, it is now the established practice of the Constitutional Court to consider that

"Article 10 para. 1 of the Constitution is aimed at the automatic conformity (of the Italian legal system) only to international-law rules of a customary nature, not to those of treaty origin."[81]

Alternatively, it has been proposed that the Convention could be "constitutionalised" by means of Article 2 of the Italian Constitution which recognises the protection of "inviolable human rights". The rights protected by the European Convention on Human Rights should "be deemed covered by this general clause and raised to the status of rules of the Constitution".[82] It is probably with this in mind that the Constitutional Court has sometimes maintained the special importance of the European Convention in its interpretation of Article 2 of the Italian Constitution. For example, it is held that the renewable nature of the right to institute judicial proceedings within the context of inviolable human rights

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81. Corte Cost. 6/3/1987, No. 153, Foro it. 1987, I, 1965; 22/12/1980, No. 188, Foro it. 1987, I, 318.
82. F. Bricola, "Prospetive e limiti della tutela penale della riservatezza", Riv. it. dir. proc. pen. 10 (1967), p. 1079 (1099).

may "also be deduced from the consideration accorded to it by Article 6 of the European Convention on Human Rights".[83]

In general, however, the European Convention on Human Rights does not play a major role in Italian constitutional case-law. The approach that the Italian courts seem to favour, from the New Federalist point of view, is clearly the primacy one. The Constitutional Courts judgement on February 1, 1982[84] is highly significant in this respect. Here, the Court was required to examine the constitutionality of Act No. 15 of February 1980, which extended the maximum period of pre-trial custody under anti-terrorist legislation. After reaffirming that the rules of the Human Rights Convention had the force of an ordinary Act, the Court avoided the question of whether the rules at issue were in accordance with the Convention and disregarded the abundant case-law of the Strasbourg organs. The court concluded that the terms of Italian legislation were not unreasonable in view of the serious threat posed by terrorist attacks.

One of the few examples of interstitial thinking, by means of an express reference by the Constitutional Court to the case-law of the Strasbourg organs (in this case, the Commission) is the judgement of December 22, 1980,[85] where the Court held that Article 6 para. 3 of the European Convention on Human Rights did not require member States to acknowledge the right of accused persons to defend themselves and did not preclude the application of a different system of rules, provided the system had been adopted in the interests of the proper administration of justice.

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83. Corte Cost. 27/12/1965, No. 98.
84. No. 15, Foro it. 1982, I, 2131, with note by Nobili.
85. No. 188, Foro it. 1981, I, 318.

Contentions of violation of the European Convention on Human Rights brought before other Italian courts have mostly been related to criminal procedure.[86] The case-law of the Court of Cassation in criminal matters is particular important. It should be noted, however, that in spite of repeated judgements against the Italian State particularly in cases concerning the conformity of Italian criminal procedure to the requirements or Articles 5 and 6 of the European Convention,[87] this case-law shows little receptiveness to influence from Strasbourg. In criminal matters, then, the favourite approach of the Court of Cassation is still the primacy one.

Although the Court of Cassation has recognised in principle that the rules of the European Convention are directly applicable in the Italian legal system, many of its judgements maintain that these rules are merely programmatic.[88] The principles of the Convention, it holds, are intended simply for the guidance of the legislature; they are mandatory only between the "High Contracting Parties", not *vis-à-vis* their respective nationals.[89] The Commission's activity, it claims, is of a purely administrative nature, and, in any event, the decision of the European Court and by

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86. *See* M. Chiavario, "La CEDU ed il suo contributo al rinnovamento del processo penala italialo", RDI 57 (1974), pp. 454 ff.
87. *See* the following cases: Artico, Judgement of 13/5/1980, Series A No. 37; Guzzardi, Judgement of 6/11/1980, Series A No. 39 1 HRLJ 257 (1980); Foti e. a., Judgement of 10/12/1982, Series A No. 56 3 HRLJ 335 (1982); Corigliano, Judgement of 10/12/1982, Series A No. 57 3HRLJ 322 (1982); Luberti, Judgement of 23/2/1984, Series A No. 75 6 HRLJ 242 (1985); Goddi, Judgement of 9/4/1984, Series A No 76 5 HRLJ 311 (1984); Colozza, Judgement of 12/2/1985, Series A No. 89; Bagetta et Milasi, Judgement of 25/6/1987, Series A No. 119; Ciulla, Judgement of 22/2/1989, Series A No. 148.
88. E.g. Cass. pen. 29/3/1979, Giust. pen. 1980, III, 137; 12/2/1982-De Fazio, Giust. pen. 1983, III, 20.
89. E.g. Cass. pen. 23/3/1983-Fignanani, Cass. pen. 1984, 1453; 23/12/1983-Bonnazzi, Cass. Pen. 1985, 298; 18/12/1986-Di Mauro, RIDU 1 (1988), 122.

the "Committee of Ministers have "no domestic coerciveness"[90] The applicability of decisions of the Commission and the European Court is limited to specific cases, and has no subsequent implications.[91]

In view of this attitude on the part of the Supreme Court in criminal matters it is not surprising that very few explicit references are to be found to the case-law of the Strasbourg Court. One notable exception of such interstitial thinking, is the Court of Cassation's criminal judgement of July 14, 1982, which expressly applied the European Court's case-law in the *Deweer* case.[92] The Court of Cassation recalled that the Strasbourg Court had clarified that, in view of the importance of the right to a fair hearing in democratic society, a "substantive" rather a "formal" view must be taken of the fair trial requirement in Article 5 of the Convention, so as to enable a person undergoing an official investigation to defend himself effectively and appropriately. In this case, the Court applied the criteria laid down in the Deweer judgement to interpret a provision of the Italian Code of Criminal Procedure which is not in conflict with the Convention.

The interstitial approach was also adopted in judgement of September 27, 1985[93] in which the Court of Cassation referred to the *Colozza* case to show that criminal proceedings may take place in the absence of the accused without breaching Article 6, provided that the summons to appear has actually been served on the accused.

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90. Cass. pen. 24/10/1983-Bonnazzi, Cass. pen. 1985, 2056, with note by Pittaro.
91. Cass. pen. 31/1/1987-Corigliano, RIDU 1 (1988), 125.
92. Cass. pen. 14/7/1982-Iaglietti, Giust. pen. 1983, III, 3 RDI 69 (1986), 142.
93. Cass. pen. 27/9/1985-De Fusco, RIDU 1, (1988), 180. *See* also Cass. pen. 11/5/1987-Sabit, RIDU 2 (1989), 358.

In the current case-law of the Court of Cassation, the provisions of the Convention do not play a major role. At the most, they serve as criteria for interpreting domestic law or as correctives to its application, without bringing about any spectacular reversals of case-law.[94] The judgement of October 27, 1984 *(Venditti)* may be cited by way of example:[95]

"The accused's right to fair hearing, and in particular the rights specifically protected by Article 6 para. 3 of the European Convention on Human Rights, are - in general, and subject to verification cases guaranteed within our criminal procedure by a number of sometimes scattered provisions of the Italian Code of Criminal Procedure, which have been reinterpreted in the light of the principles of the Convention and which constitute valid criteria for the interpretation of domestic law and provide the parameters for judging whether or not a hearing is fair"

One last example of interstitial thinking, is a decision of July 5, 1985 by the Council of the Judiciary (Consiglio Superiore della Magistratura).[96] The Council had been called upon to decide whether the principle of public hearings as enshrined in Article 6 para. 1 of the European Convention is also applicable to disciplinary proceedings. It declared that the legal rule which provided for hearings in camera had been tacitly cancelled by Article 6 para. 1 of the Convention. In reaching this decision, the Council specifically cited the European Court's judgement in the *Le Compte, Van Leuven* and *De Meyere* case.[97]

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94. *See* for example Cass. pen. 13/7/1985, Giur. it. 1986, II, 72; 21/4/1986, Giur. it. 1987, II, 265.
95. Cass. pen. 27/10/1984-Venditti, Giusti. pen. 1985 III, 601.
96. Consiglio Superiore della Magistratura, sezione disciplinare, 5/7/1985, Foro it. 1986, III, 43, with note by Pizzorusso.
97. Judgement of 23/6/1981, Series A 43 2 HRLJ 349 (1981).

5.2.5.3. Summary

If there is one Member State where the European Convention has failed to make almost any impact at all, that is Italy. Italian judges demonstrate perfectly how the primacy approach should be followed. Even in the field of criminal law, where the Convention and the decisions of the European Court of Human Rights have admittedly exerted significant influence in the thinking of European judges, Italian courts still choose to rely, almost exclusively, on their national provisions. The few existing exceptions of interstitial thinking do not seem to alter the overall picture of a state whose courts overwhelmingly favour the primacy approach. Table 5 summarises the decisions of the Italian courts in the cases included in the Polakiewicz and Jacob-Foltzer survey:

Table 5

Preferred Approach	Case Examples	Other Approaches	Case Examples
Primacy	Decision No 15 of 1/2/1982 (Constitutional Court)	Interstitial	Decision No 180 of 22/12/1980 (Constitutional Court)
	Decision of 29/3/1979 (Court of Cassation)		Decision of 14/7/1982 (Court of Cassation)
	Decision of 12/2/1982 (Court of Cassation)		Decision of 27/9/1985 (Court of Cassation)

Decision of
23/3/1983
(Court of
Cassation)

Decision of
23/12/1983
(Court of
Cassation)

Decision of
18/12/1986
(Court of
Cassation)

Decision of
31/1/87 (Court
of Cassation)

Decision of
27/10/1984
(Court of
Cassation)

Decision of
5/7/1985
(Council of the
Judiciary)

5.2.6. LUXEMBOURG

5.2.6.1. Status of the European Convention in the hierarchy of national law

Luxembourg became a signatory to the European Convention on November 4, 1950. Both the Convention and its first Additional Protocol were ratified on September 3, 1953. Luxembourg recognised the competence of the Commission to receive individual petitions (Article 25 of the Convention) and the compulsory jurisdiction of the European Court (Article 46 of the Convention) on April 28, 1958. They were both renewed on April 28, 1986 for a period of 5 years something that also applies to Articles 1 to 4 of Protocol No. 4 and Articles 1 to 5 of Protocol No. 7 respectively. In

addition, Luxembourg ratified Protocols No. 2,3,5,6 and 8 to the European Convention.

Article 37 para. 1 of the Luxembourg Constitution is the authority as regards the making of treaties.:

" The Grand Duke shall make treaties. These shall not come into effect until they have been sanctioned by law and published in the manner laid down for the publication of laws."

The Constitution does not contain any specific provisions on the relationship between international treaty law and domestic law. It was up to the Luxembourg courts to fill in the vacuum.

It was as early as 1950 that the courts confirmed the precedence of treaty law over domestic law. In the case of *Huberty v. Ministère Public* of June 8, 1950, the Court of Cassation (Cour de Cassation) declared:

"that in the case of a conflict between the provisions of an international treaty and those of a subsequent domestic law, the international law must prevail over the domestic law"[98]

This line was followed by the Conseil d'Etat[99] and reaffirmed by the Court of Cassation in its famous *Pagani* judgement of 14 July 1954.[100]

"...whereas , if it is true that, in principle, the effect of successive law depends on the date of their entry into force, the provisions contrary to the prior laws repealing the latter, this could not be so if the two laws are of an unequal force, that is to say if one of the laws is an international treaty incorporated into the internal legislation by a law of approval; that actually such a treaty is law of superior nature (essence) having a superior origin

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98. Pas. lux., Vol. 15, 41.
99. Judgement of 28/7/1951, Pas. lux., Vol. 15, 261.
100. Pas. lux., Vol. 16, 151 J. T. 1954, 694.

than the will of an internal organ; that in consequence in case of a conflict between the provisions of an international treaty and those of subsequent domestic law, the international law must prevail over the domestic law."

5.2.6.2. Impact of the European Convention and the decisions of the European Court of Human Rights on national jurisprudence

In general, the preferred approach of the Luxembourg courts is the interstitial one. The provisions of the Convention are considered self-executing by the Luxembourg courts and are frequently invoked before them. Less frequent, though, are the express references to the case law of the European Court of Human Rights. One important example that can be mentioned here, is the judgement of November 10, 1980, of the District Court (Tribunal d'arrondissement) of Luxembourg, which declared Articles 756 ff. of the Civil Code contrary to Articles 8 and 14 of the European Convention. This decision was confirmed by the Court of Appeal (Court Supérieure de Justice) on November 28, 1983.[101]

5.2.6.3. Summary

Table 6 summarises the preferred New Federalist approach of the District Court of Luxembourg in the one case that was made available from the Polakiewicz and Jacob-Foltzer survey:

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101. The Court of Cassation rejected the appeal against this judgement on January 17, 1985 (No. 2/85).

Table 6

Preferred Approach	Case Examples
Interstitial	Decision of 10/11/1980 (District Court of Luxembourg)

5.2.7. PORTUGAL

5.2.7.1. Status of the European Convention in the hierarchy of national law

Portugal became a signatory of the European Convention on Human Rights on September 22, 1976. On November 9, 1978 and after legislative approval, the Convention and the first two Protocols were ratified. In ratifying the Convention, Portugal also recognised the competence of the European Commission of Human Rights to receive individual petitions and the compulsory jurisdiction of the European Court of Human Rights and these commitments have been renewed ever since. Portugal also ratified Protocols Nos. 2,3,4,5,6, and 8 to the European Convention. No declarations under Art. 63 European Convention were made. Portugal formulated reservations in respect of Articles 4,5,7,10 and 11 of the Convention and Articles 1 and 2 of the First Protocol. Most of these reservations were withdrawn on May 11, 1987.

Art. 8 para. 1 of the Portuguese Constitution, providing for the status of international treaties in domestic law, declares that:

"rules deriving from international conventions duly ratified or approved shall, following their official publication, apply in municipal law in so far as they are internationally binding on the Portuguese State"

This provision is not very clear as regards the position of treaty law within Portuguese domestic law. However, it has been given such a meaning by the Constitutional Court, that the primacy of the treaty law over national legislation, seems to be a fact.[102] The Supreme Court has also supported this view,[103] which additionally is in accordance with the drafting history of the Portuguese Constitution. The question of primacy, however, is dividing the legal scholars. Miranda[104], for instance argues in its favour. J. J. Gomes Canotihlo and Vital Moreira[105] support the opposite view. Despite that, the judicial findings ascertain that the Constitution takes precedence over treaty law. It follows that the European Convention is directly applicable in the Portuguese legal system and takes precedence over national legislation.

5.2.7.2. Impact of the European Convention and the judgements of the European Court of Human Rights on national jurisdiction.

The Constitutional Court, in the first place, did not have much opportunity to consider the European Convention on Human Rights. This is because a detailed catalogue of fundamental rights

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102. Tribunal Constitucional (T. C), Acórdãos 67/85, D. R. 1985 II. pp. 5945 (5500); 24/85, D. R. 1985 II, pp. 4698 (4703).
103. Supremo Tribunal de Justiça, Judgement of 11/1/1977, Boletim do Ministério da Justiça No. 263 (February 1977), p. 195; 27/5/1986, Boletim do Ministério da Justiça No. 357 (June 1986), p. 182.
104. J. Miranda, "A Constituição de 1976" (1978), p. 297.
105. J. J. Gomes Canotilho/Vital Moreira, "Constituição da República Portuguesa Anotada", Vol. 1 (2nd ed. 1984). Article 8 note IV.

and freedoms, the extent of which often goes beyond that of the rights included in the Convention, is contained in the Portuguese Constitution. It should also be mentioned that the two chambers (Secçãoes) of the Court are divided as regards the question of whether national legislation violating international treaty law is unconstitutional or illegal. The first chamber of the Court, considers unconstitutionality more important than illegality.[106] The opposing view argues that the violation of treaty law only entails international responsibility, the question of unconstitutionality being irrelevant.[107] The principles of the Convention are therefore only considered as "auxiliary elements clarifying the sense and scope of constitutional norms and principles" and have so far never been applied by this Court. Therefore, the approach favoured by the Portuguese Constitutional Court is the primacy one.

One example of this approach is the decision of March 23, 1988[108] of the Constitutional Court which considered the question of the length of pre-trial confinement. The complainant demanded his provisional release from custody after having been imprisoned for nearly two and a half years, referring *inter alia* to Article 5 para. 3 of the European Convention. The Court after examining the case exclusively under Portuguese constitutional law, referred briefly to the *Wemhoff*[109] judgement of the European Court of Human Rights for the statement that the speeding of proceedings

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106. *See* for example, T. C. Acórdãos 27/84, D. R. 1984 II, p. 5884; 62/84, D. R. 1984 II, p. 11681.
107. *See* for example, T. C. Acórdãos 47/84, D. R. 1984 II, p. 6281; 88/84, D. R. 1985 II, p. 1164.
108. Acórdão No. 69/88, D. R. 1988 II, p. 7596.
109. Judgement of 27/6/1968, Series A No. 7.

must not be achieved at the expense of the search for material truth, declared the action inadmissible.

Also, on February 9, 1988[110] the Court while deciding on the constitutionality of legislation concerning compensation for the post 1975 nationalisations made a passing reference to Article 1 of the First Additional Protocol to the European Convention. The case was decided on the basis of national law.

In its decision of April 28, 1988,[111] the second chamber of the Constitutional Court was involved in the question of whether a violation of the European Convention could be considered, when examining the constitutionality of a legislative provision. The case concerned the time limit set by Article 1817 para. 1 of the Civil Code regarding an investigation of paternity. The complaint had alleged *inter alia* a violation of Article 14 of the European Convention. The Court discussed the question of whether constitutional control might include an assessment of the conformity of internal law to properly incorporated international law. However, since the case was adequately covered by Article 13 of the Portuguese Constitution, the matter was not further elaborated. The primacy approach, then, characterised once more the attitude of the Constitutional Court.

A rather interesting decision was the one made on February, 15, 1989,[112] by the first chamber of the Constitutional Court. The case regarded the legality of certain criminal proceedings against the members of a terrorist organisation. The Court found that neither Portuguese Constitutional law, nor the European Convention, obliged the criminal court to justify its decision, in or-

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110. Acórdão No. 39/88, D. R. 1988 I, p. 740.
111. Acórdão No. 99/88, D. R. 1988 II, p. 7642.
112. Acórdão No. 219/89, D. R. 1989 II, p. 6476.

der for the defence to be properly safeguarded on appeal. This way, the Court confirmed that a breach of the European Convention may give rise to a case of unconstitutionality. This is a deviation from the primacy approach that the Constitutional Court has been traditionally adopting. Rather, in this case the Portuguese court favoured an interstitial approach.

The fact that the Portuguese Constitution contains a detailed catalogue of fundamental guarantees is probably the reason for the absence of reference to the Convention, by the rest of the Portuguese Courts. As an exception to this position favouring the primacy approach, Portuguese courts have twice specifically mentioned the European Convention and its interpretation by the European Court, adopting thus, an interstitial thinking. The first decision was that of the District Court (Tribunal Judicial da Comarca), which on May 3 and 26, 1982[113] applied Art. 6 para. 3(e) of the Convention and consulted the interpretation of the European Court in the *Luedicke, Belkacem, Koç* case.[114] The Supreme Administrative Tribunal as well, in a decision of March 21, 1985,[115] interpreted Article 486 para. 3 of the Code of Civil Procedure in accordance with Art. 6 para. 1 of the European Convention and in doing so it referred to the *Ringeisen* case[116] of the European Court and the case law of the Commission on Human Rights.

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113. Not published yet.
114. Judgement of 28/11/1978, Series A No. 29.
115. Not published yet.
116. Judgement of 16/7/1971, Series A No. 13.

5.2.7.3. Summary

The evidence provided by the survey indicate, that the European Convention and the decisions of the European Court of Human Rights take second place to the national provisions in the preferences of the Portuguese courts, when it comes to the protection of the rights of their citizens. The reason for that could be the existence of a detailed list of fundamental rights within the Portuguese Constitution. In any case, the New Federalist approach adopted seems to be the primacy one, with the interstitial thinking being utilised infrequently. Table 7 summarises the attitude of the Portuguese courts as demonstrated by the findings of the Polakiewicz and Jacob-Foltzer survey:

Table 7

Preferred Approach	Case Examples	Other Approaches	Case Examples
Primacy	Decision No 69/88 (Constitutional Court)	Interstitial	Decision No 219/88 (Constitutional Court)
	Decision No 39/88 (Constitutional Court)		Decision of 3 and 26/5/1982 (District Court)
	Decision No 99/88 (Constitutional Court)		Decision of 21/3/1985 (Supreme Admin. Tribunal)

5.2.8. SPAIN

5.2.8.1. Status of the European Convention in the hierarchy of national law

Spain signed the European Convention on Human Rights in November 24, 1977, ratified it on October 4, 1979 and incorporated it along with the additional protocols into domestic law following publication in the Official Bulletin. The right of individual petition was eventually recognised on July 1, 1982 and was renewed on October 15, 1985.

Article 96 para. 1 of the Spanish Constitution of December 27, 1978 declares *inter alia*:

"validly concluded international treaties, once officially published in Spain, shall constitute part of the internal legal order...."

Additionally, Article 10 para. 2 of the Constitution demands that provisions concerning fundamental rights should be interpreted according to the Universal Declaration of Human Rights and other international human rights treaties to which Spain is a signatory.

According to Spanish legal tradition, treaties are accorded a superior legal status in the hierarchy of laws. Numerous judicial decisions refer to the precedence of treaties incorporated into Spanish law. However, the majority of them confirm the superiority of treaties which do not touch upon the crucial point of conflict between international and domestic law.[117]

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117. See for example, Tribunal Supremo 16 December 1985, Repertorio Aranzadi 1985, No 6273, Audencia Territorial de Palma de Mallorca, 23 July 1985, Revista General de Derecho 1986, p. 474.

5.2.8.2. Impact of the European Convention and the decisions of the European Court of Human Rights on national jurisdiction.

The Spanish Constitutional Court seems to be adopting an interstitial approach when deciding on human rights issues. It refers very often both to the European Convention and the judgements of the European Court interpreting the Convention, fulfilling thus the requirements of Article 10 para. 2 of the Spanish Constitution. In Judgement 62/82 of October 15, 1982, the Constitutional Court referred to Article 10 of the Convention (freedom of expression) and the decision of the European Court in the *Handyside* case,[118] in order to decide that a penalty imposed on the publisher of a publication for parents and children was not unjustified or disproportionate. In Judgement 114/1984 of November 29, 1984 the Constitutional Court declared unconstitutional the admission of evidence obtained through a violation of fundamental rights, by referring to Article 8 of the Convention and the judgement of the European Court in the *Malone* case.[119] In Judgement 74/1985 of June 18, 1985, the Constitutional Court while involved in the question of the right to the assistance of a lawyer, referred to Article 6 of the Convention and the decisions of the European Court in the *Deweer*[120], *Eckle*,[121] *Campbell and Fell*,[122] *Öztürk*[123] and *Golder*[124] cases. In Judgement 112/1988 of June 8, 1988, the Spanish Court based a ruling on the guarantee of

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118. Judgement of 7/12/1976, Series A No. 24.
119. Judgement of 2/8/1984, Series A No. 82.
120. Judgement of 27/2/1980, Series A No. 35.
121. Judgement of 15/7/1982, Series A No. 51.
122. Judgement of 28/6/1984, Series A No. 80.
123. Judgement of 23/10/1984, Series A No. 85.
124. Judgement of 21/2/1975, Series A No. 18.

personal freedom on Article 5 para. 1 (e) of the European Convention and the decisions of the European Court in the *Winterwerp,*[125] *X v. The United Kingdom* [126] and *Luberti*[127] cases. Finally in Judgement 145/1988 of July 12, 1988 dealing with the problem of the exercise by the same person of the duties of investigating judge and trial judge, the Spanish Court referred to the European Court's decision in the *De Cubber*[128] case, in deciding that the right to an impartial judge was a fundamental guarantee.

Unlike the Constitutional Court, other courts make much less use of the Convention and the decisions of the European Court of Human Rights. Indirectly, however, they adopt the interstitial approach, since they tend to reiterate the declarations of the Constitutional Court whose interpretations of constitutional rights take into consideration both the Convention and the dicta of the European Court. Sometimes, the Spanish Courts deviate from their traditional position, and adopt directly the interstitial approach, by means of direct references to the decisions of the European Court. In a judgement of March 14, 1986, the Court of Appeal of Barcelona referred to the *Rasmussen* case[129] in order to elaborate the principle of equality before the law. Also, the Court of Cassation in a judgement of October 3, 1985, in interpreting the procedural guarantees of the accused, referred to Article 6 para. 3 of the Convention and the decision of the European Court in the *Artico* case.[130]

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125. Judgement of 24/10/1979, Series A No. 33.
126. Judgement of 5/11/1981, Series A No. 46.
127. Judgement of 23/2/1984, Series A No. 75.
128. Judgement of 26/10/1984, Series A No. 86.
129. Judgement of 28/11/1984, Series A No. 87.
130. Judgement of 13/5/1980, Series A No. 37.

5.2.8.3. Summary

The findings of the survey indicate that both the provisions of the European Convention and the judgements of the European Court of Human Rights, have found fertile ground in the Spanish judicial order. As a rule, Spanish judges make express references to the law of the Convention when they are called upon to decide on human rights issues. Indeed, the adoption of an interstitial thinking is the case in every decision mentioned in the survey. No indications exist that the primacy approach has ever been utilised. The findings of the survey are summarised in Table 8:

Table 8

Preferred Approach	Case Examples	Other Approaches	Case Examples
Interstitial	Judgement 62/1982 (Constitutional Court) Judgement 114/1984 (Constitutional Court) Judgement 74/1985 (Constitutional Court) Judgement 112/1988 (Constitutional Court)		

Judgement
145/1988
(Constitutional
Court)

Judgement of
14/3/1986
(Court of Appeal
of Barcelona)

Judgement of
3/5/1980 (Court
of Cassation)

5.2.9. THE NETHERLANDS

5.2.9.1. Status of the European Convention in the hierarchy of the national law

The Netherlands became a signatory of the European Convention and the First Additional Protocol in November 4, 1950 and March 20, 1952.[131] They were both ratified on August 31, 1954. At the same time the compulsory jurisdiction of the European Court of Human Rights was recognised by the Dutch Government. A declaration recognising the right of individual petition in accordance with Article 25 of the European Convention was made on July 5, 1960. Both declarations under Articles 25 and 46 have been renewed on September 1, 1979 for an unlimited period. In accordance with Article 63 of the European Convention, The Netherlands extended the application of the

131. Trachtatenblad Nos. 154 (1951) and 80 (1952)

Convention to the Netherlands Antilles and to Aruba. The Netherlands also ratified the 2nd, 3rd, 4th, 5th, 6th and 8th Protocols.

The attitude of the Dutch Constitution of 1983 as regards the relationship between international and domestic law is monistic. Article 93 of the Constitution provides that provisions of treaties and decisions of international organisations shall have a binding effect from the time of publication. The rights contained in the European Convention are considered self-executing by the courts and are therefore directly applicable.

Article 94 of the Dutch Constitution provides:

"regulations which are in force in the Kingdom of the Netherlands shall not be applied if this application is not in conformity with provisions of treaties or decisions of international organisations which are binding upon everyone".

The Dutch Courts must therefore give precedence to self-executing treaty provisions over conflicting domestic law, be it antecedent or posterior, statutory or constitutional law.[132] The Supreme Court confirmed the priority of the self-executing provisions of the Convention and the Sixth Protocol over conflicting treaty provisions, when it refused to allow an American serviceman to be handed over to the US authorities on the grounds that he would face capital punishment.[133] But the courts have no competence to nullify, repeal or amend the legislation in question. The provision remains in force, but is not applicable.

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132. P. v. Dijk, "Domestic Status of Human Rights Treaties and the Attitude of the Judiciary: The Dutch Case," in M. Nowak/D. Steurer/H. Tretter (eds.) "Progress in the Spirit of Human Rights, Festschrift für Felix Ermacora" , pp. 1988 631 ff.
133. Supreme Court 30/3/90, ILM 29 (1990) 1388.

5.2.9.2. Impact of the European Convention and the judgements of the European Court of Human Rights on national jurisprudence

Until 1980, the Dutch courts did not seem to appreciate the favourable attitude of the Dutch legislature towards the European Convention. In spite of its direct applicability, the Convention was only treated as a secondary source of law.[134] When specific provisions of the Convention were invoked before Dutch courts, these almost always came to the conclusion that no breach had occurred. Van Dijk[135] has indicated, that one of the ways that the courts reached this result was by:

"-applying a comparable provision of Dutch law and, if necessary, giving it a very broad scope, while ignoring the provision of the Convention ..."

This indicates that New Federalist approach preferred by the Dutch courts at the time was the primacy one.

During this period the Supreme Court (De Hoge Raad der Nederlanden) only once found that a provision of the Convention was not fully respected.[136] And only once did a court abstain from applying a provision of national legislation because it contradicted the Convention.[137]

No specific references to Strasbourg case-law could be found in the jurisprudence of Dutch courts. It is therefore not surprising that a study on the implementation of human rights treaties in the Netherlands published in 1980 came to the conclusion that the

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134. E. A. Alkema, "Fundamental Human Rights and the Legal Order of the Netherlands," in H. F. Panhuys and others (eds.) "International Law in the Netherlands", Vol. III (1980), p. 109 (136).
135. *See* note 132.
136. Supreme Court 23/4/74. NJ 1974, No. 272.
137. District Court of Maastricht, 14/11/1977, NYIL 1978, 293.

role of the legislature in this field had been more prominent than that of the courts. In terms, then, of the New Federalist terminology, the Dutch courts utilised the primacy approach.

Things however, have changed in the 1980's. A statistical survey provided by Van Dijk[138] shows a considerable increase of references to the European Convention. The following examples are indicative of the tendency of the Dutch courts to indulge into an interstitial approach.

In a judgement of June 4, 1982,[139] the Supreme Court held that Article 1: 36 (2) of the Dutch Civil Code violated Article 12 of the European Convention and should not, therefore, have been applied by the lower courts. Article 1:36 (2) provided that if one parent refused his or her permission for the marriage of an under age child, the court could do nothing about it. According to the Supreme Court, such an unlimited veto power of the parents was incompatible with the right to marry laid down in Article 12 of the Convention. On July 1, 1983,[140] the Supreme Court declared that a provision of the Insanity Act which empowered the public prosecutor in certain cases to prevent a detained person from applying to a court for release from detention, was incompatible with Article 5 para. 4 of the Convention. This decision was clearly influenced by the judgement of the European Court in the *Winterwerp* case. Finally, in a judgement of May 4, 1984,[141] the Supreme Court found that Article 1:161 (1) of the Dutch Civil Code, which provides that in the case of a divorce the court shall appoint a guardian and a supervising guardian, constituted an in-

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138. *See* note 132.
139. NJ 1983, No. 32.
140. NJ 1984, No. 161.
141. NJ 1985, No. 510.

fringement of the rights of parents to respect for their family life (Article 8 of the European Convention). The Court said that such an action was only permissible it the interests of the child so require. Reaching this conclusion, the Court could not rely on any case-law from Strasbourg.

There are other examples where the Supreme Court has utilised the interstitial approach, by relying both on the national legislation and the provisions of the European Convention and/or the judgements of the European Court of Human Rights. In a judgement of January 18, 1980, the Supreme Court declared that Article 959 of the Civil Procedure Act concerning appeal against decisions of the local courts in matters of custody over infants, although originally intended to cover only cases of legitimate children, now had to be interpreted as applying equally to illegitimate children.[142] The court based its decision on the interpretation of Article 8 in connection with Article 14 by the European Court of Human Rights in the *Marckx* case. Similarly, the Supreme Court, based on Article 8 of the European Convention, applied the provisions regulating the right of divorced or separated parents to visit their children also to parents of illegitimate children.[143]

The right of the accused to be tried within a reasonable time (Article 6 para. 1 of the European Convention) has been an area where the Supreme Court developed a strong interstitial tradition. Between 1980 and 1986, the Supreme Court dealt with 120 cases concerning this problem, in which 20 were found to contain a violation of the Convention. Referring to the *Neumeister* and *Wemhoff* cases,[144] the Supreme Court expressly approved this

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142. NJ 1980, No. 463.
143. Judgement of 10/5/1985, NJ 1986 , No. 5
144. Judgements of 27/6/1968, Series A Nos. 8 and 7.

practice. It stated that in case of a violation of the right to a trial without unreasonable delay, the prosecution must be deemed to be so contrary to the fundamental principles of a fair trial that the prosecutor loses his right to continue his prosecution ad his charge can no longer be received.[145]

Other examples of the direct influence of Strasbourg case-law include a judgement of December 12, 1986,[146] where the Supreme Court held that the requirement laid down by the Minister of Justice that foreigners can only be permitted in the Netherlands for family reunions if the persons concerned have lived together before one or more of them came to the Netherlands is not in conformity with Article 8 of the European Convention. In another situation, the issue was the conviction of three persons on the basis of evidence given by anonymous witnesses. Only one of the accused filed an application to the European Commission which found a violation of the Convention. The two others asked for their release pending the examination of the case before the European Court. In its judgement, the District Court ordered the release of the two, considering that it was almost certain that the European Court would not accept a conviction on the sole bases of anonymous witnesses. The European Court in fact concluded that there had been a violation of Articles 6 para. 3 (D) and 5 para. 1 of the Convention.[147]

However, there are also examples of decisions which reveal that the Dutch courts have not abandoned the primacy approach. In a judgement of May 15, 1987 concerning the right of access of grandparents to a grandchild, the Supreme Court held that the

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145. Judgement of 23/9/1980, NJ 1981, No. 116.
146. NJ 1988, No. 188.
147. Kostovski case, Judgement of 20/11/1989, Series A No. 166.

link of kinship is not sufficient to claim such a right.[148] This interpretation of "family life" in the sense of Article 8 of the European Convention, was exclusively based on the national provisions and seems to be more restrictive than that given by the European Court in the *Marckx* case.[149]

5.2.9.3. Summary

As a conclusion it is reasonable to follow Van Dijk:

"Although the attitude of the Dutch courts may not always result in decisions which give full effect to the applicable provisions of human rights treaties, in general it may be stated for the period since 1980 that they take the treaties and the international case-law based thereupon, seriously and are in general prepared to adapt or correct their own case-law in the light of the former."[150] Table 9 demonstrates the attitude of the Dutch courts, under the prism of the New Federalist approaches:

Table 9

Preferred Approach	Case Examples	Other Approaches	Case Examples
Interstitial	Decision of 23/4/74 (Supreme Court)	Primacy	Decision of 15/5/1987 (Supreme Court)

148. NJCM Bulletin 1987, 529.
149. Judgement of 13/6/1979, Series A No. 31, para. 45.
150. *See* note 132, p. 648.

Decision of
14/11/1977
(District Court of
Maastricht)

Decision of
4/6/1982
(Supreme Court)

Decision of
1/7/1983.
(Supreme Court)

Decision of
4/5/1984
(Supreme Court)

Decision of
18/1/1980
(Supreme Court)

Decision of
12/12/1986
(Supreme Court)

Decision of
23/9/1986
(Supreme Court)

5.3. Concluding remarks

Certain interesting observations can be made regarding the above survey, when seen through the prism of the New Federalist approaches, as expanded for the purposes of this thesis. What is revealed in the Member States of the EC, in the first place, is significant fragmentation regarding the utilisation of the Convention and its interpretation by the European Court of Human Rights in the protection of the rights of their citizens. A number of national legislatures and jurisdictions rely on them on a continuous basis, whilst the attitude of others varies from hesitant to defiant. In Belgium, the Court of Cassation seems to adopt the interstitial approach. When faced with issues regarding the protection of the rights of its citizens, it utilises both the national provisions and those of the European Convention, as interpreted by the European Court of Human Rights. In Germany, the Federal Constitutional Court seems to follow the primacy approach, when deciding on matters other than criminal ones. In the latter situations, both the Constitutional and other courts seem to prefer the interstitial approach. The primacy approach is also favoured by the French Court of Cassation. However, in criminal matters, the tendency of the Criminal Chamber of the latter is to adopt the interstitial approach, a tendency followed by other French courts as well. The Greek courts clearly adopt the primacy approach. The European Convention and the decisions of the European Court of Human Rights, are very seldom relied upon in the protection of the rights of the Greek citizens. The approach preferred by the Italian Constitutional Court is the primacy one. Only very seldom, the

Court of Cassation, in criminal matters adopts the interstitial approach. The Luxembourg courts overwhelmingly support the interstitial approach, albeit, by means of references to the provisions of the Convention, not the case law of the European Court of Human Rights. The Portuguese courts prefer the primacy approach, with some notable exceptions regarding criminal matters, where the interstitial approach was adopted. The provisions of the European Convention and the case law of the European Court of Human rights, hold a prominent position in the decisions of the Spanish courts. Almost invariably, every decision of every court will include an analysis of the relevant provisions of the European Convention and the way they were interpreted by the European Court of Human Rights. Finally in the Netherlands, the interstitial is the preferred approach of the Dutch courts from 1980 onwards. Here again, it is the field of criminal procedure that attracted the more frequent application of the above mentioned approach. Table 10 summarises the preferred New Federalist approaches of the courts of the Member States of the EC:

Table 10

Member State	Approach
Belgium	Interstitial
France	Primacy
Germany	Primacy
Greece	Primacy
Italy	Primacy

Luxembourg	Interstitial
Portugal	Primacy
Spain	Interstitial
The Netherlands	Interstitial

It can be seen that the courts of five Member States of the EC favour the primacy approach, whereas four seem to adopt the interstitial approach.

It is important to note, that in certain circumstances further fragmentation can be observed in terms of the utilisation of different approaches in the decisions of courts of the same Member State. It seems that even in the Member States where the preferred approach is the primacy one, there is a tendency to refer and analyse the provisions of the Convention and the case-law of the European Court in the field of penal procedure. This is the case, for example, in France, Germany, Italy and Portugal. This can attributed to the fact that penal procedure is detailed in such a way in the Convention (Articles 5 and 6), that these provisions go beyond national legislation and do not allow for a margin of appreciation usually granted to national authorities in other articles.

One factor which is crucial in determining the utilisation of the Convention and the decisions of the European Court in domestic law is the status of the Convention in the hierarchy of domestic law. In the countries where it is awarded constitutional status or superiority over prior and subsequent legislation, the national courts refer on a regular basis to the provisions of the Convention and the judgements of the European Court of Human

Rights, following, thus, an interstitial approach. In countries, where it is not awarded prominent status, the Convention and the judgements of the European Court seem to take second place to national human rights legislation. The preferred approach here seems to be the primacy one.

Of paramount importance also is the existence of parallel constitutional safeguards in the national constitutions, especially when they are combined with traditional judicial protection of political and civil rights as is the case in France, Italy, Germany and Portugal. In these Member States the courts clearly follow a primacy approach. When faced with human rights issues they prefer to entrust the protection of their citizens on the national protective norms.

Do the courts of the Member States of the EC, then, consider the European Convention on Human Rights to be an efficient set of norms for the protection of the rights of their citizens? In the field of criminal procedure, it can be safely said that this is indeed the case. At least, that is what the adoption of the interstitial approach in the decisions of the national courts indicates. In the other areas of human rights, national courts do not seem to entrust the protection of their citizens with the provisions of the Convention, opting for the national norms instead. It is a fact, that between 1981 and 1991, the impact of rulings by the European Court has been felt in one way or another in several European countries. However, whether this was the beginning of a true dialogue between the European Court of Human Rights and national jurisdictions, is an argument that needs to be very carefully considered. Until influential countries like France, Italy and Germany start to converse seriously with

Strasbourg, then the role of the Convention and the European Court might never be as significant as it was intended to be.

CHAPTER 6

The attitude of the American state courts towards the movement of New Judicial Federalism: The situation in the states of Florida, Maryland and New York.

6.1. Introductory note

This chapter will examine the response of the courts of the states of Florida, Maryland and New York to the calls of the proponents of New Judicial Federalism for utilisation of the state constitutional provisions instead of the federal ones, in cases where breaches of human rights are alleged. The choice of norms that the courts of these states make for the protection of their citizens, is relevant to the consideration of the concepts of efficiency and uniformity that this thesis puts forward. An inclination towards state constitutional protection could indicate that the uniformly applied federal law is not regarded the most efficient protection available to the citizen.

It should be noted that the vast majority of the cases analysed have been decided by the highest ranking courts of the three states, namely the Supreme Court of the State of Florida, the Court of Appeals of the State of New York and the State of Maryland Court of Appeals. Decisions of lower ranking courts will

be analysed where available. The reason for the above approach lies in the availability of information provided by specific academic work for each of the states. Note, also, that not every decision of the court of each state is mentioned. That would be an impossible task within the limits of this thesis or even any thesis. Consequently, the evaluation of the preferred approach of each court is based on decisions representative of the specific legal issue. Additionally, in certain circumstances, the cases mentioned represent the exception to the rule as regards the preferred approach. This should be taken into consideration when considering the tables at the end of the analysis of the decisions of the courts of each of the states, which only summarise the preferred approach as demonstrated from the available cases.

It is reminded, that our intention is to offer just an example of the possible influences of New Judicial Federalism in the US state judiciary. We do not consider the three states to be a sample representative of a statistical analysis, something which lies outside the purposes of this thesis. It is also reminded, that the choice of the specific states was dictated partly on the basis of certain geographical, social and political criteria and partly on the basis of availability of information.

6.2. FLORIDA

6.2.1. The scope of New Judicial Federalism in Florida

The rediscovery within the past decades, by state supreme courts, of the broad guarantees of individual rights in state constitutions, is an area of law in the development of which, Florida has not played a particularly active role. Most commentators perceive

it to be a reluctant or even a non-participant in the state constitutional law revival.[1] Undeniably, the Florida courts have not aggressively exercised their power to interpret the Florida Constitution independently with the same frequency that other state courts have expansively utilised their state constitutions. However, this lack of aggressiveness should not necessarily be considered to exhibit timidity or a lack of sophistication on behalf of the Florida judiciary. The Florida courts have recognised the alternative of state constitutional interpretation but they have used it sparingly and only after considerable thought.

When faced with civil rights cases addressing freedoms of speech, religion and assembly, the methodology the Florida Supreme Court has used has varied throughout the years. In the case of *Florida Canners Association v. Department of Citrus*[2], where the court of appeals considered whether the free speech guarantees embodied in Article 1, section 4 of the Florida Constitution, were broader than the free speech guarantees of the First Amendment to the Federal Constitution, it held that the state provision was no broader than its federal counterpart.[3] This is a clear example of the lockstep approach, since the Florida state court chose to bind the state constitutional provision with the federal one. The same court however has treated other speech cases

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1. In a newspaper article on this issue the Florida judiciary's role was characterised as follows: "Lawyers and law professors say the state's politically conservative atmosphere, combined with the cautiousness of the high court and the apathy of practitioners, have led Florida to lag behind other states." Miami Review, Feb. 20, 1987, at 1. In a more recent article, Florida was described as possessing a "traditionalist political culture. Gormley, "Ten Adventures in State Constitutional Law", 1 Emerging Issues in State Constitutional Law 29 (1988).

2. 371 So. 2d 503 (Fla. 2d DCA 1979).

3. "Under these circumstances and in the absence of any expression by our supreme court that the Florida guarantee is broader than the federal, we conclude that the two are the same and will not treat them separately." Ibid at 517.

using a different approach. For example, in *Firestone v. Newspress Pub. Co.*[4] and *Sakon v. Pepsi Co.*[5] the Florida court deferred to the federal interpretation when construing the similar state provision but the former was not perceived to be binding since local or special circumstances might suggest different results. It seems then that the interstitial method of interpretation is employed in this cases.

As far as the right to privacy is concerned, while there is no federal textual analogue to Florida's privacy provision of article 1, section 23, a number of federal decisions concerning the right to privacy in decisional issues regarding the right to die[6] and right to an abortion,[7] have caused controversy. The Florida experience with privacy cases suggests that a different analytical approach is used in privacy cases under article 1, section 23, depending upon the nature of the claim. In right to die cases an interstitial approach is used as the court's decision in the case of *Public Health Tr. of Dade County v. Wons* indicates.[8] In abortion cases however, the Florida court, by utilising the absence of a federal counterpart provision, has interpreted the state constitutional provision independently, employing a primacy approach.[9] In general though,

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4. 538 So. 2d 457 (Fla. 1989).
5. 553 So. 2d 163 (Fla. 1989).
6. Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841 (1990); In re Quinlan, 355 A.2d 647 (N.J. 1976).
7. Roe v. Wade, 410 U.S. 113 (1973).
8. 541 So. 2d 96 (Fla. 1989). Here, instead of explicitly stating that article 1, section 23 of the Florida constitution was the basis of its decision to protect Ms. Wons' constitutional right of privacy and religion, the court analysed the right under Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980). The Wons court based the right of privacy in the Federal Constitution, thus evincing an interstitial approach. It should be asked whether a primacy approach could be employed due to the absence of a federal analogue.
9. In re T. W., 551 So. 2d 1186 (Fla. 1989) (statute requiring parental consent for abortions performed on a minor held unconstitutional under article 1, section 23 of the Florida constitution, State v. Barquet, 262 So. 2d 431 (Fla. 1972) (statute imposing a prison term for manslaughter on persons who used any means of causing an abortion unless two physicians attested that

while recognising the fundamental nature of the right to privacy, the Florida courts have not construed the right as broadly as other states.[10] Moreover, the Florida courts have held that the provision of article 2, section 23 could not enlarge a citizen's expectations of privacy for purposes of the search and seizure provisions of the Florida constitution.[11]

The right of access to courts is an area that has been subjected to extensive judicial interpretation by the state courts. Article 1, section 21 of the Florida constitution guarantees that the Florida courts "shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." There is no federal counterpart to this provision, however federal opinions have occasionally insinuated the existence of a federally protected right of access to courts both in civil[12] and criminal[13] proceedings. However, since such opinions are either

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the procedure was necessary to save the life of the mother held unconstitutional, because it violated the state constitution's due process clause).

10. Under a similar provision, the Alaska supreme court held in Ravin v. State, 537 P 2d 494 (Alaska 1975), that the right to privacy prevented the amendization of small quantities of marijuana in the home. Florida has not accepted this interpretation. The court in Maisler v. State, 425 So. 2d 107,108 (Fla. 1st DCA 1982) concluded that no compelling argument has been presented that the private possession of cannabis was permitted under the privacy guarantees of article 1, section 23.

11. State v. Hume, 512 So. 2d 185 (Fla. 1987). In Madsen v. State, 502 So 2d 948, 950 (Fla. 4th DCA 1987), the court held: Appellant's additional contention that recording of his conversation constituted a violation of his right to privacy embodied in article 1, section 23 of the Florida Constitution is similarly rejected. If we were to apply the right to privacy in the manner proposed by the appellant, we would effectively nullify the constitutional amendment to section 12, and this is obviously not an appropriate judicial prerogative.

12. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Supreme Court seemed to recognise a constitutional right of judicial access when it invalidated a state statute conditioning granting a divorce upon payment of court fees and costs. In United States v. Kras, 409 U.S. 434 (1973) the Court refused to apply the same reasoning to the payment of filing fees in bankruptcy.

13. In Bounds v. Smith, 430 U.S. 817, 821 (1977), the Supreme Court implied the existence of a fundamental "constitutional right of access to the courts" requiring prison authorities to assist inmates to prepare and file legal papers. The scope of this right has never been clearly articulated. As

narrow in scope or based on different constitutional grounds, the Florida supreme court, in access to court situations, is functioning in a field where there is no federal analogue.[14] When it comes to court costs and filing fees, Florida courts have held that they do not constitute an impermissible impairment to the constitutionally guaranteed right of access to courts if they are reasonable.[15] However, when unreasonable deposits were required as a condition for access to courts, the Florida courts have considered such a condition a violation of the access clause.[16] Reasonable statutes of limitations are also permitted under article 1, section 21. However, when these statutes function as a bar to an action before accrual, such limitations have been invalidated.[17] In interpreting the access clause then, the Florida supreme court, uninterrupted by the influence of any federal analogue, interpreted independently a constitutional right unique to Florida, following, thus, the primacy approach .

Article 1, section 9, of the Florida constitution provides that "No person shall be deprived of life, liberty or property without due process of law." In spite of the fact that this provision is almost identical to both the Fifth and the Fourteenth amendments to the Federal Constitution, the Florida Supreme Court has not always interpreted this provision in the same manner that the fed-

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regards criminal appeals, the Supreme court has held in McKane v. Durston, 153 U.S. 684 (1894), that a state need not provide a system of criminal appeals.

14. In Overland Construction Co., Inc. v. Sirmons, 369 So. 2d 572, 573 (Fla. 1979), the Florida supreme court recognised the exclusively state origins of the access to courts clause. "This constitutional mandate, which has appeared in every revision of the state constitution since 1838, has no counterpart in the federal constitution and derives its scope and meaning solely from Florida case law."

15. Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976).

16. G.B.B. Investments, Inc. v. Hinterkopf, 343 So. 2d 899 (Fla. 1977).

17. Diamond v. E.R. Squibb and Sons, Inc., 397 So. 2d 671 (Fla. 1981).

eral courts have interpreted its federal counterparts. In most due process cases the interstitial approach[18] is employed, though the use of the primacy method has also been used in several cases.[19]

Recent equal protection cases reveal that in this area a preference by the Florida courts towards the interstitial approach exists.[20]

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18. Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988) (the court reversed, under the Fourteenth Amendment, the judge's sentence of death, because the judged erred in imposing the death penalty when there was a reasonable basis for the jury's recommendation of life imprisonment), Engle v. State, 438 So. 2d 803 (Fla. 1983) (the court explicitly relied on the Sixth and Fourteenth Amendments in finding that consideration of testimony given in at another trial unconstitutionally denied an opportunity to cross examine and confront during a sentencing hearing. The court vacated the death sentence and remanded for sentencing without empanelling another jury).

Cases decided following the interstitial approach implicitly depend on an assumption that when a clear and plain statement of a state basis for a decision is absent, a federal basis will be inferred. Such cases include Wood v. State, 544 So. 2d 1004, 1006 (Fla. 1989) (the court found that a defendant must be given notice before costs are assessed against him, stating that holding goes to the very heart of the requirements of the due process clause of the state of Florida and the Federal Constitution), Garron v. State, 528 So. 2d 353 (Fla. 1988) (the court found that the use of post-Miranda silence as evidence of sanity violated due process, bases on US Supreme Court cases), Harmon v. State, 527 So. 2d 182 (Fla. 1988) (the trial court was mistaken in overriding jury recommendation of life because reasonable people could differ that death was the appropriate penalty).

19. State v. Barquet, 262 So. 2d 431 (Fla. 1972) (the court declared unconstitutionally vague and violative of the state due process guarantees, a statute prohibiting the performance of abortions except when necessary to save the life of the mother) State v. Smith, 547 So. 2d 131 (Fla. 1989) (ex parte order compelling participation in a police line up violated article 1, section 9 of the Florida constitution), Hill v. State, 549 So. 2d 179 (Fla. 1989) (the court explicitly rejected a broader federal interpretation and found that failure to admit double hearsay testimony did not violate article 1, section 16 of the Florida constitution regarding right to a fair and speedy trial in criminal matters), State v. Glosson, 462 So. 2d 1082 (Fla. 1989) (the court rejected the narrow application of the due process defence found in federal cases and held that a payment of a contingent fee to an informant conditioned on cooperation and testimony needed for a successful prosecution violated article 1, section 9 of the Florida constitution).

20. United Tel. Long Distance v. Nichols, 546 So. 2d 717, 720 (Fla. 1989) (order requiring a long-distance telephone subsidiary to compensate the local exchange parent and its ratepayers for intangible benefits derived from the parent is "neither confiscatory nor violative of the due process or equal protection clauses of the state and Federal constitutions"), Texaco, Inc. v. Department of Transp., 537 So 2d 92 (Fla. 1989) (the court rejected an equal protection claim without specific reference to state or federal basis for its decision).

In the field of eminent domain, the Florida Supreme Court had in *Department of Agric. v. Mid-Fla. Growers*,[21] the occasion to consider whether the provision of article X, section 6 of the Florida constitution, requiring private property not to be taken for a public purpose unless full compensation is paid, should be construed similarly to the federal counterpart of the Fifth Amendment. The court without referring to any federal constitutional provisions, and while conceding that the state had acted in good faith and in the public interest in destroying apparently healthy citrus trees in an attempt to control the spread of citrus canker, held that "full and just compensation is required when the state, pursuant to its police power, destroys healthy trees".[22] The primacy approach was followed in this instance.

When it comes to criminal law and procedure, Florida courts have, as a general rule, the power to interpret a provision of the state constitution more protectively than the US Supreme Court interprets a similar provision of the Federal Constitution. However, an exception to this general rule is article 1, section 12 of the Florida Constitution which expressly precludes the state courts from construing the search and seizure clause of the Federal Constitution broader than the US Supreme Court's interpretation of the Fourth Amendment to the US Constitution.[23] This

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21. 521 So. 2d 101 (Fla. 1988).
22. *Ibid* at 105.
23. Article 1, section 12 of the Florida Constitution as amended in 1982 provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall, issue except upon probable cause, supported by affidavit, particularly the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible as

restriction was imposed upon the Florida courts by voters in 1982 in direct response to the Florida Supreme Court's exercise of its power to construe its predecessor section more protectively than otherwise required by the Fourth Amendment. In the case of *State v Sarmiento,*[24] the Florida Supreme Court held that the state constitution prohibited police officers from intercepting oral communications within a suspect's residence even when consented to by one of the parts to the conversation. In holding that, the court recognised that the interception of these communications did not violate the federal constitution.[25] Referring to the trial court record, the Florida court concluded that the interception of private communications within a suspect's home without a warrant was violative of the provisions of article 1, section 12 of the Florida constitution.[26] The reasoning of this decision was subsequently reaffirmed by the Florida Supreme Court in *Odom v. State.*[27] Responding to these decisions, the Florida electorate amended the constitution to remove the court's discretion to interpret the search and seizure state constitutional provisions broader than the United States Supreme Court interpreted the Fourth Amendment.[28] Thus, for better or worse, Florida now follows the

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evidence if such articles or information would be inadmissible under the decisions of the United States Supreme Court construing the 4th amendment to the United States Constitution.

24. 397, So. 2d 643 (Fla. 1981).

25. *Ibid* at 645.

26. "We are unwilling to impose upon our citizens the risk of assuming that the uninvited ear of the state is an unseen and unknown listener to every private conversation which they have in their homes. This is too much for a proud and free people to tolerate without taking a long step down the totalitarian road. The home is the one place to which we can retreat, relax and express ourselves as human beings without fear that an official record is being made of what we say by unknown government agents at their unfettered decision." 397 So. 2d 643, 645 (Fla. 1981) (citing Sarmiento v. State, 371 So. 2d 1047, 1051 (Fla. 3d DCA 1979).

27. 403 So. 2d 936 (Fla. 1981).

28. This amendment was approved by 63% of all citizens voting.

Supreme Court's lead in the search and seizure area serving as an example of the lockstep approach.

The identification of the constitutional methodology applied by the Florida Supreme Court to resolve state constitutional issues of the entitlement to trial by jury will now be attempted. This should be distinguished from the Florida Supreme Court approach in resolving issues concerning the incidents of the jury trial rights to which one is entitled. The court's approach to the latter situation has been to rely upon the Florida constitution as its holding in *State v. Neil*[29] indicates. The Florida court position as regards the entitlement to jury trial though is not that straightforward. Two sections of Florida's Declaration of Rights protect the guarantee of trial by jury. Article 1, section 22 provides that "the right of trial by jury shall be secure to all and remain inviolate", while article 1, section 16 provides that "[i]n all criminal prosecutions the accused shall...have the right to...trial by impartial jury." Both provisions, that were recently restated in the 1968 Florida constitution, have federal analogues: the Seventh Amendment for article 1, section 22 and the Sixth Amendment for article 1, section 16. However, only the Sixth Amendment has been incorporated and applied to the states through the Fourteenth Amendment. Thus in this case there exists no dual protection of the right to jury trial in civil cases, and the states must develop their own law. Contrary to that, there is dual protection of the right to jury trial in criminal matters. Given this distinction, it is expected that in civil jury trial cases the courts would interpret the state constitution independently. In criminal matters, however, the approach would depend on how the court views issues of federal supremacy and state au-

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29. 457 So. 2d 481 (Fla. 1984) (rejecting Swain v. Alabama, 380 U.S. 202 (1966).

tonomy. Indeed, in civil jury trial cases, the predominant approach is the primacy one. Employing this methodology the Florida Supreme Court has found that a right to civil jury trial exists as to in rem forfeiture proceedings[30] and civil commitment proceedings,[31] in situations where a common law issue is raised in a compulsory counterclaim to an equity issue,[32] damages for trespass,[33] or ejection.[34] No right to jury trial exists in actions for eminent domain,[35] enjoining trespass,[36] partitioning,[37] quiet title,[38] or revocation of a real estate license.[39] In these situations the court considered the claims in respect of the state constitution and ignored completely the federal analogues, introducing, thus, a primacy thinking.

If the primacy approach is the method the Florida courts are opting for in civil jury trial issues, the situation in criminal jury trial cases is more complicated. Since 1968, unlike civil cases, there has been a federal counterpart applicable to the states as regards the right to jury trial in criminal matters-the Sixth Amendment. It could be expected then, that the method the Florida Supreme Court would follow in deciding criminal right to jury trial matters, would be the interstitial one. Nevertheless, three cases indicate that the state court has employed different approaches. In *Reed v. State*,[40] where Reed asserted a right to jury trial in the county court for a petty statutory offence of criminal

30. In Re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1986).
31. In Re Jones, 339 So. 2d 1117 (Fla. 1976).
32. Hightower v. Bigoney, 156 So. 2d 501 (Fla. 1963).
33. Wiggins v. Williams, 36 Fla. 637, 18 So. 859 (1896).
34. Hughes v. Hannah, 39 Fla. 365 22 So. 613 (1897).
35. Carter v. State Road Dep't, 189 So. 2d 793 (1966).
36. Wiggins v. Williams, 36 Fla. 636, 18 So. 859 (1896).
37. Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904).
38. Hawthorne v. Panama Park Co., 44 Fla. 194, 32 So. 812 (1902).
39. J.B. Green Realty Co. v. Warlow, 130 Fla. 220, 177 So. 535 (1937).
40. 470 So. 2d 1382 (Fla. 1985).

mischief, the court employed a federal analysis, it then looked to Florida law, and held that a right to jury trial for charges of criminal mischief does exist, basing its decision on both federal and state case law. The emphasis on the federal analysis in connection with the absence of an explicit statement of a state law basis for its decision, indicates that the court employed an interstitial analysis. One year prior to *Reed*, the Florida Supreme Court had employed the same method in *Whirley v. State*[41]-the case relied upon in *Reed*-in a question involving the right of citizens to jury trial for traffic violations. However, one should consider that in 1976, in the case of *State v. Webb*[42] -which was cited both in *Reed* and *Whirley*[43]-the court clearly employed a primacy approach. *Webb* involved a claim that a defendant charged with a violation of a state statute requiring motor vehicles to have a valid inspection certificate had the right to a jury trial. The court, employing the primacy analysis, based its holding explicitly on state grounds, while federal issues were addressed as influential but not dispositive.[44] It is therefore difficult to categorise the constitutional approach of the Florida Supreme Court in this area. It could be said that in criminal jury trial matters, the court has evolved from a primacy analysis, in *Webb*, to an interstitial approach, in

41. 450 So. 2d 836 (Fla. 1984).
42. 335 So 2d 826 (Fla. 1976).
43. 335 So. 2d 826 (Fla. 1976). E.g., Reed, 470 So. 2d at 1324; Whirley, 450 So. 2d at 838.
44. "While we are influenced by the fact that, even if the statute had not been decriminalized and still involved a criminal violation for which incarceration was a possible punishment, the right to a jury trial as provided by the sixth amendment of the United State Constitution would not apply....We therefore hold that, there being no right to a trial by jury for this traffic violation at the time of the adoption of Florida's first constitution, the denial of a jury trial by [the inspection statute] is not prohibited by Fla. Const. art. 1, 22."

Whirley and *Reed*, that first addresses the federal provision and then the state one.

The primacy approach was the approach followed in the issue of protection against double jeopardy. Article 1, section 9 of the Florida constitution provides, among others, that no person shall "be twice put in jeopardy for the same offence." This provision has as its federal analogue the Fifth Amendment which provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...." In *Ohio v. Johnson*,[45] the United States Supreme Court interpreted the federal clause as permitting an individual to be prosecuted for murder despite the fact he had pleaded guilty to a lesser charge of involuntary manslaughter, and both charges came as a result of the same homicide, provided that the individual was only punished for one conviction.[46] In the case of *Bean v. State*,[47] the Florida Fifth District Court of Appeal declined to follow the federal precedent finding it "incongruous"[48] and instead relied exclusively on the Florida constitution, holding that an individual could not be convicted twice for both murder or manslaughter arising from the same homicide.

Another example of a Florida court interpreting a state constitutional as affording more protection than its federal counterpart is the case of *Marshall v. State*,[49] where the Second District Court of Appeals held that the state constitution guarantees a right to appeal which is more protective than any rights embodied in the Federal Constitution. The appellant in Marshall had escaped from custody while an appeal of his conviction was pending, and

45. 467 U.S. 493 (1984).
46. *Ibid* at 500.
47. 469 So. 2d 768 (Fla. 5th DCA 1984).
48. *Ibid* at 769.
49. 344 So. 2d 646 (Fla. 2d DCA 1977).

the state moved to dismiss the appeal based on the escape. The US Supreme Court had previously held in *Estelle v. Dorough*,[50] that no federal constitutional provision prohibited the automatic dismissal of an appeal when the appellant had escaped custody. Ignoring *Estelle*, the Florida court refused to dismiss the appeal, relying on the state constitution.[51]

The stance of the Florida courts in right to counsel situations has also tended to be pro-state constitutional. In *Kirby v. Illinois*,[52] the United States Supreme Court held that the Sixth Amendment right to counsel guarantees became operative only when proceedings had been initiated by either "formal charge, preliminary hearing, indictment, information, or arraignment."[53] That means that according to federal interpretation, a defendant is only entitled to counsel when proceedings have been formally commenced against him. Contrary to that, the Florida constitution guarantees in article 1, section 16 the right to counsel in all criminal prosecutions. Pursuant to its authority to promulgate rules of practice and procedure, vested on it by article V, section 2 of the state constitution, the Florida Supreme Court has adopted the Florida Rules of Criminal Procedure. Under these standards the right to counsel may become available at an earlier time than required by the Federal Constitution. The above is illustrated in *State v. Douse*,[54] where the Fourth District Court of Appeal suppressed evidence which a police officer had surreptitiously obtained. This evidence was produced two days after the defendant's arrest, but before the filing of the information against him. Under the Federal

50. 420 U.S. 534 (1975).
51. 344 So. 2d at 647.
52. 406 U.S. 682 (1972).
53. *Ibid* at 689.
54. 448 So. 2d 1184 (Fla. 4th DCA 1984).

Constitution, the right to counsel would not attach until the filing of the information and as a result the defendant would be able to suppress the evidence under federal law. Despite this, the Florida court, found that "in this instance state law provides greater protection than its federal counterpart and, therefore, the case at bar should be adjudicated under principles of Florida law."[55] In another application of this principle, the same court came to a similar conclusion in *Sobczak v. State*.[56] Here, the defendant tried to suppress identification testimony resulting from a line-up conducted without defence counsel. The line-up took place following a court order obtained after the defendant's first appearance before a magistrate. The Florida Fourth District Court of Appeal, finding that Rule 3.130 of the Florida Rules of Criminal Procedure provided the right to counsel at the first appearance, concluded that the line-up was illegal under the Florida constitution and that the evidence was properly suppressed.[57]

As is known, in the late nineteenth and early twentieth centuries, the US Supreme Court developed a doctrine of substantive due process which was used to invalidate state economic regulations that interfered with traditional notions of capitalism. This judicial approach was eventually abandoned by the federal courts, leaving the state legislatures free from the supervision of federal courts on the selection of state economic measures. This judicial development though, was not unanimously followed by the state courts. In the1930s and 1940s for instance, a number of states enacted Fair Trade Laws in order to regulate retail prices for manufactured goods and created causes of action for manufactur-

55. 448 So. 2d at 1185.
56. 462 So. 2d 1172 (Fla. 4th DCA 1984).
57. *Ibid* at 1173.

ers against retailers and vendors that violated the agreement. The Florida Supreme Court invalidated in 1949 a provision of this law using a substantive due process analysis.[58] There is a number of cases that, while they could be considered to have more historical interest than current consequences, indicate that the doctrine of substantive due process is alive in Florida.[59] More recently, in the case of *Department of Insurance v. Dade County Consumer Advocate*,[60] the Florida Supreme Court invalidated on substantive due process grounds a statute prohibiting insurance agents from rebating a portion of their sales commissions to insurance purchasers. The court, relying on many of the cases mentioned above, found, although not unanimously, no reasonable or logical relationship between the statute and any legitimate state purpose.[61] An important development took place in 1986, when in the case of *State v. Saiez*,[62] the Florida Supreme Court has utilised substantive due process analysis in non-economic regulatory settings. There, the court invalidated a state criminal statute prohibiting the possession of embossing machines that could be used to reproduce credit cards. It found no reasonable relationship between the state purpose and the means chosen by the legislature to achieve the state goal.[63]

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58. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).
59. Sullivan v. DeCerg 23 So 2d 571 (Fla. 1945) (invalidation on substantive due process grounds of a statute which required licensing of professional photographers), Larsen v. Lasser, 106 So. 2d 188 (Fla. 1958) (restrictions on the manner in which public adjusters could solicit employment were found to violate substantive due process), Stadnik v. Shell's City, Inc., 140 So. 2d 871 (Fla. 1962); Florida Bd. of Pharmacy v. Webb's City, Inc. 219 So. 2d 681 (Fla. 1969) (invalidation on substantive due process grounds of state pharmacy rules regulating the advertisement of prescription drugs).
60. 492 So. 2d 1032 (Fla 1986).
61. *Ibid* at 1035.
62. 489 So. 2d 1125 (Fla. 1986).
63. "[T] he legislature has chosen a means which is not reasonably related to achieving its legitimate legislative purpose. It is unreasonable to

The numbers of recent cases involving a substantive due process analysis along with the expanded reach of the doctrine to non-economic matters, suggest a continued utilisation of state constitutional law by the Florida courts in the immediate future.

6.2.2. Summary

It is undeniable that the Florida courts have not resorted to expansive interpretation of the state constitution. However, the existing cases establish that there is an awareness of their power to do so. The failure to exercise this power may be attributed to a number of factors including the asserted conservatism of the Florida courts and the inability of counsel to raise and pursue constitutional law issues. It is more likely though that this reluctance could be owed to the absence of any methodology by which state constitutional law is approached. Additionally, the Florida Supreme Court has not articulated the proper considerations that would help it to interpret the state constitution independently. When the Florida courts have resorted to the state constitution, no clear guidance is provided as to which method of interpretation is utilised, since all of them have been adopted at one time or another. The primacy approach has been used predominantly in situations where no federal counterpart exists to a provision of the state constitution or where the federal analogue is not applicable to the states, such as access to court, right to privacy, civil jury trial cases and cases involving substantive due process. However,

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criminalize the mere possession of embossing machines when such a prohibition clearly interferes with the legitimate personal and property rights of a number of individuals who use embossing machines in their business and for other non-criminal activities." Ibid at 1129.

it has been used in situations where there is a federal analogue such as due process cases. The lockstep approach has been used in search and seizure as well as in some freedom of speech cases. The interstitial approach has been preferred in civil rights cases addressing freedom of religion assembly and speech cases, equal protection cases as well as criminal jury trial cases, and it seems to be the one favoured by the Florida courts. The New Federalist approaches that the Florida courts opted for in the cases made available are demonstrated in Table 11.

Table 11

Court	Case	Subject	Approach
Supreme Court	Flo. Canners Ass. v Dep. of Citrus	Freedom of expression	Lockstep
Supreme Court	Firestone v Newspress Pub. Co.	Freedom of expression	Interstitial
Supreme Court	Sakon v Pepsi Co.	Freedom of expression	Interstitial
Supreme Court	Public Health Tr. of Dade County v Wons	Right of privacy	Interstitial
Supreme Court	Re T. W.	Right of privacy	Primacy
Supreme Court	State v Barquet	Right of privacy	Primacy

Supreme Court	Maisler v State	Right of privacy	Primacy
Supreme Court	State v Hume	Right of privacy	Primacy
Supreme Court	Madsen v State	Right of privacy	Primacy
Supreme Court	Overland Con. Co., Inc. v Sirmons	Right of access to courts	Primacy
Supreme Court	Carter v Sparkman	Right of access to courts	Primacy
Supreme Court	G.B.B. Invest., Inc. v Hinterkopf,	Right of access to courts	Primacy
Supreme Court	Diamond v E.R. Squibb and Sons, Inc.	Right of access to courts	Primacy
Supreme Court	Engle v State	Due process	Interstitial
Supreme Court	Spivey v State	Due process	Interstitial
Supreme Court	Wood v State	Due process	Interstitial
Supreme Court	Garron v State	Due process	Interstitial
Supreme Court	Harmon v State	Due process	Interstitial

Supreme Court	United Tel. Long Dist. v Nichols	Equal protection	Interstitial
Supreme Court	Texaco, Inc. v Dep. of Transp.	Equal protection	Interstitial
Supreme Court	State v Smith	Due process	Primacy
Supreme Court	Hill v State	Due process	Primacy
Supreme Court	State v Glosson	Due process	Primacy
Supreme Court	Dep. of Agric. v mid-Fla. Growers	Eminent domain	Primacy
Supreme Court	State v Sarmiento	Criminal law and procedure	Primacy
Supreme Court	Odom v State	Criminal law and procedure	Primacy
Supreme Court	State v Neil	Criminal law and procedure	Primacy
Supreme Court	In Re Forfeiture	Criminal law and procedure	Primacy

Supreme Court	In Re Jones	Criminal law and Primacy procedure
Supreme Court	Hightower v Bigoney	Criminal law and Primacy procedure
Supreme Court	Wiggins v Williams	Criminal law and Primacy procedure
Supreme Court	Hughes v Hannah	Criminal law and Primacy procedure
Supreme Court	Carter v State Road Dep't	Criminal law and Primacy procedure
Supreme Court	Camp Phosphate Co. v Anderson	Criminal law and Primacy procedure
Supreme Court	Hawthorne v Panama Park Co.	Criminal law and Primacy procedure
Supreme Court	J.B. Green Realty Co. v Warlow	Criminal law and Primacy procedure
Supreme Court	State v Webb	Criminal law and Primacy procedure

Supreme Court	Whirley v State	Criminal law and procedure	Interstitial
Supreme Court	Reed v State	Criminal law and procedure	Interstitial
Supreme Court	Bean v State	Criminal law and procedure	Primacy
Supreme Court	Marshall v State	Criminal law and procedure	Primacy
Fourth District Court of Appeals	State v Douse	Criminal law and procedure	Primacy
Supreme Court	Sobczak v State	Criminal law and procedure	Primacy
Supreme Court	Liquor Store, Inc. v Cont. Distilling Corp.	Substantive due process	Primacy
Supreme Court	Florida Bd. of Pharm. v. Webb's City, Inc.	Substantive due process	Primacy
Supreme Court	Larsen v Lasser	Substantive due process	Primacy

Supreme Court	Dep't of Insurance v Dade County Cons. Advocate	Substantive due process	Primacy
Supreme Court	State v Saiez	Substantive due process	Primacy

6.3. NEW YORK

6.3.1. The scope of New Judicial Federalism In New York

Courts in the state of New York seem to demonstrate a preference towards relying on the individual rights guarantees provided by their own state constitution, as opposed to reliance on the protective provisions of the federal Constitution. This policy could be considered logical where the rights protected by the state constitution do not enjoy federal protection, or where substantial differences exist between the two texts which justify some kind of independent interpretation of the state constitution. New York courts, however, have been resorting to independent analysis even in situations where no textual difference between comparable provisions exists. As Galie[64] points out, the courts of that state have consistently recognised that their own constitutional traditions acquire a significant value, independent from that of the federal Constitution. In addition, this trend does not seem to con-

64. Galie, "State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York", 1960-1978, 28 Buffalo Law Review 157, 192 (1979).

stitute a recent phenomenon due to the contraction by the Burger Court of federal rights and remedies in criminal procedure. The right to counsel, for instance is similarly worded in both the Federal and the New York Bills of Rights. New York courts, however, have consistently interpreted the state provision as offering wider protection than the Federal one, forcing thus commentators to regard the right to counsel in the state of New York as "the strongest protection of right to counsel anywhere in the country"[65]. The New Federalist approach that the New York courts follow in right to councel situations, is usually the interstitial one. They first examine the federal provision only to find that the state one, which is subsequently analysed, offers wider protection.

The due process clause is another example of how two provisions, similarly worded in both the state and the federal constitutions may require separate interpretation. The fourteenth amendment to the federal Constitution reads that: "nor shall any state deprive any person of life, liberty, or property without due process of law." The New York constitution's due process clause, which came to force before the fourteenth amendment, provides that: "No person shall be deprived of life, liberty or property without due process of law."

The apparent similarity of the two provisions could dictate that the federal one should take precedence over its state counterpart. It was as early though as 1911 that it became apparent that New York courts were not willing to apply blindly the federal due process clause. In the *Ives* case[66] the state due process

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65. Galie, "The Other Supreme Courts: Judicial Activism Among Supreme Courts", 33 Syracuse Law Review 731, 764 (1982), People v. Hobson, 39 N.Y. 2d 479, 348 N.E. 2d 894, 384 N.Y.S.2d 419 (1976).
66. Ives v. South Buffalo Ry. Co., N.Y. 271, 94 N.E. 431 (1911).

clause was utilised in order to annul the Workmen's Compensation Act of 1910, a statute that forced employers to contribute to an insurance fund for the benefit of employees injured in the course of employment, irrespective of fault. That opinion of the New York Court of Appeals became promptly unpopular. It was rejected nationally. It was publicly criticised by Theodore Roosevelt, who was then planning his progressive political movement. It led to an amendment of the state constitution to include workers' compensation in no less than the Bill of Rights and it cost its author the chief judgeship of the Court of Appeals in the next election. The jurisprudencial and political importance of *Ives* is, then, beyond doubt. But this case is also significant due to the fact that its specific outcome necessitated a rejection of two preceding decisions of the United States Supreme Court that supported the validity of the statute. The Court said that the above mentioned decisions were "not controlling of our construction of our Constitution" and continued" [a]ll that is necessary to affirm in this case before us is that in view of the Constitution of our state, the liability sought to be imposed upon the employees enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void."[67] It can be said then, that *Ives* is a clear indication of the intentions of the state court to interpret independently its state constitution, since a statute considered valid as regards federal due process fell in doubt as regards state due process. The interstitial approach characterises, again, the attitude of the state courts in due process situations.

Ives is a milestone decision for the New York courts in as far as it became the departure point in their subsequent tendency

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67. Ives v. South Buffalo Ry. Co., 201 N.Y at 317, 94 N.E. at 448.

to interpret the state due process clause broader than the federal one. For example, in *Sharrock v. Dell Buick-Cadillac, Inc.*[68] the New York Court of Appeals was faced with a situation involving a challenge under the state and federal due process clauses to the statutory lien enabling garage men to foreclose for delinquent repair and storage charges. The Supreme Court of the United States had proclaimed, two months earlier, in a finding which the state court could have relied on to dispose of the case, that a private sale of property subject to a warehouseman's possessory lien did not constitute "state action" for the purposes of the fourteenth amendment.[69] The New York court, though, adopting an interstitial approach, decided that it could give a broader reading to the "state action" requirement since no reference to "state" is contained in the state due process clause, unlike its federal counterpart. Fundamental principles of federalism, the history of the due process clause in New York along with the textual constitutional difference and the long tradition of due process protection afforded to the citizens of that state, were the crucial factors taken into consideration by the Court of Appeals in its decision to invalidate the statute.[70]

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68. 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978).
69. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).
70. 45 N.Y.2d at 159-161, 379 N.E.2d at 1173-1174, 408 N.Y.S.2d at 43-45. Also Svendsen v. Smith's Moving and Trucking Co., 54 N.Y.2d 856, 429 N.E.2d 411, 444 N.Y.S.2d 904 (1981) (mem.), cert. denied, 455 U.S. 927 (1982).The concurrence in Svendsen, 54 N.Y.2d at 868, 429 N.E.2d at 412, 444 N.Y.S.2d at 905 (Jasen, J., concurring) and the dissent in Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 169, 379, N.E.2d 1169, 1179-1180, 408 N.Y.S.2d 39, 50 (Jasen. J., dissenting), would instead have relied on the per curiam opinion in Central Savings Bank v. City of New York, 280 N.Y. 9, 19 N.E.2d 659 (1939), cert. denied, 306 U.S. 661 (1939), in which the Court of Appeals held, on remittitur, that the state and federal due process clauses "are formulated in the same words and are intended for the protection of the same fundamental rights of the individual and there is, logically, no room for distinction in definition of the scope of the two clauses" Id at 10, 19 N.E.2d at 659. The explanation provided by the court in concluding that the

Unlike the provisions regarding the right to counsel and due process, the state protection against unreasonable searches and seizures does not differ either in text or in history from the federal Constitution. Article I, section 12, is identically worded with the fourth amendment and it was not until 1938 that it became part of the state constitution, New York actually being the last state to adopt it. The protection against unreasonable searches and seizures was not unfamiliar to the state of New York. It had already been contained in the Civil Rights Law for a decade but what caused dispute in the 1938 Convention, was the exclusionary rule. In *Weeks*, the Supreme Court had declared that the exclusion of evidence in federal courts was essential to meaningful protection against unreasonable searches.[71] The New York Court of Appeals, however, deviated from that holding. Judge Cardozo, pointed out that state courts were not obliged to interpret the New York statutes the way the federal courts had interpreted the federal Constitution. He concluded that the public policy of New York dictated rejection of the exclusionary rule.[72] In the end, the protection against unreasonable searches and seizures became a part of the constitution of the state of New York, unlike an explicit exclusionary rule a fact inevitably leaving open the question of whether the exclusion of evidence should follow implicitly, as was the case in the federal constitution. Subsequently it was held that it does.[73]

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amendment was in breach of the state due process clause followed necessarily from their determination that according a long line of decisions of the Supreme court of the United States, the statute was repugnant to the Federal Constitution.

71. Weeks v, United States, 232 U.S. 383 (1914).

72. People v. Defore, 242 N.Y. 13, 150 N.E 585, cert. denied, 270 U.S. 657 (1926).

73. In People v. Johnson, 66 N.Y.2d 398, 408, 488 N.E.2d 439, 446-447, 497 N.Y.S.2d 618, 625-626 (1985) (Titone, J., concurring) there is a discussion of the relevant history.

When contemplating this text and history, the New York Court of Appeals chose for many years not to deviate from the findings of the federal courts when it came to search and seizure arguments based on the state constitution.[74] This meant that New York courts in general when faced with situations dictating a choice between the state clause regarding unreasonable searches and seizures and the fourth amendment, they would consider the latter as the guiding precedent, adopting, thus, a lockstep approach.[75]

The analysis regarding search and seizure applies as well to the equal protection clause. Notwithstanding the fact that the state and the federal constitution share history and text, the Court of Appeals has followed a lockstep approach, only occasionally deciding that the equal protection clause of the state constitution provided for greater rights as opposed to its federal counterpart. In *Dorsey*[76] the court pointed out that the equal protection clause approved at the 1938 Constitution Convention, N.Y. Const. art. I section11, was designed to embody "in our Constitution the

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74. *See*,for example, People v. Ponder, 54 N.Y.2d 160, 165, 429 N.E.2d 735, 737-738, 445 N.Y.S.2d 57, 59 (1981).
75. People v. Johnson, 66 N.Y.2d at 406, 488 N.E.2d at 445, 497 N.Y.S.2d at 624, see also People v. Gonzalez, 62 N.Y.2d 386, 389-390, 465 N.E.2d 823, 824-825, 477 N.Y.S.2d 103, 105 (1984).
76. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530, 87 N.E.2d 541, 552 (1949), cert. denied, 339 U.S. 981 (1950), also Under 21 v. City of New York, 65 N.Y.2d 344, 360, 482 N.E.2d 1, 7-8, 492 N.Y.S.2d 522, 528-529 (1985) (applying federal precedents), Esler v. Walters, 56 N.Y.2d 306, 313-314, 437 N.E.2d 1090, 1094-1095, 452 N.Y.S.2d 333, 337-338 (1982) (identical coverage to the federal provision). In Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188, 424, N.Y.S.2d 168 (1979), cert. denied, 446 U.S. 984 (1980), though, the Court of Appeals, found unacceptable under state law, the fact that as a matter of federal law the denial of contact visitation privileges to pretrial detainees was not prohibited. The court declared that" We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority.
Ibid at 79 399 N.E.2d at 1193, 424 N.Y.S.2d at 174.

provisions of the Federal Constitution which are already binding upon our State and its agencies."

Why then did the New York courts prefer this line of policy? According to Kaye[77] the policy of the Court of Appeals of conforming with the federal courts can be attributed to two factors. First, "continuing a policy of conformity necessarily depends upon the continuation of that to which one has to conform" and second, "a policy of having a single workable rule can as readily be served by imposing a higher state standard as by conforming to the federal standard." The Court of Appeals noted in *P.J. Video Inc.*[78] that the interest of uniformity is only ""one consideration to be balanced against other considerations that may argue for a different rule" and continued that when "weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor."

A question that has to be answered then, is why should it be concluded that state law affords greater protection than its federal counterpart, where the text and the history of a provision dictate a policy of uniformity. A widely quoted argument indicates that the Supreme Court establishes the lowest common denominator as regards the application of individual rights, leaving to the state courts the additional duty to supplement, when necessary, those rights by means of enforcing their own constitutions.[79] A difference in interpretation of common provisions has been justified as

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77. J. S. Kaye, "Dual Constitutionalism in Practice and Principle" 61 St. John's Law Review 399 at 417 (1987).
78. People v. P.J. Video Inc., 68 N.Y.2d 296, 304, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912-913 (1986), cert. denied, 107 S. Ct. 1031 (1987).
79. *See* Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979) (right of visitation granted to pretrial detainee by state constitution) cert. denied, 446 U.S 984 (1980), People v Adams, 53 N.Y.2d 241, 250, 423 N.E..2d 379, 383, 440 N.Y.S.2d 902, 906 (1981), People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986).

being based in sound policy considerations such as particular characteristics of the state, statutes of common law, and public attitudes as regards the scope, definition and protection of the relevant right.

In New York, issues that involve particular characteristics of that state and its traditions have been considered to be the ones related to free expression,[80] as well as disputes regarding land use.[81] Here, the state courts adopt the primacy approach. The New York Court of Appeals has also departed from the federal constitution in search and seizure cases due to the above mentioned policy considerations[82]. Kaye[83] cites as an example, that by decisional law developed over the years, definable standards had been established and consistently applied to probable cause determinations within the state of New York. The New York Court of Appeals has a steady record of applying those standards as a matter of state constitutional law under article I, section 12. In *P.J*

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80. *See* People v. Barber, 289 N.Y. 378, 384, 46 N.E.2d 329, 331 (1943), Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980), Bellanca v. State Liquor Auth., 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S 2d 87 (1981) cert. denied, 456 U.S. 1006 (1982), SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985), Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844, (1986). These cases involve freedom of speech.

81. McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985). See also Pollock, "State Constitutions, Land Use and Public Resources: The Gift Outright", in "Developments in State Constitutional Law: The Williamsbourg Conference" (B.D. McGraw ed. 1985),

82. *See* for example, People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985), People v. P.J. Video Inc., 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), cert. denied, 107 S. Ct. 1031 (1987), People v. Johnson, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985), also see Comment, "Article I, Section 12 of the New York State Constitution: Revised Interpretation in Wake of New Federal Standards?", 60 St. John's Law Review 770 (1986). The Court of Appeals wrote in 1987 in Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987), that the constitutionality of compulsory urine testing for public school teachers "presents a type of inquiry appropriate for resolution under the state Constitution" Id. at 65, 510 N.E.2d at 327-328, 517 N.Y.S.2d at 459.

83. *See* note 77 at 419.

Video [84] the Court expressly pronounced its departure, on policy considerations, from the from fourth amendment precedents due to the fact that the Supreme Court had lately changed the federal standards, thus "heightening the danger that our citizens' rights against unreasonable police intrusions might be violated"

It seems then, that the state of New York could be, for a number of reasons, fertile ground for the development of an independent body of constitutional jurisprudence. A question that has to be asked though, is whether this trend will have the impetus to survive through the nineties. Because it is easily understood that the survival of the doctrine of New Judicial Federalism depends predominantly on a continuous supply of indications that state courts do actually wish to assume the dominant role in protecting individual rights, a role traditionally occupied by the Supreme Court. On that subject, as far as New York is concerned, important information is provided in a survey by Gardner.[85]In Part III[86] of his project, Professor Gardner, who is not included amongst the New Federalism enthusiasts, after concluding that it would not be feasible to examine the status of state constitutional law of every

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84. People v. P.J. Video Inc., 68 N.Y.2d at 301, 501 N.E.2d 562, 508 N.Y.S.2d at 913, also State v. Kimbro, 197 Conn. 219, 496 A 2d 498 (1985). Connecticut Supreme Court Chief Justice Peters noted, in electing to interpret broadly state constitutional law instead of the federal precedent that "[T]he Connecticut Court was able to profit from a developed history of an established, workable test for warrantless searches, without having to commit itself to changing federal views on the reach of the fourth amendment. We were reinforced in our view of our constitution by a similar decision reached by a Massachusetts court with similar constitutional history." E. Peters, "Remarks at the Second Circuit Judicial Conference", at 3 (Sept. 5, 1986) (unpublished text),cf. Peters, "State Constitutional Law: Federalism in the Common Law Tradition" (Book Review), 84 Michigan. Law. Review. 583, 588 (1986) (reviewing Developments in State Constitutional Law: The Williamsburg Conference (1985).

85. "The Failed Discourse of State Constitutionalism", 90 Michigan. Law. Review, 761 (1992).

86. *Ibid* at 778.

relevant decision of every state court, defines a field of inquiry whose main limitations are: a) Taking into consideration a number of criteria he confines his survey to a sample of seven states; b) arguing that state supreme courts are far more likely to devote sustained attention to state constitutional issues than are lower courts, he only examines decisions of the highest court of each state; c) he excludes decisions in which the state high court did not write a full opinion, or at least perform some kind of legal analysis and d) he confines his analysis to cases decided during 1990, the most recent for which published state high court decisions were available, at the time the survey was conducted. As regards this last limitation, Gardner admits that his choice to focus on a single year may result in some distortion due to annual variations in caseload. He points out however, and this seems to be a valid argument that the more recent the focus, the more any distortion would tend to favour the predictions of New Judicial Federalism. This is due to the fact that independent state interpretation decisions are more likely with the passage of time, since the more recent the year, the more time the message of the New Judicial Federalism has had to penetrate the state judiciaries. Additionally, since the US Supreme Court by continuing each year to slow or reverse the expansion of federally protected rights, providing thus state courts with more to react against.[87]

In Professor Gardner's survey the record of the Court of Appeals, of the State of New York, the highest ranking court of that state, holds a prominent position. Initially, in an attempt to demonstrate the infrequency of state constitutional decisions, it is mentioned that in New York only 20% of the cases that have been

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87. *Ibid* at 780, note 66.

decided involved state constitutional issues. The actual numbers are as follows. In 1990, the Court of Appeals issued 240 opinions containing some kind of legal analysis. Out of these, 184 involved no constitutional issue at all, 7 involved only a federal constitutional claim and 37 involved state constitutional claims. Another 12 opinions left unclear whether the case rose to constitutional dimensions.[88] Out of the 37 cases that rested on the state constitution, in 12 the mention of the state constitution consists of either an acknowledgement that a party is raising a state constitutional claim, a citation to the state constitution or the assertion that the case will have the same outcome under both the state and federal constitutions.[89] In 12 more opinions, the court held, that some "right" or "constitutional right" is at issue, without mention of any constitution.[90]

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88. *Ibid* at 780, note 68.
89. *Ibid* at 781, note 70. People v. Carter, 566 N.E.2d 119, 120, 123 (N.Y. 1990), cert. denied, 111 S. Ct. 1599 (1991), Johnson Newspaper Corp. v. Melino, 564 N.E.2d 1046, 1047, 1049 (N.Y. 1990), People v. Ortiz, 564 N.E.2d 630, 632 (N.Y. 1990), Schneider v. Sobol, 558 N.E.2d 23, 24 (N.Y. 1990), McKenzie v. Jackson, 556 N.E.2d 1072 (N.Y. 1990), People v. Basora, 556 N.E.2d 1070, 1071 (N.Y. 1990), People v. Cain, 556 N.E.2d 125, 126 (N.Y. 1990), cert. denied, 111 S. Ct. 134 (1990), Forti v. New York State Ethics Commn., 554 N.E.2d 876, 882-86 (N.Y. 1990), People v. Hernandez, 552 N.E.2d 621, 624 (N.Y. 1990), affd. sub nom. Hernandez v. New York, 111 S. Ct 1859 (1991), People v. Sides, 551 N.E.2d 1233, 1234 (N.Y. 1990), People v. Cintron, 551 N.E.2d 561, 566, 567 (N.Y. 1990).
90. *Ibid* at 782, note 71. People v. Rodriguez, 564 N.E.2d 658, 659 (N.Y. 1990) (due process right to be present at trial), People v. LaClere, 564 N.E.2d 640, 61 (N.Y. 1990) (right to counsel), People v. Thomas, 563 N.E.2d 280, 281 (N.Y. 1990) (right to have counsel at line-up), People v. Gordon, 563 N.E.2d 274, 275 (N.Y. 1990) (showup identification), City of New York v. State, 562 N.E.2d 118, 121 (N.Y. 1990) (equal protection argument), People v. Harris, 559 N.E.2d 660, 661 (N.Y. 1990) (due process right). In re Lionel F., 558 N.E.2d 30. 31 (N.Y. 1990) (double jeopardy), cert. denied, 111 S. Ct. 304 (1990s, People v. Garcia, 555 N.E.2d 902, 902 (N.Y. 1990) (ineffective assistance of counsel), People v. Wandell, 554 N.E.2d 1274, 1274 (N.Y. 1990) (effective assistance of counsel), People v. Gonzalez, 554 N.E.2d 1269, 1270 (N.Y. 1990) (right to counsel), cert. denied, 111 S. Ct 99 (1990). In re Jamal C., 553 N.E.2d 1018, 1019 (N.Y. 1990) (constitutional right to the presence of counsel), People v. Tuck, 551 N.E.2d. 578, 578 (N.Y. 1990) (right to confrontation).

Gardner uses the fact that in none of these cases did the court make any statement of the *Michigan v. Long* kind-that its decision was based on adequate and independent state grounds-to conclude that it is impossible to determine whether these rulings are state constitutional rulings or not.[91] It is further argued that this approach of the Court of Appeals, led to a situation where litigants were discouraged to make such claims, something easily seen by the low proportion of cases where a state constitutional ruling is requested. The example used is the protection of freedom of speech. Although both the federal and the state constitution protect it,[92] only 3 published opinions were issued by New York trial courts under the state constitution in 1990[93], as opposed to 15 issued by the US district courts sitting in New York.[94] Gardner

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91. *Ibid* at 782.
92. U.S. Const. amend. I, N.Y. Const. art. I section 8.
93. Gardner at 784, note 82. People v. Perkins, 558 N.Y.S2d 459 (Dist. Ct. 1990), People v. Reynolds, 554 N.Y.S2d 391 (City Ct. 1990), People v. Blanchette, 554 N.Y.S.2d 388 (City Ct. 1990). Gardner notes that a fourth case, People v. Pennisi, 563 N.Y.S.2d 612 (Sup. Ct. 1990), seems unclear as to whether the constitutional claim adjudicated is a federal or a state one, a fifth case, Delano Village Cos., v. Orridge, 553 N.Y.S2d 938 (Sup. Ct. 1990), seems to clearly decide a free speech claim under the federal constitution but it is unclear about whether the ruling should also be understood as one under the state constitution, and two other free speech cases, Johnson Newspaper Corp. v. Melino, 564 N.E.2d 1046 (N.Y. 1990) and Golden v. Clark, 564 N.E.2d 611 (N.Y. 1990) were decided under the state constitution.
94. Piesco v. City of New York, 753 F. Supp. 468 (S.D.N.Y 1990) (retaliatory discharge), New York News, Inc. v. Metropolitan Transp. Auth., 753 F. Supp. 133 (S.D.N.Y. 1990) (restricting sale of newspapers), Levin v. Harleston, 752 F. Supp. 620 (S.D.N.Y 1990) (academic freedom), Central Am. Refugee Ctr. v.. City of Glen Cove, 753 F. Supp 437 (E.D.N.Y. 1990) seeking employment, New York State Assn. of Career Schools v. State Educ. Dept., 749 F. Supp. 1264 (W.D.N.Y. 1990) (regulation of schools), Uryevick v. Rozzi, 751 F. Supp. 1064 (E.D.N.Y. 1990) (employment rules), New Alliance Party v. Dinkins, 743 F. Supp. 1055 (S.D.N.Y. 1990) (regulation of political party rally), Wojnarovicz v. American Family Assn., 745 F. Supp. 130 (S.D.N.Y. 1990) (state copyright law), Don King Prods., Inc. v. Douglas, 742 F. Supp. 778 (S.D.N.Y. 1990) (libel), Nee York State Natl. Org. for Women v. Terry, 737 F. Supp. 1350 (S.D.N.Y. 1990) (civil rights), Starace v. Chicago Tribune Co., 17 Media L. Rep. (BNA) 2330 (S.D.N.Y. 1990) (libel), Selkirk v. Boyle, 738 F. Supp. 70 (E.D.N.Y. 1990) (public employment), Bordell v. General Elec. Co., 732 F. Supp. 327 (N.D.N.Y. 1990) (workplace confidentiality), Sarceno v. City of Utica, 733 F. Supp. 538 (N.D.N.Y. 1990) (retaliatory discharge), Young v. New

though, being at pains to prove that litigants dealing with free speech issues, when faced with the choice between a federal and a state court, placed a lower value on the opportunity to raise a state constitutional issue, devotes only a footnote in order to mention two free speech cases where the Court of Appeals of New York, after adopting an interstitial approach, expressly asserted that the state constitution provides greater protection for free speech than its federal counterpart.[95]

Where the survey of Gardner is important though, as regards the course of New Judicial Federalism in New York is the somewhat reluctant acknowledgement, that state constitutes one of the exceptions that provide "comfort" to the "proponents of New Federalism".[96] In 1990, the New York Court of Appeals held in 4 cases that the state constitution provides greater protection of individual rights than the Federal Constitution.[97] A characteristic example of the court's state constitutional analysis is its approach in *People v. Dunn.*[98] There a criminal defendant placed a challenge against a search both under the state and the federal constitutions. The court examined in the first place the claim under the Fourth Amendment of the US Constitution. It held that no search had occurred as a matter of federal constitutional law.[99] The court then, apparently following an interstitial approach, turned to the state constitutional claim. It considered whether the analysis of

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York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990) (regulation of begging).

95. *Ibid* note 84. Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1277-78 (N.Y. 1991), O'Neill v. Oakgrove Constr., 523 N.E.2d 277, 280 n.3 (N.Y. 1988).

96. *Ibid* at 795.

97. People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990), People v. Van Pelt, 556 N.E.2d 423 (N.Y. 1990), People v. Villardi, 555 N.E.2d 915 (N.Y. 1990), People v. Davis, 553 N.E.2d 1008 (N.Y. 1990).

98. 564 N.E.2d 1054 (N.Y. 1990).

99. 564 N.E.2d at 1056-57.

the controlling federal case should be adopted as a matter of state constitutional law.[100] The court continued by indicating that it had interpreted the state constitution independently from its federal counterpart in the past, and that it would do that again here.[101] "Unlike the Supreme Court", the New York court thought that the analysis under the state constitution should have a different focus from the controlling Fourth Amendment precedent. That focus was contained in a federal circuit court opinion which the New York court found "persuasive."[102] The New York court additionally cited a dissenting Supreme Court opinion by Justice Brennan, as well as some previously decided New York cases. It then concluded, that a search had occurred under the state constitution, although the defendant's state constitutional rights had not been violated by that search.[103] Similarly in *People v. Davis*,[104] the court after considering a right to counsel claim under both the state and the federal constitutions, it held that the New York constitution provided broader protection than the federal one and cited contrasting state and federal cases to prove it.[105]

6.3.2. Summary

New York seems to be one of those states where the call of New Judicial Federalism has had a positive response. Historical

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100. 564 N.E.2d at 1056-57. Gardner correctly observes, that this approach somehow diverges from a proper interstitial approach, since when it comes to the latter there is no suggestion that state courts decide whether a federal rule should be adopted as the state law based on the merits of the federal rule. Rather, state courts are urged to adopt any rule an independent interpretation of the state constitution dictates.
101. 564 N.E.2d at 1057.
102. 564 N.E.2d at 1058 n.4.
103. 564 N.E.2d at 1058.
104. 553 N.E.2d 1008 (N.Y. 1990).
105. 553 N.E.2d at 1010-1011.

circumstances and socio-cultural characteristics which are unique to New York, have contributed to an increased tendency of the state to rely on the state constitutional provisions, instead of the federal ones, for the protection of the fundamental rights of their citizens. What is significant in the case of New York is that a preference towards the state provisions is observed, even in circumstances where a similar federal provision exists. Moreover, the state provision is frequently preferred over the federal one, even when the latter is worded similarly with the former. When it comes to the New Federalist approaches, the New York Court of Appeals seems to make frequent use of the interstitial and the lockstep ones. Both have been utilised in criminal law and procedure issues. The interstitial approach is also the favourite of the New York Court of Appeals in due process cases, while the lockstep approach has been widely utilised in equal protection situations. The interstitial approach seems to be the preferred one in freedom of speech cases as well as in cases concerning land use. Table 12 summarises the New Federalist approaches favoured by the New York Court of Appeals in the cases made available:

Table 12

Court	Case	Subject	Approach
Court of Appeals	Ives v. South Buffalo	Due process	Interstitial
Court of Appeals	Sharrock v Dell Buick-Cadillac, Inc.	Due process	Interstitial

Court of Appeals	Svendsen v Smith's Moving and Trucking Co.	Due process	Interstitial
Court of Appeals	Central Savings Bank v City of New York	Due process	Lockstep
Court of Appeals	People v Hobson	Due process	Interstitial
Court of Appeals	People v Ponder	Criminal law and procedure	Lockstep
Court of Appeals	People v Gonzalez	Criminal law and procedure	Lockstep
Court of Appeals	Dorsey v Stuyvesant Town Corp.	Equal protection	Lockstep
Court of Appeals	Under 21 v City of New York	Equal protection	Lockstep
Court of Appeals	Esler v Walters	Equal protection	Lockstep
Court of Appeals	Cooper v Morin	Criminal law and procedure	Interstitial

Court of Appeals	People v P.J. Video Inc.	Criminal law and procedure	Interstitial
Court of Appeals	People v Dunn	Criminal law and procedure	Interstitial
Court of Appeals	People v Davis	Right to councel	Interstitial
Court of Appeals	People v Bigelow	Criminal law and procedure	Interstitial
Court of Appeals	People v Johnson	Criminal law and procedure	Interstitial
Court of Appeals	McMinn v Town of Oyster Bay	Land use	Interstitial
Court of Appeals	People v Barber	Freedom of expression	Interstitial
Court of Appeals	Bellanca v State Liquor Auth.	Freedom of expression	Interstitial
Court of Appeals	Arcara v Cloud Books, Inc.	Freedom of expression	Interstitial
Court of Appeals	Johnson Newspaper Corp. v Melino	Freedom of expression	Interstitial

Court of Appeals	Golden v Clark	Freedom of expression	Interstitial
Court of Appeals	Immuno AG. v Moor-Jankowski	Freedom of expression	Interstitial
Court of Appeals	O'Neill v Oakgrove Constr.	Freedom of expression	Interstitial

6.4. MARYLAND

6.4.1. The scope of New Judicial Federalism in Maryland

As is already known a significant change in the relationship between the Supreme Court of the United States and the state supreme courts became apparent in the 1970s. During the era of the Warren Court any changes in the direction of the protection of civil rights and liberties would stem almost exclusively either from the Supreme Court or other federal courts. That situation started to change when the Court under Justice Burger decided to adopt a different, less stringent, approach as regards the protection of individual rights and liberties than the one to which its predecessor had opted to adhere to. As the protection of a significant number of federal rights shrivelled, state courts began to explore the potential offered by their own constitutions to defend the protection of individual rights and liberties. In a spectrum of cases ranging from abortion matters to the right of the press to be

present in judicial proceedings, state courts around the country started to interpret their state constitutions independently from the dicta of the Supreme Court of the United States and the Federal Bill of Rights.

When it comes to how the Maryland courts-especially the highest of all the Maryland Court of Appeals-handled the alternative possibility of protection of individual rights through independent interpretation of the state constitution, the phrase that best describes the situation is "middle of the way". An examination of its decisions, from the 1970s onwards, indicates that the Court of Appeals was not indifferent to invocations of provisions of the Maryland Constitution and Declaration of Rights.

The first area to be examined is that of freedom of speech. In general, despite the difference in text between Article 40 of the Maryland Declaration of Rights and the First Amendment of the US Constitution, the Maryland Court of Appeals has interpreted the two provisions similarly, following, thus, a lockstep approach. Only occasionally, mainly in the area of speech on private property, has the Maryland Court of Appeals expanded freedom of speech in the state. In *State v. Schuller*,[106] the Maryland Court relied on the uncertainty in federal doctrine to strike down the state's statute banning residential picketing. Here the court opted for the more protective line of cases in which the Supreme Court of the United States considered picketing as a form of expression, protected therefore by the First Amendment.[107] Although the Maryland court adopted the more speech protective line of cases in this area of free speech law, it did so on the basis of federal not

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106. 280 Md. 305 (1977)
107. Thornhill v. Alabama, 310 U.S. 88 (1940).

state tradition. In this respect the interstitial approach that the Maryland court chose in order to protect an individual's right to free speech on private property, contrasts with the primacy approach taken by the California Supreme Court in *PruneYard Shopping Center v Robins.*[108] The Maryland court has followed the federal precedent in cases involving commercial speech, as the outcome in the case of *re Oldtown Legal Clinic*[109] indicates. The situation is not different in the area of obscenity. Notwithstanding the fact that the Maryland court, had since the 1920s, established a specific practice, it finally decided to walk in lockstep with the guidelines provided by the US Supreme Court[110] as it is apparent in the cases of *Mangum v. Maryland State Board of Censors*[111] and *Gayety Books v. City of Baltimore.*[112] Things are slightly different when it comes to freedom of the press cases. In a case involving the press's right to be present in judicial proceedings,[113] the court's decision rested both on the state's tradition of press rights and courtroom openness and the federal standard. When it came to defamation cases, although the court's early experience was one of realignment with the federal dicta, as the case of *Jacron Sales Co. v. Sindorf* indicates,[114] it later showed in the *Hearst Corp. v. Hughes* [115] case a willingness to go one step further than the federal document.

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108. 447 U.S. 74 (1980).
109. 285 Md. 132 (1979)
110. Burstyn v. Wilson, 343 U.S. 495 (1952), Roth v. U.S., 354 U.S. 476 (1957), Manual Enterprises v. Day, 370 U.S. 478 (1962), Jacobellis v. Ohio, 378 U.S. 184 (1964), Memoirs v. Attorney General of Massachusetts, 383 U.S. 413 (1966), Miller v. California, 413 U.S. 15 (1973).
111. 273 Md. 176 (1974).
112. 297 Md. 206 (1977).
113. 297 Md. 68 (1983).
114. 276 Md. 580 (1976).
115. 297 Md. 112 (1983).

The treatment of religious freedom and the problems of church-state relations is another area indicative of the Maryland Court of Appeals approach to state constitutional development. It should be noted, that there are many areas of church-state relations where the US Supreme Court has not ruled. Consequently, until the nation's high court rules, the responsibility for resolving these problems remains with the state courts, which have the opportunity to utilise their own constitutions to that effect. The Maryland position seems to be that where the US Supreme Court has ruled, as in the question of free exercise of religion,[116] to follow the lockstep approach.[117] In areas where there is a difference in the provisions between the US and the Maryland Constitution, as in the area of religious establishment, the Maryland court has permitted the state greater leeway than the federal courts have allowed. For instance, in the question of public aid to private colleges with religious affiliation, the Maryland court found that none of the grants violated Article 36 of the Maryland declaration of Rights.[118] To support its view the court examined history and mentioned a number of cases[119] that held that "grants to educational institutions...have never, in Maryland, been held to be impermissible under Article 36, even though the institutions may be under the control of a religious order."[120] It has been a consistent practice of the Maryland Court of Appeals

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116. Torcaso v. Watkins, 367 U.S. 488 (1961).
117. Schowgurow v. Maryland, 240 Md. 121 (1965).
118. Horace Mann League, Inc. v. Board of Public Works, 242 Md. 645, cert. denied, 385 U.S. 97 (1966).
119. Speer v. Colbert, 24 App.D.C. 187 (1904), Mt. St. Mary's College v. Williams, 132 Md. 184 (1918), Baltzell v. Church Home, 110 Md. 244 (1909).
120. 242 Md. 645, 690,(1966).

ever since to permit significant degrees of state involvement in certain areas of religious matters.

The experience of the Maryland court in the area of privacy and personal autonomy is again one of moderation and restraint. It should be noted that the right to privacy is not explicitly provided for in the text of the US Constitution. Rather, the Supreme Court has recognised through a number of decisions, that there are additional fundamental rights existing alongside those specifically mentioned in the Bill of Rights which protect an individual's autonomy in deciding matters concerning marriage and child rearing,[121] contraception,[122] and abortion.[123]As far as the states are concerned, only four, Florida, Alaska, California and Montana have an express constitutional provision guaranteeing an independent right to privacy. This however, should not mean that there is no room for state court development of the right of privacy in states like Maryland that do not specifically recognise it. The Maryland Court of Special Appeals, when addressed with this question in *Schochet v. State*[124] held that: "...we are writing on a slate, moreover, one-third of which has already been filled by the Supreme Court. On the basis of that part of constitutional picture already completed, we are called upon to make an honest prediction of what we think the remaining, unfinished part of the picture will turn out to be".[125] That means that there is room for constitutional development where the US Supreme Court has not decided yet, such as in the areas of drug testing and euthanasia.

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121. Meyer v. Nebraska, 262 U.S. 390 (1923).
122. Griswold v. Connecticut, 381 U.S. 479 (1965).
123. Roe v. Wade, 410 U.S. 113 (1973).
124. 541 A. 2d 183 (1988).
125. *Ibid* at 186.

However, when not writing on a "clear slate", the Maryland Court has not so far shown any willingness to expand the right of privacy beyond the federal scope, again following a lockstep approach.[126]

The rebirth of equality guarantees in state constitutions renders this area of individual rights a very interesting one to consider. The equal protection clause of the Federal Constitution is included in the Fourteenth Amendment. When it comes to state constitutions, even though they do not contain an express provision guaranteeing the "equal protection of the laws", a number of provisions have been held to contain an equal provision component. Most of the states have interpreted the broad guarantees of individual rights as requiring equal protection of the laws generally. These states have considered these broad guarantees as not only protecting individuals against governmental decisions to treat people differently, but also as providing equality in specific situation, such as state education funding. Thus, there is a difference in terms of the affirmative component of equality between the federal and the state provisions, a fact allowing considerable room for states to interpret their own constitutions independently. In Maryland, the equal protection element is deemed by the Maryland Court of Appeals to be included in the state due process clause (Article 24). However, since the state constitution has no express equal protection clause, Article 24 has been held to afford no greater protection than the Fourteenth Amendment of the Federal Constitution.[127] This though, has not prevented a number

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126. Doe v. Commander, Wheaton Police Department, 273 Md. 262 (1974), Montgomery County v. Walsh, 274 Md. 502 (1975), Neville v. State, 290 Md. 364 (1981) and Schochet v. State, 541 A. 2d 183 (1988).
127. U.S. Mortgage Co., v. Matthews, 167 Md. 383 (1934).

of judges since 1981 from leaving open the option of innovation and indulge into an interstitial thinking, by utilising the state equal protection provision. In *Attorney General v. Waldron*[128] the metaphor of a "double helix" has been used to suggest that the Maryland equal protection provision has a life of its own distinguished from the Fourteenth Amendment clause. Consequently, the US Supreme Court interpretation of the equal protection provision of the federal Constitution is persuasive authority in most, but not all, cases regarding equality issues under Article 24 of the Maryland charter. This case, involving "the right to engage in a chosen calling" along with *Hornbeck v. Somerset Co. Board of Education* [129] a case involving "the right to a thorough and efficient education", are the only instants subject to a heightened standard of review. In a 1989 case, *Potomac Electric Co. v. Smith*[130] the Court of Special Appeals rejected a claim that the right to recover non economic damages was an important personal right within the meaning of Waldron, and held that the ceiling imposed by the state legislature was not in violation of either the equal protection principles embodied in Article 24 or the Fourteenth Amendment. In general the Maryland court shows a certain reluctance to abandon, in equal protection situations, its lockstep thinking. However, it has not precluded the possibility of doing so in the future, as its writing in *Waldron* suggests.[131]

A lot of the discussion regarding state constitutionalism has focused on criminal law. Indeed, the most extensive experimenta-

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128. 289 Md. 683 (1981).
129. 295 Md. 597 (1983).
130. 558 A. 2d 768, 79 Md. App. 591 (1989).
131. "Article 24 acts to vindicate important personal rights protected by the Maryland Constitution or those recognized as vital to the history and traditions of the people of this State"

tion in terms of state constitutional interpretation has taken place in this area. Despite the misconception of New Federalism being used as a code word for increased rights of the criminally accused, the development of fundamental criminal rights based on state constitutions is considered to be a most significant phenomenon. What then was the Maryland response to these developments?

In the area of searches and seizures the Maryland Court of Appeals followed the lockstep approach, a stance that has earned it the reputation of a "law and order" court. Article 26 of the Maryland Declaration of Rights which is the state analogue to the Fourth Amendment has been a part of the Maryland Constitution since 1776. As Article 23 of the state's first Declaration of Rights in 1776, the protection against unreasonable searches and seizures preceded the Fourth Amendment to the Federal Constitution. Also, the language appears to consider the Maryland clause broader and potentially more protective than its federal counterpart. The Maryland courts however, did not take advantage of the potential of their state constitution. Article 26 has been held to have the same meaning and effect as the Fourth Amendment.[132] The one notable exception was the case of *Garrison v. State*.[133] There, the Maryland Court of Appeals, which historically has permitted the use of evidence illegally seized by state officers and more recently has refused to adopt a different probable cause standard than the one applied in the Fourth Amendment, adopting an interstitial thinking, rejected the "good faith" exception of the exclusionary rule adopted by the Supreme

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132. Givner v. State, 210 Md. 484 (1956), Smith v. Maryland, 442 U.S. 735 (1979), Potts v. State 300 Md. 567 (1984).
133. 303 Md. 385 (1985).

Court in the case of *United States v. Leon.*[134] However, when the same issue arose four years later in *Malcolm v. State,*[135] the Maryland court returned to its normal approach of walking in lockstep with the federal provisions.[136] In general, the court's reluctance to move away from the federal cases, even when its decision rests on independent state grounds,[137] is consistent with its lockstep approach to criminal law issues.

The interpretation by the Maryland Court of Appeals of the privilege against self-incrimination provisions is characteristic of its approach to state constitutionalism in criminal law and procedure. The Maryland analogue to the Fifth Amendment to the US Constitution is Article 22 of the Maryland Declaration of Rights. The leading case is *Lodowski v. State.*[138] There, the Court of Appeals, applying the Fifth Amendment to the US. Constitution, ruled that the trial judge had erred in refusing to suppress a written statement by a defendant who had supposedly waived his right to counsel. The court reasoned that a suspect can not voluntarily waiver his right of counsel, if he is not told that attorneys have been retained on his behalf, are physically present in the police station, and are available for immediate consultation.[139] Shortly after *Lodowski I* was decided, the Supreme Court came to the opposite conclusion in *Moran v. Burbine.*[140] What is more important, the Court expressly permitted the states in *Burbine*, to

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134. 468 U.S. 897 (1984).
135. 314 Md. 221 (1988).
136. *Ibid* at 240.
137. It should be noted, that in Garrison the Maryland court did not attempt a "plain statement" as indicated by the outcome of Michigan v. Long.
138. Lodowski v. State I, 302 Md. 691 (1985), vacated and remanded, 475 U.S. 1078 (1986), rev'd on remand, Lodowski II, 307 Md. 233 (1986).
139. Lodowski I, 302, Md. 691, 721 (1985).
140. 475 U.S. 412 (1986).

reach a different result: "Nothing we say today disables the States from adopting different requirements for the contact of its employees and officials as a matter of state law."[141] The State of Maryland appealed the judgement in *Lodowski I* to the Supreme Court, which vacated the judgement and remanded the case to the Maryland Court of Appeals for reconsideration in light of *Burbine*. The state court however, despite the permission it was granted by the US Supreme Court to interpret the state constitution independently, reasoned that no matter how independent the Maryland charter may be from its federal analogue in theory, in practice the decisions of the Supreme Court are virtually direct authority in the area of criminal law: "It is true that similar provisions within the Maryland and United State Constitutions are independent and separate from each other. Generally, however, comparable provisions of the two constitutions are deemed to be in pare materia...Provisions comparable to the Fifth Amendment clauses concerning self-incrimination and due process of law...appeared in the Declaration of Rights, Constitution of Maryland (1776) and in each Constitution thereafter. Thus the concern with self-incrimination...was shared by those who framed the Federal Constitution and those who framed the Maryland Constitution...We cannot say...that the Federal provisions and the State provisions are to be construed and applied differently."[142] The court then concluded that under its previous holdings, the Fifth Amendment to the US Constitution and Article 22 of the Maryland Declaration of Rights will be construed similarly. Its approach then and interpretation of the Fifth Amendment and Article 22 of the state constitution is

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141. *Ibid* at 428.
142. Lodowski v. State II, 307 Md. 233, 245-246 (1986).

the same as its approach and reconciliation of the differences between the two provisions guaranteeing individuals against unreasonable searches and seizures, namely the lockstep one.

The situation is no different when it comes to the Maryland experience of the right to trial by jury. The Maryland Constitution has three relevant provisions. Article 5 of the Declaration of Rights, which has no federal counterpart, guarantees that the inhabitants of this state "are entitled to the Common Law of England and the trial by Jury, according to the course of Law." Article 21, which is almost identical to the Sixth Amendment to the US Constitution declares: "That in all criminal prosecutions every man has a right...to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty." Finally Article 23, which is similar to the Seventh Amendment states: The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved." The Maryland courts had the chance to get involved in a discussion of state constitutional interpretation in issues regarding jury size[143] and the use of peremptory challenges in jury selection.[144] In both instances the Maryland court declined to employ its own constitution, opting instead to follow a lockstep approach with the developments in federal law.

The stance of the Maryland Court of Appeals towards the issue of capital punishment, is also illustrative of the continual efforts to comply with the shifting mandates stemming from the US Supreme Court. The federal precedent on this occasion is the case

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143. State v. McKay, 280 Md. 558 (1977).

144. Lawrence v. State, 295 Md. 557 (1983), Evans v. State, 304 Md. 304 Md. 487 (1985).

of *Furman v. Georgia*,[145] where the US Supreme Court nullified in effect most death penalty laws and overturned death sentences throughout the country. Maryland's pre-*Furman* death penalty statute gave the trial court absolute discretion to impose the death penalty, unless the jury specified "without capital punishment" in the verdict. Following the *Furman* decision, the Maryland Court of Appeals struck down that statute concluding that the "death penalty is unconstitutional when its imposition is mandatory."[146] In *Bartholomey v. State*[147] the Maryland Court of Appeals ruled that the recent US Supreme Court decision, *Furman v. Georgia*, barred the death sentence under Maryland law, relying on the Supreme Court decision that declared the death penalty unconstitutional because it was imposed at the discretion of the judge or the jury and as a result was disproportional against blacks. The General Assembly, as a reaction to that decision approved in 1975 a mandatory death penalty, automatically imposed upon conviction of a narrowly defined first degree murders, a law that the Maryland Court of Appeals ruled in *Blackwell v. State*[148] unconstitutional because it barred judges from executing discretion in sentencing. In 1976 the US Supreme Court concluded in *Gregg v. Georgia*[149] that the death penalty is not per se cruel and unusual punishment in violation of the Eighth Amendment. Not surprisingly, the next-and current-death penalty statute provided for schemes approved by the Supreme Court in *Gregg v. Georgia*. And

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145. 408 U.S. 238 (1972).
146. Bartholomey v. State, 267 Md. 175 (1972).
147. *Ibid*
148. 278 Md. 466, cert. denied, 431 U.S. 918 (1976).
149. 428 U.S. 153 (1976).

in *Tichnell v. State,*[150] the first review of a capital sentence imposed under the current Maryland death penalty statute, the Court of Appeals announced that the "Maryland statutory scheme for the imposition of the death penalty" was constitutional on its face.[151] This then is another area, where the Maryland Court of Appeals was unwilling to depart from its traditional, lockstep approach to matters of criminal law.

When it comes to challenges to economic regulations of the states on the basis of the federal Constitution the cases brought in federal courts are rare today. Since 1937, federal judicial review of legislation that has to do with economic rights and interests has been the exception rather than the rule, and the only case[152] since 1937 where the Supreme Court invalidated a state economic measure was subsequently overruled.[153] Towards the end of the nineteenth century, the due process clauses of the Fifth and Fourteenth amendments came to use in order to establish substantive rights not specifically mentioned in the Constitution. Initially the doctrine of substantive due process was applied by only a small number of state courts. The Supreme Court took over in 1905 when, in the case of *Lochner v. New York,*[154] it held that a statute that limited the working hours of employees in a bakery violated the due process clause. During the *Lochner* era the federal courts regularly quashed decisions of the legislature on a number of subjects, such as labour laws, tax statutes and rates established by public utility agencies.

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150. 287 Md. 695 (1980).
151. *Ibid* at 730.
152. Morey v. Doud, 354 U.S. 457 (1957).
153. City of New Orleans v. Dukes, 427 U.S. 297 (1976).
154. 198 U.S. 45 (1905).

This line of decisions came to an end in 1937 when in the case of *West Coast Hotel Co. v. Parrish*[155] the Court overruled a previous case, sustaining a state minimum wage law for women.[156] From then on the rule was that, if legislation did not intrude upon the Bill of Rights, and did not restrict the political processes, it would be upheld unless the law was "of such character as to preclude the assumption that it rests upon some rational basis".[157] As a consequence of that retrenchment of the Supreme Court, state courts have, generally, played a more activist role in economic matters than the federal one. If the doctrine of substantial due process no longer has any vitality at the federal level, it is very much alive in the state courts. At least thirty-two state highest courts have refused to abide by the US Supreme Court holdings and are active in reviewing economic rights. Is the Maryland Court of Appeals one of these courts? Has it been active in the recognition and protection of economic rights? The due process provision embodied in Article 24 of the Maryland Declaration of Rights, had been used in the nineteenth century to strike down a number of laws[158] and to sustain a number of others.[159] In general, this line of cases indicates that Article 24 was construed in a similar manner to the late-nineteenth-century construction by the Supreme Court of cases involving the due process clause of the Fourteenth Amendment. Throughout the first

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155. 300 U.S. 379 (1937).

156. Adkins v. Children's Hospital, 261 U.S. 525 (1923).

157. U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

158. Grove v. Todd, 41 Md. 633 (1875), Ulman v. Baltimore, 72 Md. 587 (1890), Scharf v. Tasker, 73 Md. 378 (1891), Arnsperger v. Crawford, 101 Md. 247 (1905).

159. State v. Mayhew, 2 gil, 487 (1945), Wright v. Wright, 2Md. 429 (1852), Baltimore v. State, 15 Md. 376 (1860), Singer v. State, 72 Md. 464 (1890), Deems v. Baltimore, 80 Md. 164 (1894).

half of the twentieth century, the Maryland Court of Appeals developed a policy of deferring to the legislature, a policy similar to the one federal courts were following after 1937. For instance, in *Goldsmith v. Mead Johnson & Co.*,[160] a case involving the validity of the Maryland Fair Trade Act, the court held that the state economic regulation did not violate the state's due process clause. A change of course took place when the court in the case of *Loughran v. Lord Baltimore Candy and Tobacco Co.*,[161] departing from the lockstep approach with the federal court it used since then, it struck down a state statute on substantive due process grounds. This became the predominant approach of the Maryland court through most of the 1970's. In the case of *Maryland Board of Pharmacy v. Sav-a-Lot*[162] the Maryland Court of Appeals struck down a statute regulating prescription drug prices because it violated the due process clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. The same approach was used again in the case of *Maryland State Board of Examiners v. Kuhn*[163] to review economic legislation. In 1977, after using this approach for thirty seven years, the Court of Appeals found, in *Governor v Exxon*,[164] that a statute distinguished between producers and refiners on the one hand, and other sellers of petroleum products on the other, prohibiting the former to operate retail service stations, was not in violation of Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Federal Constitution.[165] This

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160. 176 Md. 682 (1939).
161. 178 Md 38 (1940).
162. 270 Md. 103 (1973).
163. 270 Md. 496 (1973).
164. 279 Md. 410 (1977).
165. 279 Md. 410, 417 (1977).

interstitial approach announced in *Exxon* is the standard today and as a consequence economic regulation in Maryland will not be held void if it can be supported by any considerations relating to public welfare. However, nothing precludes the Maryland Court of Appeals from returning to its primacy model approach that it used between 1940 and 1976, in circumstances appropriate by state law or tradition.

6.4.2. Summary

All but one-the dual sovereignty-dominant models have, at one time, been used by the Maryland Court of Appeals. Its approach could, in general, be described, as the "middle way". In handling individual rights, the court was satisfied to "fill the gaps" and walk in lockstep with the federal Constitution, through adoption in most cases of the federal dicta, and turning to its own constitution only in the absence of federal law. The best example of this approach can be seen in the way the court handled situations involving the right of privacy. It behaved accordingly in equality cases, as well as in cases having to do with issues of religious freedom, freedom of speech on private property and freedom of press. Finally, the court filled in the gaps by recognising "less" rather than more protection in the areas of commercial speech and defamation. In handling criminal law matters, the court tended to walk in lockstep with the developments dictated by the US Supreme Court. Despite the fact that the judges of the Maryland Court of Appeals have had since the early 1970s more time to consider state constitutional issues raised before them, the highest state court still follows the lead of Washington. In search

and seizure cases, the court missed the opportunity to adopt a stricter probable cause standard than the one announced by the US Supreme Court, for the evaluation of the constitutionality of a search and seizure. Again, in issues of a criminal defendant's rights, the Maryland Court refused to interpret the state clause broader than the right based on the interpretation of the Supreme Court of the Fifth Amendment provision. Even following the Supreme Court's encouragement to the states to "adopt different requirements for the conduct of its...officials as a matter of state law,"[166] the state court demonstrated no willingness to depart from its position that in the area of criminal law the US Supreme Court's decisions are direct authority.

The primacy model was only used in the court's treatment of state and local issues, as well as situations regarding the area of separation of powers and economic rights until 1977. The reason that this approach is the one less preferred, lies in the political culture in Maryland, that dictates the norms and traditions that shape the judicial process. Maryland has a heterogenous political culture, stemming initially from the existence of divided loyalties at the time of the Revolution up to and through the existence of two opposed ways of life prior to the Civil War into the twentieth century. The existence of two cultures throughout Maryland history (Loyalist and Revolutionary, free and slave economy, northern and southern ways of life) forced the state to elevate compromise and accommodation into an art, in order to make governing possible. This background explains why the Maryland Court of Appeals has adopted a more innovative approach in some areas of law while refraining from it in others. The primacy approach in

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166. Moran v. Burbine, 475 U.S. 412, 450 (1986).

Maryland has been limited to issues of state separation of powers and state and local issues, areas that traditionally fall beyond the jurisdiction of the federal courts and the review of economic legislation before 1977, an issue the US Supreme Court is eschewing. This also explains the court's approach to civil rights and liberties. The existence of a well-developed federal analogue forced the state court to opt for the lockstep approach. The following Table 13 summarises the New Federalist approaches that the Maryland Court of Appeals has adopted when faced with different aspects of human rights protection:

Table 13

Court	Case	Subject	Approach
Court of Appeals	State v Schuller	Freedom of expression	Interstitial
Court of Appeals	Re Oldtown Legal Clinic	Freedom of expression	Lockstep
Court of Appeals	Mangum v Maryland State Board of Sensors	Freedom of expression	Lockstep
Court of Appeals	Gayety Books v City of Baltimore	Freedom of expression	Lockstep

Court of Appeals	Jacron Sales Co. v Sindorf	Freedom of expression	Lockstep
Court of Appeals	Hearst Corp. v Hughes	Freedom of expression	Interstitial
Court of Appeals	Schowgurow v Md.	Freedom of expression	Lockstep
Court of Appeals	Horace Mann League, Inc. v Board of Public Works	Freedom of expression	Interstitial
Court of Appeals	Mt. St. Mary's College v Williams	Freedom of expression	Interstitial
Court of Appeals	Baltzell v Church Home	Freedom of expression	Interstitial
Court of Appeals	Speer v Colbert	Freedom of expression	Interstitial
Court of Appeals	Schochet v State	Right of privacy	Lockstep
Court of Appeals	Doe v Commander, Wheaton Police Dep't	Right of privacy	Lockstep

Court of Appeals	Montgomery County v Walsh		Right of privacy	Lockstep
Court of Appeals	Neville v State		Right of privacy	Lockstep
Court of Appeals	U.S. Mortgage Co., v Matthews		Equal protection	Lockstep
Court of Appeals	Attorney General v Waldron		Equal protection	Interstitial
Court of Appeals	Hornbeck v Somerset Co. Bd. of Education		Equal protection	Interstitial
Court of Appeals	Potomac Electric Co. v Smith		Equal protection	Lockstep
Court of Appeals	Givner v State		Criminal law and procedure	Lockstep
Court of Appeals	Frank v Maryland		Criminal law and procedure	Lockstep
Court of Appeals	Garrison v State		Criminal law and procedure	Interstitial
Court of Appeals	Malcolm v State		Criminal law and procedure	Lockstep

Court of Appeals	Lodowski v State I	Criminal law and procedure	Lockstep
Court of Appeals	Lodowski v State II	Criminal law and procedure	Lockstep
Court of Appeals	State v McKay	Criminal law and procedure	Lockstep
Court of Appeals	Lawrence v State	Criminal law and procedure	Lockstep
Court of Appeals	Bartholomey v State	Criminal law and procedure	Lockstep
Court of Appeals	Blackwell v State	Criminal law and procedure	Lockstep
Court of Appeals	Tichnel v State	Criminal law and procedure	Lockstep
Court of Appeals	Grove v Todd	Substantive due process	Lockstep
Court of Appeals	Ulman v Baltimore	Substantive due process	Lockstep

Court of Appeals	Scharf v Tasker	Substantive due process		Lockstep
Court of Appeals	Arnsperger v Crawford	Substantive due process		Lockstep
Court of Appeals	Baltimore v State	Substantive due process		Lockstep
Court of Appeals	Deems v Baltimore	Substantive due process		Lockstep
Court of Appeals	Wright v Wright	Substantive due process		Lockstep
Court of Appeals	State v Mayhew	Substantive due process		Lockstep
Court of Appeals	Singer v State	Substantive due process		Lockstep
Court of Appeals	Goldsmith v Mead Johnson	Substantive due process		Lockstep
Court of Appeals	Loughran v Lord Baltimore Candy and TobaccoCo.,	Substantive due process		Primacy

Court of Appeals	Maryland Board of Pharmacy v Sav-a-Lot	Substantive process	due	Primacy
Court of Appeals	Maryland State Board of Examiners v Kuhn	Substantive process	due	Primacy
Court of Appeals	Governor v Exxon	Substantive process	due	Interstitial

6.5. Concluding Remarks

Certain interesting remarks can be made as regards the response of the three states analysed to the message of New Judicial Federalism. The movement itself, in the first place seems to have taken different forms. In Florida, state courts have been reluctant to resort to the provisions of their state constitution for the protection of the rights of the citizen, despite a promising start. The Florida courts prefer, when the federal constitution provides guarantees for a certain individual rights, to ignore the parallel protective state constitutional guarantees.

Similar is the approach adopted by the Maryland courts. The use of state constitutional protective norms, greatly depends on whether parallel federal provisions exist as well as interpretations of these provisions by the federal Supreme Court. In these situations, the reluctance to part company with the federal norms is

apparent. Where no federal analogues exist, the Maryland courts appear to turn to their own constitutional traditions and case-law more often.

The courts of New York on the other hand seem to be more receptive to the calls of New Federalism. Even when federal analogues to the state constitutional provisions exist, there is a steady tradition of favouring the state norms, in a significant number of occasions. It seems that the unique historical circumstances and particular cultural characteristics which were the cause for the undermining of the ideas of New Federalism in Florida and Maryland and contributed to the underdevelopment of their own state constitutional discourse, had the opposite result in the case of New York.

When it comes to the utilisation of the methods of interpretation advocated by New Judicial Federalism, certain common patterns emerge as regards the decisions of the courts of the three states. The approach preferred is dependent on the subject of each case decided. In criminal law and procedure cases, in the first place, the highest ranking courts of all three states clearly opt to entrust the protection of the rights of their citizens to the provisions of the federal Constitution, following, thus, a lockstep approach. The state provisions are considered to provide no broader protection than the ones of the federal document. This tendency, which suggests that the message of New Judicial Federalism has not been received in the specific issues, is surprising, taking into consideration that it was the suggestion of existence of problems in the area of criminal law and procedure issues, that sparked the birth of this movement. It would be expected that state courts would avail themselves of their state

provisions and opt more frequently for an interstitial or even a primacy approach. It seems, however, that it is more convenient, in the sensitive area of criminal law and procedure, to follow the lead of the federal Supreme Court than take initiatives which might be proved costly in the future. The search and seizure situation in Florida is proof to that. The state judges dared to deviate from the *dicta* of the federal Supreme Court, only to be forced by the state electorate to realign themselves with the latter.

Another common pattern that emerges is in the area of civil rights and liberties and specifically the freedom of expression. Here the interstitial approach is the one used more frequently. Whereas though in New York and Florida the use of the above approach is covering almost every aspect of the freedom of expression, in Maryland it is preferred only in cases having to do with the freedom of press and defamation.

One observation common to all three states, is that the state constitutional provisions were more eagerly relied on, and the primacy approach preferred, when no parallel federal norms or Supreme Court interpretation existed. This is the situation in cases dealing with issues of substantive due process, although in Florida the tendency now is to follow an interstitial approach. In general, though it is indicated that, although the primacy approach has appeared with considerable frequency in the available decisions of the state courts under examination, the former approach is not often utilised in practice, simply because the vast majority of human rights are in some way covered by the provisions of the federal Constitution. When this is the case, the state courts are

very hesitant to ignore the federal *dicta* completely, as the primacy approach advocates.

One last point which is common in regard to the choice of New Federalist approaches in all three states as seen from the available case-law, is that the dual sovereignty approach has never been utilised by any of the courts. This, though should not come a surprise, since this approach is not widely utilised. Indeed only the Supreme Courts of Vermont and Washington seem to prefer this approach.

The above seem to be the only areas where common elements in the attitude of the courts of the three states under examination, as regards their New Federalist preferences, can be detected from the available case-law. In other human rights areas the choice of preferences does not seem to follow a specific pattern common to all three states. All three approaches have been used in almost every human rights area by each state court, with the exception of the New York Court of Appeals, which seems to avoid the primacy approach. It can be said that the individual, specific characteristics of each state are of paramount importance when the New Federalism, in general, and its specific approaches, in particular, are considered by the state courts.

The New Federalist approaches that the courts of each of the three states prefer in general areas of human rights protection are summarised in Table 14. For the purposes of this tabular summary the areas considered are civil rights and liberties, which include in general political rights, freedom of conscience and expression and the right of privacy and personal autonomy, and criminal law and procedure, which incorporates, among others, issues of searches and seizures, trial by jury and capital

punishment. Additionally the area of economic rights, which includes substantive due process is going to be considered, albeit only in regard to Florida and Maryland, since no information was made available of how the New York courts deal with the issue:

Table 14

State	Civil rights and liberties	Criminal law and procedure	Economic rights
Florida	Lockstep/Interstitial/Primacy	Lockstep/Primacy/Interstitial	Primacy
New York	Interstitial	Lockstep/Interstitial	
Maryland	Lockstep/Interstitial	Lockstep/Interstitial	Lockstep/Primacy/Interstitial

At this point, it would be interesting to examine if any analogies could be drawn between the situation in the USA and that in the EC, as regards the attitude of the courts, when having to choose between the national and the uniformly applied sets of norms in order to protect the rights of their citizens. Such an analogy seems appropriate in the area of criminal law and procedure. In the EC the courts of the Member States have demonstrated a tendency towards entrusting, in criminal matters, the protection of the rights of their citizens to the European Convention of Human

Rights. The latter is what comes closer to be considered a uniformly applied set of norms for the Member States of the EC, a role which in the USA is played by the Bill of Rights of the Federal Constitution. A similar tendency is demonstrated, as we saw earlier, by the decisions of the courts of the American states under examination. In criminal matters they chose to protect the rights of their citizens by means of the provisions of the federal Bill of Rights and walk in lockstep with the way the latter is interpreted by the federal Supreme Court. The state provisions are given the same meaning as their federal counterpart. This might suggest that, at least to a certain degree, the area of criminal law and procedure is one that could, in the context of non-unitary entities, in general be regulated by means of uniformly applied provisions.

A further similarity that exists between the two entities has to do with the time of the appearance and elaboration of the consideration of whether to entrust the protection of their respective citizens to the respective uniformly applied provisions or not. The Member States of the EC started considering seriously the European Convention since the early 1980s. At around that time the movement of New Federalism posed the dilemma for the state courts of choosing between the state protective provisions and the ones of the Bill of Rights of the Federal Constitution.

The most important conclusion from all the above, though, is that, despite the variations in the absorption of the theories of New Federalism-from underdevelopment in Florida and Maryland to highly influential in New York, there is no doubt that this new movement is here to stay. The fact that its use may be limited in the circumstances that each individual states considers appropri-

ate in accordance to its unique characteristics, cannot detract from the validity of the argument that the states have discovered that the bills of rights of their own state constitutions may offer to their citizens higher levels of efficiency, in terms of protection of individual rights, than the uniformly applied federal Bill of Rights.

CONCLUSION

In its introduction, this thesis set two hypotheses as regards the levels of efficiency that a system of protection of the rights of the individual from violation by governmental authority, could achieve. The first hypothesis was that where a system of protection operates through fragmented procedures, then it could be presumed that individuals are not enjoying the most efficient protection of their rights. Conversely, the second hypothesis was that maximum levels of efficiency of protection could be achieved where the system operates through one uniformly applied set of norms as opposed to fragmented procedures. The validity of these hypotheses was put to the test by means of the comparison between the European and the American situation in the relevant legal area. And the findings of this analysis may be worth considering by the Europeans in their attempts to proceed to integration in the field of human rights by means of a list of rights of uniform application.

The presumption of the first hypothesis was that fragmented procedures do not guarantee efficient protection of individual rights. The obvious testing ground of this argument is the EC. The citizen of a state which was a member of the EC in 1992, enjoyed protection of its individual rights by a number of sets of norms. Initially, as a citizen of a certain state, his rights were guaranteed from the relevant constitutional provisions of that

state. Then as a citizen of a state which was at the time a member of the EC, he enjoyed the protection that the judicial organ of the Community, the Court of Justice, afforded to him by means of interpretation, in the absence of a list of rights within the EC context. Lastly, as a citizen of a state which at the time was a signatory of the European Convention on Human Rights, he had at his disposal a further net of protective norms. The fragmentation of the procedures is clear. The protective measures that come closer to have some degree of uniform application are those of the European Convention. The fact remains, however, that the Convention is an international agreement with all the disadvantages this might carry as regards status in the domestic legal order of the signatory states.

Does the fact that the European citizen relies for the protection of his individual rights on a number of different sets of provisions compromise the efficiency of this protection? It is difficult to argue in favour of this position. It is clear in the first place, that the protective net of the separate national rules functions on high levels of efficiency. Proof of that is that the use of other sets of provisions is usually second priority to the national rules, as it happens with the guarantees of the European Convention on Human Rights. The protection of human rights at the EC level could also be described as efficient, to the extent that the Court of Justice has made sure that the appropriate human rights principles were inserted into the framework of European law.

The second hypothesis was that rights of the individuals are protected at maximum level when this protection is entrusted to one, uniformly applied set of norms. The validity of this presumption can be tested by taking into consideration the system of

protection of individual rights in the USA. There, as mentioned before, citizens enjoy double security as regards infringements of their rights by the government, to the extent that both state and the federal constitutional provisions are in place. However, it is only the Bill of Rights of the federal Constitution that guarantees the rights of all the American citizens, irrespective of state citizenship. Does then the federal Constitution afford the maximum level of efficiency for the security of the individual liberties of the American citizens? The proponents of New Judicial Federalism do not seem to be in favour of this argument. They feel, as seen before, that the tendency to substitute the state constitutional provisions with the federal, uniformly applied one, has led to lowered levels of efficiency of the protection of individual rights. Efficiency of protection, they advocate, can be restored by abandoning reliance on the federal document. The state constitutions are armed with more than enough ammunition to counter any human rights infringements. But in the end, how influential could the theory of New Judicial Federalism be, within the legal context of human rights protection? After all, its proponents, albeit mostly figures of importance in the judicial and academic world, admittedly constitute a minority. The state courts as well, are deciding only a fraction of the cases that come before them on the basis of state constitutional provisions. That means, that the general feeling is that the uniformly applied norms of the federal Constitution afford, if not maximum levels of efficient protection, at least satisfactory ones.

The arguments against the theory of New Judicial Federalism, and consequently against the position that the Bill of Rights of the federal Constitution and its interpretation by the

American Supreme Court has reached a point where it does not function properly, can be convincing. However, they are all based on a specific point in relation to the course of New Judicial Federalism. This point is the practical application of its theoretical principles by the state judiciary. It is of paramount importance to them that the state courts do not seem in their majority to entrust the protection of the individual rights of their citizens to the provisions of the state constitutions, preferring to resolve differences on the basis of the federal Bill of Rights. They seem to ignore though, that as every theoretical legal construction, New Judicial Federalism must also be evaluated as to its significance, by taking into consideration two more of its aspects. The first one, is the mere fact of its emergence. If the problem of efficiency of protection by the federal Constitution did not exist, then there would be no reason for the disruption of the *status quo* of the federal protection. After all this practice had gone unchallenged for years, until the retrenchment of the Supreme Court, when interpreting the federal Bill of Rights, gave rise to suspicions of inefficiency of protection. The second important aspect is future perspectives. It is generally acknowledged that state constitutional protection of human rights, as advocated by New Judicial Federalism, has not completed its course. Its followers argue, that as constitutional law of the states finds its way in the university curricula, new lawyers which recognise its potential will start utilising it in the courts, instead or in conjunction with the federal provisions. State judges then, will be obliged to take the state constitutional arguments into serious consideration. Steadily but slowly, the state judiciary could start to regard it mandatory that litigation is based on state constitutional arguments, whenever

possible. Even the fierce opponents of New Judicial Federalism warn about the repercussions of further acceptance and practical application of its principles, admitting thereby that this movement is not only a flash in the pan in the area of the protection of human rights in America.

The situation on the USA then might indicate, taking into consideration the repercussions of New Judicial Federalism, that the presumption that uniform application of sets of rules provide maximum efficiency is questionable. What is more important, its validity is not without question even in the European context. As mentioned before, the set of norms that come the closest to be considered as a uniformly applied measure for the protection of the rights of the individual in the EC, is the European Convention on Human Rights. If our second hypothesis is correct, then member states would elect to entrust the protection of the rights of their citizens by means of the uniformly applied convention, in order to achieve maximum efficiency. However, the results of the test of the application of the New Judicial Federalism approaches on the European situation conducted earlier in this thesis, indicate that the situation is nothing like this. Despite the fact that during the second half of the 1980s the awareness of the member states as regards the European Convention has grown considerably, the rule has been that national protective norms are the preferred means of protection of the rights of the individual. This might indicate that the courts of the Member States, especially the larger ones, consider the European Convention to be functioning at a lower level in terms of efficiency of protection.

What usefulness then, if any, could the finding that the two hypotheses set initially are of questionable validity, have for the

general question of the integrating value of human rights and the specific one of the creation of a catalogue of human rights for Europe? We argue that they are worth considering in both occasions. As regards the general problem in the first place, the choice is between integration as regards human rights for the sake of integration, integration for the sake of efficiency of protection of human rights and efficient protection of human rights, regardless of how this will be achieved-either through uniform procedures or fragmented ones. We submit, that it is the last two choices that are the most appropriate. Without prejudice to the general weight that integration carries, the focus as regards human rights should shift from the hunt for integration to the hunt for efficiency. This is dictated from the particular characteristics that the field of human rights possesses in its legal sense, which advocates that any legal approach should procure more than technical arrangements. The first priority then is for the efficient protection of the rights of the individual *per se*. The means by which this protection will be achieved should be a secondary preoccupation If it can be ensured that efficient protection will materialise through uniformly applied measures, then this should be the way to go ahead. On the other hand, if there are doubts as to the efficiency of the uniform norm approach, then different alternatives should be considered.

The above consideration bears a certain weight on the specific question of the usefulness of an integrating attempt in the field of human rights in the context of the EC. This could assume the form of a catalogue of human rights, which will apply uniformly to all the member states. Such a catalogue will have to ensure that the EC citizen is afforded the highest possible levels of

efficiency in the protection of his/her rights. Otherwise, if there are doubts as to the efficiency of protection that its norms guarantee, its existence will be redundant. How can efficiency be assessed? The simplest way is to consider the effects that other integrative attempts had in the specific legal area. The utilisation of the paradigm of the Bill of Rights of the American Constitution seems to be an appropriate comparative example. The efficiency of protection of its norms was not in doubt until the proponents of New Judicial Federalism diagnosed a number of worrying symptoms. The way these provisions were interpreted by the federal Supreme Court, had the effect that the citizens were afforded less efficient protection of their individual rights than before. The whole structure then of uniform application of human rights norms in the USA became suspect as to its ability to function in an appropriate manner. Can such a phenomenon of deficient protection of human rights occur in Europe, if a uniformly applied set of provisions becomes responsible for the protection of the EC citizens by governmental violations? We submit that this is not an impossibility. It is conceded that Europe and the USA have been subjected to different integrative experiences. Most importantly, they now occupy different degrees of integration. The USA is the most prominent example of a federal structure world-wide. The EC, on the other hand, has been described as a quasi-federation or a confederation. This second description might indicate that the EC, has now the characteristics that the USA had at its embryonic stages, before it became a federal state. And although by no means certain, it is not out of the question that the Community might evolve from a confederal formation to become a federal one, along the lines of the American paradigm. Should such a

development occur, there is no reason why the same problems will not emerge in the performance of uniformly applicable sets of norms in certain legislative areas. The field of human rights protection is one of these areas which, as seen, has not been without problems.

The plans, then, for a common catalogue for human rights in the EC, should be treated with scepticism. It might be that the fact that the Member States have developed their own human rights safeguards will prevent any uniformly applied measure from becoming inefficient. But this will depend on the status that will be awarded to the common set of norms and its hierarchical relationship with the relevant national laws. Additionally the American example, as seen from the New Federalist point of view indicates, that even strong national protective measures do not guarantee the highest levels of efficiency for the uniformly applied one. The American phenomenon of dormancy of state law, as a consequence of years of non-utilisation of state constitutional provisions and its substitution with the parallel ones of the federal document in conjunction with the reluctance to break away from the *dicta* of the federal Supreme Court, could find its way in Europe, albeit at later stages of its development. Exclusive use of a uniformly applied list of rights in the EC could, hypothetically, result in a weakening of national protective measures. And if, like the American situation, the efficiency of the European common set of norms is doubted by the member states, then this attempt will backfire in terms of its integrative usefulness.

In the end, what is important is that the human rights of the individuals are efficiently protected. Whether this will materialise

by means of fragmented or uniformly applied measures is almost irrelevant. Admittedly in a union of states, it would be ideal if the protection of the rights of individuals followed the path of integration. However, if such integrative attempts ultimately jeopardised the ability of individuals to control governmental violations of their rights, then perhaps others non-integrative alternatives should be considered.

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