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by *Philippe Sands**

I. INTRODUCTION

As a European lawyer who has been fortunate enough to visit Boston College Law School on two occassions to teach courses in European law, it is a great pleasure to be able to introduce the first of an intended annual issue of the *Boston College International and Comparative Law Review* devoted to European law. The purpose of the issue is to make available to the law community in the United States information and articles on recent developments in the theory and practice of European law. The annual issue will thus fill an important gap in the field of U.S. international and comparative legal periodicals and its birth reflects the growing significance of European law within the academic and practicing legal community of the United States.

For the purpose of this *Review*, European law means the institutional and substantive laws of the European Economic Communities (the Communities)[1] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). What follows is a brief overview of the relevant institutional structures and areas of substantive law of the Communities and the ECHR.

The European Economic Communities actually comprise three legal communities established by separate treaties. The European Coal and Steel Community (ECSC) was established by a treaty signed on April 18, 1951, in Paris, by representatives of France, Germany, Italy, Belgium, Holland, and Luxembourg (the Six).[2] Its primary objective is the creation of a common market for coal and steel among the signatory States. On March 25, 1957, the Six signed two further treaties establishing the European Community of Atomic Energy (EURATOM),[3] whose objective is the development and distribution of nuclear

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[1] The European Economic Communities is used to include the ECSC, EURATOM, and the EEC.

[2] Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

[3] Treaty Establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167.

energy within the Community, and the European Economic Community (EEC).[4] The EEC, and the other two communities, now have twelve members: the original Six, together with the United Kingdom, Denmark, Ireland,[5] Greece[6] and most recently Spain and Portugal.[7] The EEC's principal functions are the establishment of a common market and the progressive approximation of the economic policies of the Member States, by the promotion throughout the EEC of:

> a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, and an accelerated raising of the standard of living and closer relations between the States belonging to it.[8]

The foundations of this development are to be achieved by adherence to four fundamental principles. These are (i) the free movement of goods between the Member States;[9] (ii) a common agricultural policy;[10] (iii) the free movement of persons,[11] services,[12] and capital based on the right of establishment and the principle of non-discrimination;[13] and (iv) a common transport policy.[14] These foundations are to be supplemented by a number of policies, expressly laid out in the EEC Treaty. The EEC has a policy of preventing distortions of competition[15] and prohibiting dumping practices[16] and aids granted by Member States which distort or threaten to distort competition.[17] While the EEC does not at present have the objective of creating a uniform system of taxation among the Member States, it does prohibit the imposition of taxes which might prevent the free movement of goods.[18] The Treaty leaves to each member the direction of its national economic policy, subject to an obligation to pursue policies which will ensure the equilibrium of overall balance of payments and the maintenance of confidence in its currency, high levels of employment and stable prices. Such

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[4] Treaty Establishing the European Economic Community, *done at* Rome, March 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

[5] Acceded to membership on January 1, 1973. Norway's application for membership from the same date was accepted, but that country did not join following a negative vote in a national referendum on the question of membership.

[6] Acceded to on January 1, 1981.

[7] Acceded to on January 1, 1986.

[8] EEC Treaty, *supra* note 4, at art. 2.

[9] *Id.* at arts. 9–37.

[10] *Id.* at arts. 38–47.

[11] *Id.* at arts. 48–51.

[12] *Id.* at arts. 59–66.

[13] *Id.* at arts. 52–58 and 67–73.

[14] *Id.* at arts. 74–84.

[15] *Id.* at arts. 3(f) and 85–90.

[16] *Id.* at art. 91.

[17] *Id.* at arts. 92–94.

[18] *Id.* at arts. 95–98.

economic policies are of common concern.[19] With a view to stabilizing the currencies of Member States, a European Monetary System came into operation on March 13, 1979.[20] The EEC also has a common commercial policy, on the basis of uniform principles in tariff rates, the conclusion of tariff and trade agreements, export policy, and the protection of trade.[21] Its social policy[22] includes an adherence to the principle that "men and women should receive equal pay for equal work."[23]

By a Merger Treaty of April 8, 1965, which entered into force on July 1, 1967, the separate institutions of the ECSC, EURATOM, and the EEC were merged.[24] These common institutions are the Commission, the Council of Ministers, the Assembly (more commonly known as the Parliament) and the Court of Justice. The Commission, sitting in Brussels, is composed of 17 members "chosen on the grounds of their general competence and whose independence is beyond doubt."[25] The Commissioners hold office for four years, having been chosen by mutual agreement between the Members, and they have under their direction some thirty Directorates, encompassing the executive arms of the three Communities. The Commission is the Community's civil service, the body which represents the interests of the Community. The Commission is "an initiator and co-ordinator of Community policy; it is the executive agency of the Communities; it is the guardian of the Community Treaties."[26] The Council of Ministers is composed of one representative from each Member State. The Minister attending will vary depending on the subject matter to be discussed and the decisions to be made. Meetings of the Council of Ministers occur periodically in one of the Member States. The actual powers of the Council vary with each Treaty, "but in effect the Council expresses the political will of the members and exercises the legislative or regulatory function."[27]

The Parliament is the parliamentary organ for the three Communities. It is elected by direct universal suffrage and meets in Luxembourg or Strasbourg. While it has no legislative powers, it possesses a power of control over the Commission, the right to reject the budget and a right to be consulted by the Council on certain legislative matters.

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[19] *Id.* at arts. 103–109.

[20] By European Council Resolution of December 5, 1978.

[21] EEC Treaty, *supra* note 4, at arts. 110–116.

[22] *Id.* at arts. 117–122.

[23] *Id.* at art. 119.

[24] Treaty Establishing a Single Council and a Single Commission of the Commission of the European Communities, April 8, 1965, *reprinted in* 4 I.L.M. 776 (1965) [hereinafter Merger Treaty].

[25] *Id.* at art. 10.

[26] D. LASOK & J. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN ECONOMIC COMMUNITIES 112 (2d ed. 1976).

[27] D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 209 (4th ed. 1982).

The Court of Justice to the three Communities sits in Luxembourg and has twelve judges and five Advocate Generals. Its primary function is to ensure respect for the rule of law in the application and interpretation of the Treaties and of acts made by the Communities' institutions under them. The EEC Treaty provides in Article 189 that:

> in order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.[28]

While recommendations and opinions have no binding force the significance of the EEC lies in the fact that Regulations, Directives and Decisions create rights and obligations which can, in certain circumstances, be relied upon by individuals before the courts of the Member States, known as direct effect.[29] Moreover, in the event of a conflict between a rule of Community law and a rule of national law, the Community law will prevail.[30]

The Court derives its jurisdiction from the EEC Treaty. Cases will reach the Court in a variety of ways. The Court is empowered to give preliminary rulings on references from national courts of the Member States on the interpretation of the EEC Treaty, and on the validity and interpretation of acts of the institutions.[31] The Court may also review the legality of the Council and Commission's binding acts, or failures to act, in actions brought by Member States, the Council and the Commission and, subject to fulfilling the rules of standing, legal or natural persons.[32] The Court may also decide matters brought by the Commission or a Member State against a Member State which is alleged to be failing to fulfill an obligation under the Treaty[33] and hear matters alleging the non-contractual liability of the EEC.[34] The Court's jurisprudence has made a very great impact, particularly by contributing to the development of a coherent and effective legal system, and by extending the powers of the Community and the influence of the law into the legal systems of the Member States.

The European Convention on Human Rights was signed in Rome on November 4, 1950 and came into force on September 3, 1953.[35] To date it has eight

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[28] EEC Treaty, *supra* note 4, at art. 189.

[29] *See e.g.*, van Gend & Loos v. Netherlands Fiscal Administration, [1961–1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8008 (1963).

[30] *See e.g.*, Flaminio Costa v. E.N.E.L., [1961–1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8023 (1964).

[31] EEC Treaty, *supra* note 4, at art. 177.

[32] *Id.* at arts. 173–175.

[33] *Id.* at art. 169.

[34] *Id.* at arts. 178 and 215.

[35] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, [hereinafter The European Convention of Human Rights].

Protocols,[36] the first six of which have entered into force. It has been ratified by all twenty-one member states of the Council of Europe,[37] which sponsored the Convention. The principal aim of the Convention is the creation of a mechanism for the protection and collective international enforcement of certain rights and freedoms, which are set out in Articles 2 to 18 of the Convention and Articles 1 to 3 of the First Protocol and 1 to 4 of the Fourth Protocol. The Convention guarantees the rights of all persons, of whatever nationality, within the jurisdiction of the contracting state.[38] It covers the following rights: the right to life;[39] prohibition against torture and inhuman or degrading treatment or punishment;[40] prohibition against slavery, servitude, and forced or compulsory labor;[41] liberty and security of person;[42] fair and public hearings by an independent and impartial tribunal in the determination of civil rights and obligations or criminal charges;[43] prohibition of retrospective criminal liability;[44] respect for private and family life, home and correspondence;[45] freedom of thought, conscience and religion;[46] freedom of expression;[47] freedom of peaceful assembly and association;[48] and the right to marry and found a family.[49] The First Protocol provides that persons shall be protected from the deprivation of their possessions,[50] that they shall not be denied the right to an education;

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[36] Protocol No. 1, 213 U.N.T.S. 262 (1955); Protocol No. 2, Conferring upon the European Court of Human Rights Competence to Give Advisory Opinions, 1963 Y.B. EUR. CONV. ON HUM. RTS. 2; Protocol No. 3, Amending Articles 29, 30 and 34 of the Convention, 1963 Y.B. EUR. CONV. ON HUM. RTS. 8; Protocol No. 4, Securing Certain Rights and Fundamental Freedoms Other Than Those Already Included in the Convention and in the First Protocol, 1963 Y.B. EUR. CONV. ON HUM. RTS. 14; Protocol No. 5, Amending Articles 22 and 40 of the Convention, 1965 Y.B. EUR. CONV. ON HUM. RTS. 2; Protocol No. 6, Concerning the Abolition of the Death Penalty, *reprinted in* 22 I.L.M. 539 (1983); Protocol No. 7, Extending the List of Civil and Political Rights, *reprinted in* 24 I.L.M. 435 (1985); Protocol No. 8, Procedures to Expedite Proceedings Before the European Commission of Human Rights, *reprinted in* 25 I.L.M. 387 (1986).

[37] The twelve members of the European Economic Communities and Austria, Cyprus, Iceland, Liechtenstein, Malta, Norway, Sweden, Switzerland, Turkey.

[38] The European Convention of Human Rights, *supra* note 34, at art. 1.

[39] *Id.* at art. 2.

[40] *Id.* at art. 3.

[41] *Id.* at art. 4.

[42] *Id.* at art. 5.

[43] *Id.* at art. 6.

[44] *Id.* at art. 7.

[45] *Id.* at art. 8.

[46] *Id.* at art. 9.

[47] *Id.* at art. 10.

[48] *Id.* at art. 11.

[49] *Id.* at art. 12.

[50] First Protocol, 213 U.N.T.S. 262, March 20, 1952, art. 1. Article 1 provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

that the state shall respect the right of parents to ensure teaching and education in conformity with their own religious and philosophical convictions;[51] and that free elections shall be held at reasonable intervals by secret ballot.[52] The Fourth Protocol provides for freedom from imprisonment for civil debts;[53] freedom of movement and of residence, and freedom to leave any country;[54] freedom from exile and the right to enter a country of which one is a national;[55] and prohibition of the collective expulsion of aliens.[56]

Many of the rights are subject to limitations on the grounds of public order, national security, public safety, the prevention of disorder or crime, and the protection of the rights of others. In time of war or other national emergency threatening a nation, a contracting party may take measures derogating from the obligations under the Convention, although no derogation is permitted from certain Articles in any circumstances.[57]

The machinery for the enforcement of the rights protected is considered to be: "generally regarded as the most effective and advanced international system for the protection of human rights in existence today, and this is largely due to the work of its supervisory organs."[58] The three organs[59] which have the task of ensuring enforcement of the Convention are the European Commission of Human Rights,[60] the European Court of Human Rights[61] and the Committee of Ministers of the Council of Europe.[62] One remarkable feature about the Convention is that it grants to persons, whether or not nationals of the state, the right to commence international proceedings which may result in a judicial determination in his or her favor. Eighteen of the contracting parties now recognize the competence of the Commission to "receive petitions . . . from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation" of a right guaranteed by the Convention.[63] Nineteen contracting parties have accepted the "jurisdiction of the Court in all matters concerning the interpretation and application" of the Convention.[64] Individuals

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[51] *Id.* at art 2.

[52] *Id.* at art 3.

[53] Protocol No. 4, Securing Certain Rights and Freedoms Other than those Already Included in the Convention and the First Protocol, 1963 Y.B. EUR. CONV. ON HUM. RTS. 14, art. 1.

[54] *Id.* at art. 2.

[55] *Id.* at art 3.

[56] *Id.* at art. 4.

[57] The European Convention of Human Rights, *supra* note 34, at art. 15 provides that no derogation may occur in any circumstances from the provisions of arts. 2, 3, 4(1) and 7.

[58] A. DRZEMCZEWSKI, THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN DOMESTIC LAW 3 (1985).

[59] The European Convention of Human Rights *supra* note 34, at art. 19.

[60] *Id.* at arts. 20–37.

[61] *Id.* at arts. 38–56.

[62] *Id.* at arts. 32, 54 and 61.

[63] *Id.* at art. 25. Turkey, Malta and Cyprus have not accepted the right of individual petition.

[64] *Id.* at art. 46(1).

do not have the right of access to the court.[65] They may only petition the Commission, which is obligated to try to secure a friendly settlement of the matter on the basis of respect for the rights contained in the Convention.[66] If the Commission is unsuccessful in this task, it is to produce a Report expressing its opinion as to whether the facts of the matter disclose a breach of the Convention.[67] The Report will then be forwarded to the Committee of Ministers.[68] The Report will be prepared on the basis of evidence presented in the parties' written observations and at hearings before the Commissioners.[69] The Commission has significant powers of investigation, another unusual feature of this international body.[70] The Court only has jurisdiction to adjudicate on the matter if the Commission's report is transmitted to it, within three months, by the Commission or one of the state parties which possesses a vested interest in the matter.[71] State parties undertake to abide by the decisions of the Court[72] which do not necessarily have the force of law in the national legal system. The Court may grant just satisfaction, including compensation, to the injured party where the internal law of the state allows only a partial reparation to be made.[73] The supervision of the Court's judgments is carried out by the Committee of Ministers, which also takes decisions where the Court has not been seised in accordance with Article 48. These decisions are binding where reached by a two-thirds majority.

The four articles in this first European Law issue reflect issues of a certain topicality. Our contributors represent diverse areas in the study and practice of European law. Andrew Drzemczewski, an international civil servant at the Council of Europe, examines the possibility of the changes to the institutional structure of the European Convention which are currently being discussed. James Venit, writing from the perspective of an American practitioner in Brussels, looks at recent developments in the application of the European Community's Article 85 antitrust rules, with particular reference to the procedures whereby potentially illegal collaborations can be notified to the European Commission. Brian Cheffins, an Associate Professor at the University of British Columbia, also discusses Article 85, but with reference to the grant of patent rights with exclusive territorial rights. Nerys Jefford, an English barrister, provides a thorough overview of the procedures and reviews on antidumping laws in the EEC

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[65] *Id.* at art. 48.
[66] *Id.* at art. 28.
[67] *Id.* at art. 31(1).
[68] *Id.* at art. 31(2).
[69] *Id.* at art. 28(a).
[70] *Id.*
[71] *Id.* at arts. 32 and 48.
[72] *Id.* at art. 53.
[73] *Id.* at art. 50.

and in the United States. The four articles make a valuable contribution to their fields. This volume will set the trend for future issues: it contains notes on recent trade practice, a book review, a bibliography, and a chronology of the legal developments within the European Community in the past year.

The appearance of this volume fills a very important gap in U.S. international and comparative legal periodicals. Its arrival heralds great possibilities and special mention must be made of the contribution of Maxwell Jenkins in the volume's conception and of Nancy Ackerman and the *Review* staff in its publication.