THE CONCEPT OF FUNDAMENTAL RIGHTS IN EUROPEAN ECONOMIC COMMUNITY LAW*

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I. INTRODUCTION

Legal rights are said to be fundamental when they are expressed in or guaranteed by the preeminent laws of a given legal system or when their existence is essential to the existence and content of other legal rights of the system.¹ Hence, an examination of fundamental rights in a legal system must focus on the system’s “constitutional” text, on authoritative judicial interpretations of the text, and on those rules which are of primary importance to the structure and content of the system.

In European Economic Community (EEC) law, the fundamental rights of this unique legal system are found in the Treaty of Rome and in the jurisprudence of the European Court of Justice. This Article will examine the provisions of the Treaty of Rome in order to determine which fundamental rights are directly protected under the Treaty.² The contribution of the European Court of Justice to the development of the concept of fundamental rights will then be analyzed. Finally, the system of rights which has developed under the Treaty of Rome will be evaluated in terms of its contribution to a comprehensive framework for the protection of human rights in Europe.

This analysis will show that a number of the economic and social rights protected under European Economic Community law are es-

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¹ Perrot, The Logic of Fundamental Rights, in FUNDAMENTAL RIGHTS 1, 8 (1973).
² This Article will concentrate to a much greater degree on substantive fundamental rights rather than on procedural rights. For a discussion of some of the procedural aspects of the protection of fundamental rights in EEC law, see Stein & Vining, Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context, in EUROPEAN LAW AND THE INDIVIDUAL 113 (F. Jacobs ed. 1976).

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sentially related to the individual’s freedom to achieve purposes or ideals. Traditionally, the protection of fundamental rights has meant a concern for the protection of negative liberties, or freedom from governmental encroachment upon the personal sphere of the individual. In recent times, however, the concept of human rights has been broadened, and many economic and social rights have gained increasingly wide acceptance. One of the important contributions of European Economic Community law has been to clarify and to give content to a number of these newly recognized economic and social rights.

In order to be complete, an analysis of fundamental rights in EEC law must consider its relationship to the European Convention on Human Rights and to the notion of a comprehensive human rights code embracing civil and political rights as well as economic and social rights. Thus, the final section of this Article will examine the question of accession of the EEC to the European Convention on Human Rights. First, however, the sources and delimitation of fundamental rights in EEC law will be examined.

II. FUNDAMENTAL RIGHTS IN THE TREATY OF ROME

A. Context

Respect for democratic principles and the rule of law is one of

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* Insofar as the EEC is not affected, the protection of fundamental rights within the Member States remains the responsibility of the individual Member States.
the fundamental elements of the movement for European integration. Article 1 of the Statute of the Council of Europe\(^7\) states that one of the means by which the achievement of greater unity among its members shall be pursued is by "the maintenance and further realization of human rights and fundamental freedoms." In addition, article 3 declares that:

>[e]very Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council. . . .\(^8\)

The maintenance and promotion of human rights is, therefore, one of the stated objectives of the Council of Europe. Moreover, it is a condition of membership. In 1978, the Council stated that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities."\(^9\) The European Economic Community generally has acted in accordance with the principle of the declaration, as evidenced in particular by freezing its "association" relations with non-democratic Greece in 1967 as an act of censure.\(^10\)

B. General References

The provisions of the Treaty of Rome\(^11\) stand in contrast to the bold declarations of the Statute of the Council of Europe. The Treaty does not, at first glance, appear to be much concerned with the question of fundamental rights and freedoms. The Treaty has

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\(^8\) Id. at 106.

\(^9\) Commission of the European Communities, *Accession of the Communities to the European Convention on Human Rights*, BULL. EUR. COMM. Supp. (2/79) at 11 (1979). Earlier, in April 1977, the European Parliament, the Council and the Commission had adopted a joint declaration which noted "the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms" and which proclaimed that "[i]n the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights." Joint Declaration on Human Rights, 20 O.J. EUR. COMM. (No. C 103) 1 (1977).


no general catalogue of fundamental rights, nor does it make any reference to such a concept. Indeed, the absence of a catalogue of fundamental rights is a regressive feature of an otherwise progressive document. Commentators who have attempted to explain the absence have noted the essentially economic character of the Treaty and have argued that questions of human rights will normally not arise in the economic field.

The Treaty approaches a general statement regarding the protection of fundamental rights in its preamble, which refers to the determination of the Member States to ensure "the economic and social progress of their countries." It also affirms "as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples." And finally, in its ninth paragraph, the preamble states the resolve of the Member States "by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts."

Such vague references unfortunately do not provide any substantive fundamental rights. Nor does the reference in the eighth paragraph of the preamble to the Charter of the United Nations help in providing a catalogue of rights. Although there are seven references to human rights and fundamental freedoms in the Charter, it does not contain a general catalogue of fundamental rights. The general references in the preamble to the Treaty of Rome do indicate, however, that although the economic character of the Community was perhaps not felt to be especially relevant to human rights concerns, the draftsmen were nevertheless well aware of these concerns. Furthermore, a close examination of the Treaty reveals that it does contain a number of specific provisions relating to human rights.

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12 See Pescatore, Les droits de l'homme et l'intégration européenne, 5 CAHIERS DE DROIT EUROPÉEN 629, 630 (1968).
13 See, e.g., A. Toth, Legal Protection of Individuals in the European Communities 107 (1978). These arguments are not entirely satisfactory, however, for they do not take into account the recent evolution of the concept of fundamental rights toward the recognition of many economic and social rights.
14 Treaty, supra note 11, preamble.
15 Id.
17 A number of authors have mistakenly stated that there are no references to human rights in the Treaty of Rome. See, e.g., Pescatore, Fundamental Rights and Freedoms in
C. Specific Provisions

The Treaty of Rome and its related documents, although lacking a comprehensive catalogue of fundamental rights, are nevertheless quite concerned with a number of these rights. The following table provides an overview of the extent of this concern:  

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<thead>
<tr>
<th>Category</th>
<th>Provisions</th>
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<tr>
<td>1. Adequate Standard of Living</td>
<td>(a) Treaty of Rome: Articles 2, 3(i), 39(1), 51, 117, and 123.</td>
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<td>3. Employment</td>
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<td>(a) Treaty of Rome: Articles 137, 138(3), and 144.</td>
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<td>(b) Statute of the Court of Justice: Articles 3, 4, 6, 17, 28, and 33.</td>
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<td>(c) Rules of Procedure of the Court of Justice: Articles 39, 40, and 63.</td>
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Each of these categories will be discussed separately.

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The following examination of the Treaty provisions is based in part on the seven-fold classification of fundamental rights provisions found in Bridge, Fundamental Rights in the European Economic Community, in Fundamental Rights 291, 292-97 (1973). Pescatore has suggested a two-fold classification of rights guaranteeing equality and rights promoting freedom which, while most interesting, is not as comprehensive as the Bridge classification. See Pescatore, supra note 12, at 646.
1. The Right to an Adequate Standard of Living

Article 2 of the Treaty sets the promotion of "an accelerated raising of the standard of living" in the Member States as one of the objectives of the EEC. Article 3 then sets out a list of the activities of the Community for the purposes of article 2, which includes, inter alia, "the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living." The Social Fund is later established by article 123 of the Treaty "in order to improve employment opportunities for workers in the common market and to contribute thereby to raising the standard of living . . . . [I]t shall have the task of rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community." Article 39(1)(b), which deals with the common agricultural policy of the Community, notes that one of the objectives of the policy shall be to "ensure a fair standard of living for the agricultural community." Article 51 authorizes the Council to make provisions for the social security of migrant workers and their dependents. As a result of article 51, a series of complex regulations concerning the social security of migrant workers was issued by the Council. These were in turn followed by a considerable body of litigation in the Court of Justice. Finally, article 117 acknowledges "the need to promote improved working conditions and an improved standard of living for workers."

It may be fairly argued that through these provisions, which seek generally to raise the standard of living, the Treaty implicitly recognizes a right to an "adequate" standard of living. The notion of an adequate standard of living would include, as a minimum, the right to adequate food, clothing and housing. Such an interpretation is in keeping with the spirit and aims of the Treaty since the

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20 For discussions of the various cases, see generally D. Lasok & J. Bridges, supra note 19; E. Stein, P. Hay & M. Waelbroeck, supra note 19; K. Lipstein, supra note 19.

21 See International Covenant on Economic, Social and Cultural Rights, supra note 4, at 50, which states in article 11: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

22 The Court has on a number of occasions interpreted the Treaty by reference to the
purpose in seeking to raise the standard of living is clearly to provide a standard of living which will be generally adequate for the citizens of the Member States. Thus, recognition of the purposive nature of the provisions, indeed of the Community legal system as a whole, leads to the conclusion that the Treaty recognizes the right to an adequate standard of living.

2. Freedom of Movement

In addition to assuring an adequate standard of living, the Treaty envisages the free movement of persons, services and capital. Article 3(c) provides that the activities of the Community shall include "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital." Moreover, article 48 states that "freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest." Article 48 also defines the concept of freedom of movement. The notion of freedom of movement includes the right to accept offers of employment, to move freely within the territory of Member States, and to stay in a Member State for the purpose of employment, as well as the right to remain in the territory of a Member State after having been employed in that state.


25 Article 48 states:

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accor-
Article 49 then obliges the Council to issue directives or make regulations in order to progressively implement the principle of free movement as defined in article 48.26

Article 51 is designed to further facilitate the free movement of workers by establishing Community legislation permitting the pooling of social security rights. In essence, the article and relevant regulations are designed to ensure the aggregation of rights to social benefits for workers.

As articles 48 through 51 deal with the movement of workers, defined by the courts as all wage-earners or persons subject to a contract of employment,27 articles 52 through 58 deal with the movement of other persons, including merchants, industrialists and members of liberal professions. Article 52 provides that “restrictions on the freedom of establishment of nationals of a Member State shall be abolished.” Freedom of establishment is defined to include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for nationals by the law of the country where such establishment is effected. Article 57(1) provides for “the mutual recognition of diplomas, certificates and other evidence of formal qualifications” in the case of self-employed persons. Since the provision of services is in many ways related to the activities of self-employed persons, article 63 provides for “the abolition of existing restrictions on freedom to provide services within the Community.” Furthermore, article 67 states that “Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States.” Finally, article 123 provides for the establishment of the European Social Fund which is designed to render the employment of workers easier and to increase their geographical and occupa-

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26 For a discussion of the regulations issued under this article, see P.J.G. Kapteyn & P. Verloren van Themaat, Introduction to the Law of the European Communities 207-09 (1973); A. Parry & S. Hardy, EEC Law 217-21 (1973).

tional mobility within the Community.28

3. Employment

In addition to articles 3(i) and 123, which have already been discussed, article 118 of the Treaty deals with a number of employment-related rights. This article charges the Commission with the task of promoting close cooperation between Member States in matters relating to employment, labour law, working conditions, vocational training, prevention of occupational accidents and disease, occupational hygiene, the right of association, and collective bargaining between employers and workers. The aim of the provision is to establish a right to employment under conditions which are as favorable as possible.29 In addition to the above provisions, a number of other articles touch upon various aspects of employment. These will be discussed in the following sections.

4. Non-Discrimination

There are a number of provisions in the Treaty which deal with the prohibition of discrimination. Indeed, the principle of non-discrimination seems to have been considered of particular importance, for the Treaty has a provision of general applicability setting forth the principle. Article 7 states that “within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”30 Although the principle of non-discrimination is clearly one of the fundamental rules of the Community, it is nevertheless subject to possible derogation, since it is stated to be “without prejudice to any special provisions” of the Treaty. It has been noted that article 7 refers to discrimination exercised not only by the Member States but also by individuals.31

A number of other articles prohibit discrimination in specific instances. Article 37(1) provides that “Member States shall . . . adjust any State monopolies of a commercial character so as to en-

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28 For a discussion of freedom of movement in EEC law, see generally C. MAESTRIERI, LA LIBRE CIRCULATION DES PERSONNES ET DES SERVICES DANS LA CEE (1972); Plender, supra note 24, at 306.
29 See Bridge, supra note 18, at 291-94. See also A. PARRY & S. HARDY, supra note 26, at 226.
31 See A. PARRY & S. HARDY, supra note 26, at 163.
sure that . . . no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.” In addition, article 48(2) requires “the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.” Article 52, which provides for the right of establishment, also provides for the right to be subject to the same conditions in “the country where such establishment is effected” as are laid down for the nationals of that country.

The principle of non-discrimination is further extended by article 119 which prohibits sexual discrimination by requiring Member States to “maintain the application of the principle that men and women should receive equal pay for equal work.” Although the provision was initially inspired by economic rather than social considerations,2 the Court of Justice has nevertheless fully recognized the human rights dimensions of the equal pay principle. In Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne (SABENA), the Court stated that article 119 “forms part of the social objectives to the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of their peoples.”3 The Court also noted that article 119 had a direct effect and could be relied upon in national courts.

Article 220, which deals with discrimination on the basis of nationality, provides that “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals.”

A third ground of discrimination is dealt with by article 76 of the Rules of Procedure of the Court of Justice and by articles 4 and 5 of the Supplementary Rules of Procedure, which effectively prevent discrimination by providing for free legal aid.4

4 See Bridge, supra note 18, at 293. For the most recent codification of the Rules of Procedure, see 25 O.J. EUR. COMM. (No. C 39) 1 (1982).
5. Right to Compensation

The Treaty also recognizes the right to receive compensation for damage suffered as a result of the activities of the Community. Article 215 states that "in the case of noncontractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." The three basic elements necessary for a claim under article 215 are: (i) damage, (ii) an illegal act for which the Community is responsible, and (iii) a causal link between the damage and the act of the Community. Article 215 refers to "the general principles common to the laws of the Member States." The Court is thus required to apply these general principles as an additional source of law. This notion of "additional sources of law," i.e. sources in addition to the Treaty itself, has played an important role in the protection of fundamental rights in EEC law.

6. Due Observance of Law

The Treaty requires the due observance of law in the activities of the Community. Article 164 requires the Court of Justice to "ensure that in the interpretation and application of this Treaty the law is observed." The article does not, however, define "the law" or its sources. It is this broad wording and lack of definition which have allowed the Court to draw upon a variety of additional sources in applying Community law and in protecting fundamental rights. Under article 164, the Court has delivered a number of important judgments which will be examined in detail in the following section of the Article.

Article 173 adds to the due observance of law requirement by providing that:

[the] Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or

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See D. Lasok & J. Bridge, supra note 19, at 32.
opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.\(^3\)

Finally, article 179, in giving the Court of Justice jurisdiction in “any dispute between the Community and its servants,” provides for the right of the servants of the Community to have their relations with the Community regulated according to law.

7. **Democratic Control**

The Treaty also establishes, to a limited extent, a form of democratic control over the activities of the Community. Article 137 states that “the Assembly, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the advisory and supervisory powers which are conferred upon it by this Treaty.” Article 143 empowers the Assembly to “discuss in open session the annual general report submitted to it by the Commission.” Article 144 allows the Assembly to censure the Commission and to require the resignation of the members of the Commission as a body.

The Assembly does not have the parliamentary legislative power usually found in similar domestic institutions; yet, it does have considerable influence. Although the Assembly does not have the right to initiate legislation, in practice the Commission usually accepts most of the amendments to its draft legislation which are proposed by members of the Assembly.\(^s\) Moreover, a subsequent modification of the Treaty of Rome by a treaty of April 22, 1970, the Treaty of Luxembourg, has conferred upon the Assembly increased budgetary powers over a portion of the Community budget.\(^9\) Indeed, since 1975, the European Parliament has had the

\(^3\) Article 184, although rarely invoked, adds: Notwithstanding the expiry of the period laid down in the third paragraph of Article 173, any party may, in proceedings in which a regulation of the Council or of the Commission is in issue, plead the grounds specified in the first paragraph of Article 173, in order to invoke before the Court of Justice the inapplicability of that regulation.

\(^s\) See *The Powers of Europe’s Parliament*, *The Economist*, Apr. 21, 1979, at 73.

right to reject the entire Community budget.\footnote{40}

Finally, the Assembly's most important power may well be its power to publicly debate matters involving the running of the Community. Since 1973, the Assembly sessions have had a question period during which both commissioners and the President of the Council have had to provide answers.\footnote{41}

Article 138(3) of the Treaty of Rome states that "the Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States." The first elections were held in June 1979.\footnote{42} The second elections will take place in June 1984.

8. Procedural Rights

The Treaty also contains a number of provisions relating to proceedings before the Court of Justice. Article 167 is designed to ensure the independence of the Court by requiring that "the Judges and Advocates-General . . . be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence." Articles 3 and 4 of the Statute of the Court of Justice also help to ensure the independence of the Court by providing that "Judges shall be immune from legal proceedings" and that they shall "not hold any political or administrative office." Article 6 of the Statute of the Court provides for the security of tenure of the judges by stipulating that they can only be removed from office by a unanimous decision of the other judges.

Article 166 of the Treaty also establishes the position of Advocate-General, whose duty is to make reasoned submissions "with complete impartiality and independence" on cases brought before the Court of Justice in order to assist the Court in the performance of its duties. The Advocates-General enjoy the same immunities and privileges as do the judges of the Court.

Article 17 of the Statute of the Court establishes a right to counsel\footnote{43} and further provides that counsel shall "enjoy the rights and

\footnote{40}{The Economist, Jan. 26, 1980, at 57.}
\footnote{41}{The Economist, supra note 38, at 73.}
\footnote{43}{Protocol Establishing the Court of Justice, Apr. 17, 1957, 298 U.N.T.S. 147. Article 17 provides "[t]he States and the institutions of the Community shall be represented before
immunities necessary to the independent exercise of their duties." Other rights guaranteed by the Statute of the Court include the right to a public hearing,\textsuperscript{44} to a record of the hearing,\textsuperscript{48} and to reasoned, public judgments.\textsuperscript{46}

Finally, Article 170 of the Treaty provides for an extension of the \textit{audi alteram partem} principle to Member States in situations where one Member State alleges that another has failed to fulfill an obligation under the Treaty.\textsuperscript{47}

Some of the rights which have been discussed\textsuperscript{48} are similar to the traditional negative rights. Others, of a principally positive nature, owe their inspiration to the economic nature of the Community's aims and objects. Some, such as freedom of movement, blend both the negative and positive aspects of rights. Indeed, the latter phenomenon leads one to question whether the notions of positive and negative rights are still adequate in a transnational context. For example, Community law has demonstrated how freedom of movement, which generally has been conceived as a negative right, may require positive state action in the form of special social security provisions in order to be meaningful.\textsuperscript{49} Perhaps the attempt to
place rights into separate categories of negative and positive or civil/political and social/economic has led to the imposition of an overly mechanistic and lexicographic relationship on rights which are in reality interdependent and inconceivable outside the context of each other.\textsuperscript{50} If so, this would suggest that a unitary approach to fundamental rights in Europe, with a synthesis of civil/political and social/economic rights, would be desirable—not only in abstracto, but as the best means of ensuring optimum protection of the individual's rights and freedoms. This notion will be discussed further in the final section of the Article.\textsuperscript{51}

9. Limitations Clauses

The relativity of the concept of fundamental rights\textsuperscript{52} requires an examination at this point of the limitations placed by the Treaty on the rights expressed therein. Limitations clauses dictate the scope and, at times, even the content of fundamental rights provisions. Hence, a thorough analysis of fundamental rights must necessarily examine the limitations clauses.

There are essentially six limitations to the fundamental rights provisions of the Treaty. The first is found in article 36 of the Treaty, which permits deviations from the prohibition on quantitative restrictions on imports and exports "on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property." Any such deviations must not, however, "constitute a means of arbitrary discrimination."\textsuperscript{53}


\textsuperscript{51} See infra notes 175-178 and accompanying text.

\textsuperscript{52} The notion of absolute and inalienable natural rights, which was a key feature of traditional natural rights theory, has in recent times been held to be untenable. Bentham, in a colorful remark, once stated that such a notion was "rhetorical nonsense—nonsense upon stilts." See Laguer, \textit{The Issue of Human Rights}, in \textit{Essays on Human Rights} 5 (D. Sidorovsky ed. 1979). See also Kuypers, \textit{On the Traditional Foundations of Human Rights}, in \textit{Le Fondement des Droits de l'Homme} 69 (Institut International de Philosophie ed. 1966).

Article 48(3) provides that the right of free movement of workers may be "subject to limitations justified on grounds of public policy, public security or public health." Article 55 exempts any activities in a Member State which "are connected, even occasionally, with the exercise of official authority" from the operation of the right of establishment. Article 56 further provides that the right of establishment "shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health." Under this article, a Member State may expel undesirable foreigners whether they are layabouts, unfit-for-work migrants, carriers of certain disease, or political agitators, so long as their conflict with the law of the state is exclusively the result of the personal conduct of the individuals concerned within the meaning of Council Directive 64/221 of 25 February 1964.

While the above limitative provisions relate essentially to freedom of movement, two other articles in the Treaty reserve for the Member States national control over the traditional limitation areas of state security and order maintenance. Article 223 states that "no Member State shall be obliged to supply information the dis-

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68 7 J.O. Comm. EUR. 850 (1964). Article 2 of Directive No. 64/221 prohibits measures taken under the guise of public policy solely for economic ends. Article 3 then states:

1. Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned. 2. Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures. 3. Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory. 4. The State which issued the identity card or passport shall allow the holder of such document to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 4 provides a limitative list of the diseases and disabilities which may be invoked for refusing entry on the grounds of public health. Articles 5 through 9 provide certain administrative and procedural rights to persons involved in disputes concerning actions based on one of the three grounds of public policy, security or health. See A. Parry & S. Hardy, supra note 26, at 244.
closure of which it considers contrary to the essential interests of its security” and allows a Member State to “take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material.” Article 224 deals with the “measures which a Member State may be called upon to take in the event of war or serious international tension constituting a threat of war, or in order to carry out undertakings into which it has entered for the purpose of maintaining peace and international security.” Under article 225, the Court of Justice is empowered to decide on claims by the Commission or a Member State that another Member State is “making improper use of the powers provided for in Articles 223 and 224.”

The limitations provisions, particularly those relating to security and order maintenance, leave a considerable amount of power and discretion in the hands of national authorities. Lasok and Bridge have argued that the Treaty, by safeguarding certain state interests in this fashion, has reduced the scope of arbitrary “emergency” action which states may be tempted to take to protect their “sovereign rights.” While the provisions may be helpful to the extent that they provide an escape valve for avoiding or reducing Community tension, they are far too broadly worded to offer, in themselves, any measure of protection of fundamental rights. Indeed, their wording is such that they could permit very serious violations of fundamental rights. Ultimately, it is the Court of Justice which may be the best safeguard of fundamental rights in this context.

It should also be noted that despite the number of provisions in the Treaty of Rome dealing with fundamental rights, the Treaty still lacks a comprehensive catalogue of rights. There remains a large gap in the protection of fundamental rights under the Treaty. Again, it has largely fallen upon the Court of Justice to try to fill this gap. The next section of the Article will examine the role of the Court of Justice in protecting fundamental rights in the European Economic Community.

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60 See D. Lasok & J. Bridge, supra note 19, at 77.
61 Although the Court is not the only safeguard, see supra notes 58-59 and accompanying text, it is nevertheless the final arbiter and a most important bulwark against violations of fundamental rights.
III. FUNDAMENTAL RIGHTS AND THE COURT OF JUSTICE

A. Early Jurisprudence

In its early jurisprudence, the Court of Justice made little attempt to fill the gap created by the nonexistence of a comprehensive catalogue of rights. In its early decisions, the Court refused to consider any rights other than those specifically mentioned in the Treaty. The Court rejected arguments for the protection of fundamental rights based upon the human rights provisions of national constitutions. The Court stated that its task was not to ensure respect for domestic rules of law, including constitutional provisions concerning the protection of fundamental rights, and refused to go beyond the precise text of the Treaty.62

One of the first cases to raise the fundamental rights issue was Stork v. High Authority.63 The plaintiff in that case, a German company, considered that its interest had been adversely affected by a reorganizational measure imposed upon the Ruhr coal mining industry by the High Authority of the European Coal and Steel Community (ECSC) and sought the annulment of the ECSC decision. In support of its argument, the plaintiff invoked articles 2 and 12 of the Grundgesetz für die Bundesrepublik Deutschland which guarantee the free development of the human personality and the free choice of trade or profession.64 The Court, however,

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64 Articles 2 and 12 of the Basic Law for the Federal Republic of Germany provide:
  2. (1) Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.
  (2) Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law.
  12. (1) All Germans shall have the right freely to choose their trade, occupation, profession, their place of work and their place of training. The practice of trades, occupations and professions may be regulated by or pursuant to a law.
  (2) No specific occupation may be imposed on any person except within the framework of a traditional compulsory public service that applies generally and equally to all.
  (3) Forced labour may be imposed only on persons deprived of their liberty by court sentence.

refused to concern itself with the provisions of the German Basic Law. Similarly, in the case of *Ruhrkohlenverkaufsgesellschaften v. High Authority*, one of the plaintiffs invoked article 14 of the Grundgesetz für die Bundesrepublik Deutschland which guarantees the right to private property. The Court again rejected the argument by stating that its task was not to ensure respect for municipal law. In the later case of *Sgarlatta v. Commission of the European Communities*, a number of Italian citrus fruit producers sought the annulment of various Community regulations. In support of their claim, the producers invoked the vague notion of the "fundamental principles" governing the legal protection of fundamental rights in all Member States. Once again, the argument was not accepted by the Court. In this manner, the Court of Justice appeared to safeguard the principle of Community uniformity. Had the court sought to protect individuals on the basis of the arguments respecting the municipal human rights provisions of Member States, which in a number of instances varied from state to state, the Court might have been faced with a serious threat to uniformity. Yet, the decisions, while protecting uniformity and the autonomy of Community law, did nothing to correct the lacunae in the protection of fundamental rights in the Community legal system. More importantly, in all of the cases the Court, having rejected the arguments on the ground that it only had competence to apply Community Law rather than national law, did not address the further question of whether similar analogous guarantees could be provided by Community law itself.

These early decisions, characterized by legal scholars as "the sins

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68 Article 14 of the Basic Law for the Federal Republic of Germany states:

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws. (2) Property imposes duties. Its use should also serve the public weal. (3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts. According to this principle of proportionality, the burden imposed upon an individual by the public authorities must not be disproportionate to the public benefit sought to be attained.

70 Pescatore, supra note 17, at 348.
of youth,” gave way in the early 1970's to a series of dynamic, imaginative judgments which sought to reconcile the needs for uniformity and for greater protection of fundamental rights.

B. Later Jurisprudence: The Development of an Activist Approach

The problem of the protection of fundamental rights had grown even more acute with the clear affirmation by the Court of the supremacy of Community law over national constitutions. The Court's decision in Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel meant that, in matters which fell within Community competence, individuals no longer had the protection of their constitutional human rights laws, but at the same time they were not, in many instances, given similar safeguards under European Economic Community law. The existence of a vacuum in the area of fundamental rights thus became even more evident and problematic. The Court of Justice then moved in bold and imaginative fashion in an attempt to remedy the problem. In a departure from its earlier jurisprudence, the Court ruled in a number of important decisions that the protection of fundamental rights formed an integral part of Community law.

1. Treaty Basis

The basis for the Court's activist role was found in a broad interpretation of article 164 of the Treaty of Rome, which states that "the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." The very general terms of this article allowed for an interpretation which gave it a much broader meaning than at first seemed apparent. The Court found that the words "observance of law and justice" could be given a broader meaning than simply the interpretation and application of Community rules. Indeed, taken in a broad sense, the words allowed decisions to be based on law other than Treaty law as well as on Treaty law. Consequently, the Court found a great

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72 Toth, supra note 35, at 667.
deal of freedom to search for general principles of law. It proceeded to do so, based on the notion that Community law must be considered to have a very broad legal source, consisting not merely of the written law of the Treaty and enactments of the Community institutions, but also of a set of broad principles of law common to the legal systems of the Member States of the Community.  

The broad interpretation of article 164 is supported by the wording of articles 173 and 215 of the Treaty. Article 173, which is concerned with proceedings taken against acts of the Community institutions, states in effect that the Court of Justice must control or supervise the legality of Community actions for violations of the Treaty and also for the violation of "any rule of law relating to its application." Article 215 also makes reference to "the general principles common to the laws of the Member States." The general wording of both articles lends support to the notion that Community law consists not only of the written text of the Treaty and of Community enactments but also of those unspecified rules of law pertaining to the application of the Treaty.

The broad interpretation of these articles introduced a large opening through which the Court began to actively ensure the pro-

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78 The inspiration for the Court's departure from its earlier decisions appears to have come from a brilliant article by Pierre Pescatore, published in 5 CAHIERS DE DROIT EUROPÉENNE 629, 642 (1968), and from the opinion of the European Commission in Stauder v. City of Ulm, 1969 E. Comm. Ct. J. Rep. 419, 9 Comm. Mkt. L.R. 112 (Preliminary Ruling), in which the Commission stressed that Community institutions were under an obligation to maintain fundamental rights based on the "common constitutional traditions" of the Member States. See Dzemczewski, Fundamental Rights and the European Communities: Recent Developments, in 2 THE HUM. RTS. REV. 69, 70 (1977).

74 Article 173 of the Treaty provides:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Treaty, supra note 11, art. 173.

76 Id. art. 215 states in part:

The contractual liability of the Community shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

76 See Pescatore, supra note 17, at 348. See also Pescatore, supra note 12.
tection of fundamental rights in Community law. It now had the
latitude to search not only within the four corners of the Treaty
itself, but also within the common legal principles of the Member
States. The following section of the Article will examine in detail
the major decisions of the Court which established its important
role in the protection of fundamental rights.

2. Decisions of Principle

The case of Stauder v. City of Ulm was the first to signal a
departure from the Court's earlier jurisprudence. In the Stauder
case, the Commission had authorized Member States to sell butter
at a reduced price to certain categories of needy people in order to
reduce a Community butter surplus. In order to prevent fraud,
however, the recipients of the social assistance measure were re-
quired to show a coupon-card bearing the name of the recipient.
Mr. Stauder, a resident of Ulm, Germany and a beneficiary under
the assistance program, considered the coupon-card requirement to
be a violation of his constitutional rights to human dignity and to
equality before the law. He therefore challenged the requirement
before the Verwaltungsgericht of Stuttgart, which referred the
matter to the Court of Justice.

78 Article 1 of the Basic Law for the Federal Republic of Germany provides:
(1) The dignity of man shall be inviolable. To respect and protect it shall be the
duty of all state authority.(2) The German people therefore acknowledge inviola-
able and inalienable human rights as the basis of every human community, of peace
and of justice in the world.(3) The following basic rights shall be binding as di-
rectly valid law on legislation, administration and judiciary.

Press and Information Office, German Federal Government, Basic Law for the Fed-

79 Article 3 of the Basic Law for the Federal Republic of Germany states:
(1) All persons shall be equal before the law.(2) Men and women shall have equal
rights.(3) No one may be prejudiced or favoured because of his sex, his parentage,
race, language, homeland and origin, faith or his religious and political opinion.

Press and Information Office, German Federal Government, Basic Law for the Fed-

80 The Verwaltungsgericht submitted the following question to the Court of Justice:
Is it compatible with the general principles of Community law in force that the
decision of the Commission of the European Communities of 12 February 1969
(69/71/EEC) makes the allocation of butter at a reduced price to the beneficiaries
of certain social assistance schemes dependent on the disclosure of the benefi-
ciary's name to the sellers (Article 4 of the decision)?

(Preliminary Ruling).
Advocate-General Roemer declared in his opinion on the case that:

common conceptions of value in the national constitutional law, in particular, national basic rights, must be established by a comparative evaluation of the law and these common conceptions must be observed as unwritten components of Community law in the formulation of secondary Community law. Consequently, the Court may quite properly be requested to test the validity of a decision of the Commission against this criterion.  

The Court, in its judgment in the case, chose to depart from its former attitude of aloofness and addressed itself, though only in passing, to the question of fundamental rights. The Court remarked that the Commission authorization did "not contain any element that might jeopardize the fundamental rights of the individual contained in the general principles of the law of the Community of which the Court must ensure the observance." Thus, the Stauder case marked the first step in the evolution of the jurisprudence of the Court.

The second major step came in the case of Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Under Community regulations, import and export licenses could only be obtained subject to the payment of a deposit. In this case, the export-import firm had lost a substantial part of its deposit for failure to comply with export license requirements. The firm brought an action in the Verwaltungsgericht of Frankfurt am Main, which referred the matter to the Court of Justice.

One of the arguments raised before the Court was that the regulations were invalid because they infringed the principle of proportionality (Verhältnismässigkeit), developed by the German Federal Constitutional Court, which is applicable under articles 2 and 14 of

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81 Id. at 428, 9 Comm. Mkt. L.R. at 115.
82 Id. at 425, 9 Comm. Mkt. L.R. at 119.
84 The questions submitted by the Verwaltungsgericht to the Court were the following: 1. Whether the obligation to export laid down in Article 12(1)(iii) of E.E.C. Council Regulation 120/67 dated 13 June 1967, the requirement of a deposit and the power to order forfeiture of such deposit if the articles are not exported within the period of the license, are lawful. 2. If the answer to question 1 is yes, whether Article 9 of E.E.C. Commission Regulation 473/67 dated 21 August 1967, in its application to Regulation 120/67, is lawful in that it excludes the power to order forfeiture of the deposit only in cases of force majeure.

Id. at 1127, 11 Comm. Mkt. L.R. at 258.
the Grundgesetz für die Bundesrepublik Deutschland. In its judgment, the Court first made it very clear that Community law overrides national constitutions. Therefore, the validity of a Community instrument could not be affected by allegations that it struck "at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure." However, the Court then went on to explicitly state that:

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\text{[a]n examination should . . . be made as to whether some analogous guarantee, inherent in Community law, has not been infringed. For respect for fundamental rights has an integral part in the general principles of law of which the Court of Justice ensures respect. The protection of such rights, while inspired by the constitutional principles common to the Member States, must be ensured within the framework of the Community's structure and objectives. We should therefore examine . . . whether the deposit system did infringe fundamental rights respect for which must be ensured in the Community's legal order.}^{67}\]

The Court then proceeded to analyze the deposit system on this basis and concluded that the system did not infringe any rights of a fundamental character. Thus, in the Handelsgesellschaft case the Court moved from an earlier passing reference to fundamental rights to a systems analysis based on the criterion of respect for fundamental rights. The Stauder and Handelsgesellschaft cases together affirmed the existence of a Community concept of fundamental rights and laid the foundation for the development of a broad Community system of rights.

This process was taken a step further in J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission of the European Commu-

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65 For the text of article 2 of the Basic Law for the Federal Republic of Germany, see supra note 64. The text of article 14 is set forth supra note 67.
66 The Court stated:
Recourse to legal rules or concepts of national law to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Community law. The validity of such instruments can only be judged in the light of Community law. In fact, the law born from the Treaty, the issue of an autonomous source, could not, by its very nature, have the courts opposing to it rules of national law of any nature whatever without losing its Community character and without the legal basis of the Community itself being put in question.

67 Id.
ties, in which the Court moved toward an optimum standard of fundamental rights. The Court, after reaffirming that fundamental rights form an integral part of the general principles of law of which it must ensure the observance, stated:

"In assuring the protection of such rights, the Court is required to base itself on the constitutional traditions common to the Member States and therefore could not allow measures which are incompatible with the fundamental rights recognized and guaranteed by the Constitutions of such States. The international treaties on human rights in which the Member States have cooperated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law."

The Court then indicated that the fundamental rights protected by the constitutional laws of all of the Member States included the right of property and the free exercise of trade, labour and other commercial activities.

These three decisions, in addition to affirming the existence of a Community concept of fundamental rights, also identified certain rights and thus gave specific content to the concept. The cases recognized the right to human dignity, the principle of proportionality, the right of property, and the free exercise of trade, labour and other commercial activities as part of the Community concept of fundamental rights. A number of other decisions of the Court also have recognized certain general principles of law and, in so doing, have given further specific content to the concept. Thus, the Court has recognized the general requirement of certainty, as well as the principles of good faith, respect for vested rights, and the exigen-

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**Footnotes:**

90 Id. at 508, 14 Comm. Mkt. L.R. at 354.
cies of the proper administration of justice, including procedural fairness, legality, and equality.\textsuperscript{95}

In addition, a series of more recent cases has further elaborated upon the reference in the \textit{Nold} case to international human rights treaties. In \textit{Rutili v. Minister of the Interior, France},\textsuperscript{96} the Court stated:

\begin{quote}
Taken as a whole, these limitations placed on the powers of member-States in respect of control of aliens found in Articles 2 and 3 of Directive 64/221 and Article 8 of Regulation 1612/68 are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the member-States, and in Article 2 of Protocol 4 of the same Convention.\textsuperscript{97}
\end{quote}

Thus, for the first time the Court made specific use of an international human rights treaty in support of its reasoning. In the more recent case of \textit{Hauer v. Land Rheinland Pfalz},\textsuperscript{98} the Court based its decision squarely on article 1 of the First Additional Protocol to the European Convention on Human Rights. In this case, an application by a German landowner to plant vines on land which had not previously been so planted was rejected because of a Community regulation which prohibited the granting of new permits. The landowner challenged the denial of the application and pleaded, \textit{inter alia}, the incompatibility of the Community regulation with certain fundamental rights provisions in articles 12 and 14 of the German Basic Law.\textsuperscript{99} Both the Court and Advocate-General Capotorti reaffirmed the primacy of Community law in such cases of conflict. Both the Court and the Advocate-General also reaffirmed the notion that the right to property and the right to freely pursue a trade or profession are protected as fundamental rights under Community law. Signore Capotorti undertook a detailed analysis of the right to property under the common constitutional law of the Member States and under article 1 of the First Additional Protocol to the European Convention for the Protection of


\textsuperscript{97} \textit{Id.} at 1232, 17 Comm. Mkt. L.R. at 155.


\textsuperscript{99} For the text of article 12, see \textit{supra} note 64. For the text of article 14, see \textit{supra} note 67.
Human Rights and Fundamental Freedoms\textsuperscript{100} and concluded that:

Article 2 of Council Regulation 1162/76 is not contrary to any of the principles of Community law intended to protect individuals; in particular, it does not infringe the fundamental right to the peaceful enjoyment of private property, which is recognized in Community law both on the basis of the internal legal orders of the Member States and under Article 1 of the First Additional Protocol to the European Convention on Human Rights.\textsuperscript{101}

Thus, the conclusion in the Hauer case rests upon an examination of the internal legal orders of the Member States and upon a detailed analysis of the First Protocol to the European Convention on Human Rights.

In the subsequent case of National Panasonic (U.K.) Ltd. \textit{v.} Commission of the European Community,\textsuperscript{102} the Court did not even mention common constitutional principles; its analysis of the right to privacy was based solely upon the European Convention on Human Rights. In Panasonic, an English company had brought an action against the Commission after Commission investigators had presented themselves at the company's premises with a search warrant and proceeded to search the premises. The company complained that it had not previously received any request for access to its premises or notice of the imminence of the warrant and had, therefore, been unable to dispute its validity before submitting to the search. For this reason, the company alleged that its right to privacy, its right to be heard and its right to prepare for the investigation had been violated. The company's action was ultimately dismissed by the Court and the applicant was ordered to pay costs.

\textsuperscript{100} Article 1 states:

\begin{quote}
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.
\end{quote}


In arriving at its conclusion, the Court examined the applicability of article 8 of the European Convention on Human Rights and decided that the Commission had not infringed the right invoked by the applicant. As previously mentioned, the Court discussed the right to privacy solely in relation to the European Convention on Human Rights, making no mention of common constitutional principles. Indeed, the Court seems to have simply assumed that the right to privacy, in the broad sense of article 8 of the Human Rights Convention, was a fundamental right protected by Community law. This is evidenced by the Court's discussion of the applicability of the exception to the right. The judgment indicates an assumption by the Court that the Convention, insofar as its provisions apply to the Community context, forms an integral part of the Community legal order.

This assumption by the Court of Justice is particularly interesting in view of the case of Surjit Kaur v. The Lord Advocate of the Court of Sessions of Scotland (Outer House) which was decided in the same year as Panasonic and in which it was held, inter alia, that the European Convention on Human Rights was not enforceable by the Scottish courts under section 2 of the European Communities Act. The plaintiffs in this case had argued that the European Convention on Human Rights was enforceable in Scotland as part of Community law. Since the Convention formed part of Community law and since Community law was enforceable under the European Communities Act, it was argued that the court was obliged to enforce the Convention. Had this ingenious argu-

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103 Article 8 states that "everyone has the right to respect for his private and family life, his home and his correspondence." The article further stipulates that there shall be no interference with this right:

except such as is in accordance with the law and is necessary in a democractic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention on Human Rights, supra note 5, art. 8.


105 Id. at 98-99. Section 2 of the European Communities Act provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

European Communities Act, 1972, ch. 68.
ment been accepted, the United Kingdom would have received a Bill of Rights "through the back door." The court did not, however, accept the argument. Lord Ross stated that "the European Court does not deal with fundamental rights as such in the abstract; it only deals with them if they arise under Treaties and have a bearing on Community law questions." Lord Ross then added that "the issue raised in the present case has no Community law content at all. The pursuers here are not seeking to protect some economic right, but merely to assert a right alleged to be conferred on them by the Convention." Therefore, according to the Scottish court, the activist judgments of the Court of Justice have not led to the enforceability of the European Convention on Human Rights per se before United Kingdom courts. Nevertheless, one may ask whether the Convention on Human Rights, to the extent that it forms an integral part of Community law, is enforceable in the United Kingdom courts in those instances in which the case at bar has "Community law content." In such cases, there could perhaps be a "back door Bill of Rights" upon which United Kingdom citizens may rely.

As the previous discussion illustrates, the central question is whether the Human Rights Convention does indeed form an integral part of Community law. The view that it does form part of Community law has been espoused by the Commission and by several legal scholars. Although the support for this conclusion is still not overwhelming, a continual movement by the Court toward this position is clearly discernible. The Panasonic case and the other cases which have been reviewed in the above analysis show that the Court is willing to continue evolving and expanding the concept of fundamental rights. There can be little doubt that the Court is steadily moving toward the unequivocal conclusion that the Convention on Human Rights, insofar as it is applicable to the Community context, forms part of Community law.

3. Sources of Fundamental Rights

The following section of the Article will summarize and structure

107 Id. at 97.
108 Commission of the European Communities, supra note 9, at 10.
some of the essential principles found in the cases discussed above. There are three general sources of fundamental rights in Community law, apart from the provisions of the Treaty itself. This section shall briefly examine each in turn.

a. **General Principles of Law**

The Court of Justice has, in a substantial number of cases, recognized a number of general principles of law as part of Community law.\(^{110}\) These principles include very broad concepts, such as good faith, and more specific notions, such as the right to be convicted only once for a single offence.\(^{111}\) Although some of these general principles have clearly drawn their inspiration from doctrines of public international or municipal law, others, such as the notion of "comparable price conditions to consumers in comparable circumstances," remain untraceable.\(^{112}\)

b. **Common Constitutional Provisions**

As previously noted, the Court, in protecting fundamental rights, is bound to draw inspiration from constitutional traditions common to the Member States. The Court, therefore, cannot uphold measures which are incompatible with fundamental rights commonly recognized and protected by the constitutions of Member States.

One interesting point observed by Hill\(^{113}\) is that the Court, in the *Nold* case, did not speak of traditions common to *all* constitutions of the Member States, but of rights protected by *the* constitutions of those States. This formula indicates that the Court does not seek a common minimum standard, that is, a principle common to all of the Member State constitutions. Since "the catalogue of fundamental rights and guarantees . . . of the Member States of the European Communities differ so appreciably,"\(^{114}\) such an approach would effectively render the whole procedure virtually meaningless. Rather, the formula indicates that the Court will seek

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\(^{110}\) For an analysis of the concept of general principles of law, see Reuter, *Le recours de la Cour de justice des Communautés européennes à des principes généraux de droit*, in *MÉLANGES HENRI ROLIN* 263 (1964).

\(^{111}\) For a list of principles recognized by the Court, see Commission of the European Communities, *supra* note 89, at 9.

\(^{112}\) See D. Lasok & J. Bridge, *supra* note 19, at 96.

\(^{113}\) See Hilf, *supra* note 70, at 149.

\(^{114}\) See Bernhardt, *supra* note 92, at 27.
an "optimum standard of fundamental rights."\footnote{Commission of the European Communities, supra note 89, at 9.}

However, Hilf also has argued that the maximum standard approach means that any rule of Community law which is in conflict with any of the rights guaranteed by any of the Member State constitutions will be invalidated.\footnote{See Hilf, supra note 70, at 149. The author states that "the reference to [the] constitutions of Member States indicates that the Court will observe a maximum standard, that is to say, it will invalidate any rule of Community law which is in conflict with any of the rights guaranteed by any of the Member States constitutions." Id. (emphasis added).} The argument is flawed, however, in that it ignores the elements of commonality and unity of Community law. The Court, keeping in mind that general respect for fundamental rights is a basic element of all of the Member State constitutions, has sought a reasonable degree of convergence in national measures for the protection of fundamental rights. In this manner, the Court has avoided an overly rigid approach in its search for "common principles" while still retaining the elements of commonality and unity of Community law.

c. International Human Rights Law

The Court also has indicated that international human rights treaties on which the Member States have collaborated or of which they are signatories also form part of Community law.\footnote{Firma J. Nold, Kohlen- und Baustroffgrosshandlung v. Comm'n of the European Communities, 1974 E. Comm. Ct. J. Rep. 491, 14 Comm. Mkt. L.R. 338. See Schermers, The European Court of Justice: Promotor of European Integration, 22 Am. J. Comr. L. 444, 454 (1974).} Most writers, in dealing with this source of fundamental rights, have stressed the need for unanimity of Member State participation in the international human rights treaties.\footnote{See, e.g., Pescatore, The Protection of Human Rights in the European Communities, 9 COMM. MKT. L. REV. 73, 75-76 (1972); Sorensen, The Enlargement of the European Communities and the Protection of Human Rights, 1971 EUR. Y.B. 3, 5-6 (Council of Europe).} A question which does not seem to have been considered, however, is whether the optimum standard approach, with its search for a reasonable degree of convergence, could be used in the area of international human rights law. There is no reason why the arguments used to support the notion in the field of comparative constitutional law would not be equally applicable to the field of public international law. This approach would allow the Court greater scope and flexibility; yet it would no more undermine the elements of commonality and unity of Community law than does the search for common constitutional
provisions. In this manner, the Court could look to documents other than the European Convention on Human Rights, such as the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{119}

A related question is the status of the Universal Declaration of Human Rights\textsuperscript{120} vis-à-vis Community law. Many legal scholars now believe that the Universal Declaration, although originally of no legally binding effect, has now become part of customary international law.\textsuperscript{121} Given this transformation in the juridical character of the Declaration, there is nothing to prevent the Court from looking to the Declaration as a guide to the protection of fundamental rights within the Community. The very nature of customary international law implies common acceptance by the international community. Therefore, if the optimum standard approach is applied to public international law as well as to comparative constitutional law, the Universal Declaration could serve as an additional source of fundamental rights—without endangering the commonality and unity of Community law.

\textsuperscript{119} See supra note 4.

\textsuperscript{120} See supra note 4.

4. Restrictions on Fundamental Rights

As can be expected, the Court has not viewed the concept of fundamental rights as an absolute concept. Indeed, the Court has noted that within the Community context:

"[T]hese rights are far from constituting unfettered prerogatives, but must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community on condition that the substance of these rights is left untouched."

Nevertheless, the Court has generally sought to limit the scope of the public order, public security and public health exceptions to the Treaty rights. Professor Cerexhe has noted that, while restrictive measures are permitted, they should be imposed only in cases involving conduct which constitutes a real and grave threat to a fundamental societal interest. In this fashion, the Court has generally sought to provide the greatest possible protection of fundamental rights, despite the relativity of the concept and the existence of the limitations provisions of the Treaty.

5. Criticisms of the Court of Justice

The progressive evolution in the approach of the Court of Justice to the question of fundamental rights has not been without critics. Some have argued that the Court's acknowledgement of such a large number of rights—the right to ownership, to profession, to work, and to other matters—has exceeded the limits of judicial legislation. Others have argued that the restrictions placed on the rights, such as "the overall objectives pursued by the Community," are so broad and imprecise as to seriously limit the scope

123 For a discussion of the "limitations" provisions of the Treaty, see supra notes 52-61 and accompanying text.
125 See Hilf, supra note 70, at 154.
of protection.\textsuperscript{126}

While the latter criticisms are not entirely without validity, the Court has nevertheless been sensitive to the protection of fundamental rights. The majority of scholars have applauded the progressive evolution of the Court's jurisprudence.\textsuperscript{127} In addition, the European Parliament, Council and Commission adopted in April 1977 a declaration which stressed "the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms."\textsuperscript{128} In so doing, the three institutions formally espoused the progressive development of the concept of fundamental rights in Community law.

C. Problems of Italian and German Constitutional Law

Serious problems can arise in cases of conflict between national standards for the protection of fundamental rights and the Community standard, particularly in cases where the national standard goes beyond that recognized under Community law. In such instances, there is a tension between the desire for the optimum protection of the fundamental rights of the citizen and the desire for uniformity of Community law. This problem has thus far arisen particularly in the context of Italian and German constitutional law because these two member states have constitutional courts.

The majority of the Italian tribunals which have considered the problem have taken the view that the probability of such conflict is highly unlikely.\textsuperscript{129} The Italian Constitutional Court has even stated that such a conflict would be "aberrant" and "extremely improbable."\textsuperscript{130} Nevertheless, the Italian Court has been careful to reserve for itself the right, in an extreme case, to question the law of the Treaty itself if its effect were to permit substantial infringement of fundamental rights.\textsuperscript{131}

\textsuperscript{126} Id.
\textsuperscript{129} See, e.g., Pescatore, supra note 12, at 635-36.
\textsuperscript{130} See Commission of the European Communities, supra note 89, at 10.
\textsuperscript{131} See id.
The problem is even more acute in Germany. A number of German legal scholars have declared that national protection of fundamental rights must continue so long as the Community has established similar and adequate protection of fundamental rights. They have argued that the fundamental rights enshrined in the Grundgesetz für die Bundesrepublik Deutschland must have priority over Community law. The German courts also have raised a number of concerns over the adequacy of Community law in the area of fundamental rights and the potential conflict between Community law and German constitutional law.

In *Internationale Handelsgesellschaft*, the German Federal Constitutional Court went so far as to claim the right to examine secondary Community law, stating that the fundamental rights contained in the German Basic Law formed an integral part of the Basic Law and that there could be no transfer of sovereignty with respect to that vital function of the Constitution. The Court then concluded that:

So long as the process of Community integration has progressed to the stage where Community Law also contains a codified catalogue of fundamental rights which has been passed by a parliament, . . . a court in the Federal Republic of Germany may and should approach the Federal Constitutional Court to determine the validity of a Community Law, after the ruling of the European Court of Justice provided for in Article 177 of the Treaty has been obtained, if the court considers the provision of Community Law relevant to its decision inapplicable in the interpretation given by the European Court of Justice because and in so far as it conflicts with one of the fundamental rights guaranteed by the Basic Law.

Although the European Parliament and Commission and a majority of legal scholars have criticized the decision of the German Constitutional Court and although the Court later adopted a

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132 See, e.g., Wagner and Wengler, cited in Pescatore, supra note 12, at 633.
133 See, e.g., Finanzgericht Bremen, 3 September 1963; Verwaltungsgericht Frankfurt am Main II. Kammer, 17 December 1963. See Pescatore, supra note 12, at 632-35 for a further discussion of these and other cases and of German doctrinal writings on the issues.
more conciliatory stance, it must be recognized that the German Court and the German doctrinal writers have a legitimate concern. Indeed, their concern that the transnational integrationist movement not be allowed to ignore or to violate fundamental rights is to be applauded. The challenge facing the Community is that it cannot ignore the threat to Community unity posed by the German (and Italian) approach, nor can it ignore the concerns raised about the protection of fundamental rights.

The following section of the Article will examine some of the possible solutions to this problem and the various alternatives which are available for the protection of fundamental rights in the future.

IV. OPTIONS FOR THE FUTURE

There are basically three methods by which the protection of fundamental rights at the Community level could be reinforced. The first is, quite simply, the continued evolution and development of the jurisprudence of the Court of Justice. The second method is the formal adherence by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The third alternative involves the drafting of a comprehensive catalogue of fundamental rights which would become part of Community law.

A. The Role of the Court of Justice

In a sense, the Court of Justice has partially preempted the German and Italian national court decisions. As previously noted, the Court of Justice has declared that fundamental rights form an integral part of the “general principles of law” the observance of which it ensures and has looked to national constitutions and to international human rights law for guidelines as to the content of these rights. The activist approach of the Court largely protects the fundamental rights of individuals while at the same time maintains the central position of the Court as final arbiter on Community law, a position which is necessary to Community unity.

Yet, for all the creativity and activism of the Court, the case method for the protection of fundamental rights nevertheless remains deficient. First, the method cannot fully allay the fears of

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198 See Europäische Grundrechtszeitschrift, July 25, 1979, cited in Dubois, supra note 95, at 620.
national constitutional courts. Although the maximum standard approach to the use of national constitutional rights allows the Court of Justice to recognize a great many constitutionally guaranteed rights, it does not allow the Court to recognize all of these rights. The Court is forced into adopting a "flexible maximum standard." If it adopts an "absolute maximum standard," its own supremacy will be ousted and the principle of Community unity will be lost.\footnote{For a discussion of the principle of Community unity, see supra notes 113-116 and accompanying text.} Yet, the flexible approach means that there will inevitably be some constitutional rights which will not meet the test of commonality. In such cases, the potential for national judicial "rebellion" remains.

A second problem with the case method is the lack of predictability and certainty. As the Commission has noted:

\begin{quote}
However . . . worthy of approval the method developed by the Court may be, it cannot rectify at least one of the shortcomings affecting the legal order of the Communities through the lack of a written catalogue of fundamental rights: the impossibility of knowing in advance which are the liberties which may not be infringed by the Community institutions under any circumstances. The European citizen has a legitimate interest in having his rights vis-à-vis the Community laid down in advance.\footnote{Commission of the European Communities, supra note 9, at 7.}
\end{quote}

Such advance knowledge would, of course, lend a greater degree of predictability to the outcome of any legal dispute. Advance knowledge and increased certainty regarding fundamental rights would also encourage greater respect for those rights. Individuals will be more vigilant and jealous of their rights if they are aware at the outset of the existence of those rights. Furthermore, institutions will be more careful in their actions if there is a ready and available set of norms, a catalogue of rights, against which those actions can be judged.

The third potential problem with the case method is that it may place the Court in the position of an institutional role conflict. The Court has established its own unique role as an institution. It has developed its own history and institutional integrity. The single most obvious and pervasive aspect of this role has been its strong commitment to the principle of European integration and to the Community legal order. This position, which necessarily implies a strong commitment to Community institutions and organs, might
seriously conflict with the Court's other role as defender of fundamental rights. Moreover, the broad and imprecise restrictions placed upon the exercise of fundamental rights in the Court's own jurisprudence tend to encourage such conflict. The suitability and integrity of the Court could be called into question in situations involving controversy between the protection of fundamental rights and the protection of vital interests of Community organs.

Another aspect of this problem involves perceptions of institutional role conflict. It has been said many times that justice must not only be done, but must also be seen to be done. The potential for role conflict could lead to problems of justice not being seen to be done. Indeed, some authors have already questioned whether justice can be done in cases of sharp role conflict: "The Court's ... strong commitment to European integration, to the support of Community organs and the new legal order, calls into question its suitability as a forum to adjudicate controversies involving fundamental rights posed against vital interests of Community organs and their acts. . . ." Indications of role conflict can already be found in the Court's jurisprudence, such as the restrictive attitude of the Court in cases of individual challenges to regulations under article 173 of the Treaty of Rome and in cases in which the Court has been more lenient with the Community organs when it considered their acts to be of benefit to the Community.

Nevertheless, the Court of Justice is itself capable of providing at least a partial solution to these problems. If the trend in the jurisprudence of the Court has been correctly identified and if the arguments concerning the use of a "flexible maximum standard" with respect to international law are also correct, the Court may be in a position to incorporate significant portions of the International Bill of Rights, in addition to the European Convention on Human Rights, into Community law. If the Court were to do so, it could eliminate some, though not all, of the problems mentioned above. These international instruments could provide a rough standard against which Community acts could be measured prior to court action. The problem of uncertainty would thus largely be


140 See Economides & Weiler, supra note 109, at 687.

141 Id. at 687 n.15.
resolved. The use of international human rights law would also strengthen the role of the Court as protector of fundamental rights. However, it could only partially resolve the problem of "institutional role conflict." Only a formal Community Charter of Rights or formal adherence to the European Convention on Human Rights could satisfactorily resolve this particular problem. However, the potential for "national judicial rebellion" would still remain. The further development of the jurisprudence of the Court would not meet the condition stipulated by the German Federal Constitutional Court in *Handelsgeellschaft* as a prerequisite for a change in its position: "that Community Law also contains a codified catalogue of fundamental rights" which has been "passed by a Parliament."

The foregoing discussion leads to two general conclusions. First, the Court of Justice has not exhausted its creative role in the protection of fundamental rights. There remains considerable scope for the further development of the principles which the Court has established to date. Yet, it is also clear that the case method presents a number of problems, the nature of which is such that they cannot be left unresolved. Hence, although the Court must continue to play a cardinal role in the protection of fundamental rights, the case method alone can no longer suffice.

The following sections of the Article will examine the two other principal methods which have been suggested for ensuring the optimum protection of fundamental rights in Community law, notably, accession by the Community to the European Convention on Human Rights and a comprehensive Community catalogue of rights.

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142 Judgment of May 29, 1974, 37 BVerfG (No. 18) 271, quoted in Drzemczewski, supra note 134, at 72-73.

143 The question of accession is such a complex matter that limitations of time and space preclude a comprehensive treatment of the subject in this Article. Therefore, only a brief outline of some of the major issues will be presented. For further discussion of accession, see Brown & McBride, supra note 135; Economides & Weiler, supra note 109; Leuprecht, *Problems Relating to the Accession of the European Communities to the European Convention on Human Rights*, Paper delivered at the Colloquy on the European Communities and the European Convention on Human Rights, International Institute of Human Rights, June 10-11, 1982; Proceedings of the International Convention on the European Communities and Human Rights, Venice, November 9-11, 1979; Proceedings on the Colloquy on the Accession of the European Communities to the European Convention on Human Rights, Louvain-LaNeuve, February 7, 1980.
B. Accession to the European Convention on Human Rights

1. Introduction

In a 1979 memorandum, the Commission of the European Communities has strongly recommended accession by the Community to the European Convention on Human Rights. Accession also has been supported by the Parliamentary Assembly of the Council of Europe, the Economic and Social Committee of the European Community, and the European Parliament. In addition, increasing doctrinal and political support for accession exists. Indeed, the Federal Minister of Justice of the Federal Republic of Germany has declared that:

[A] uniform application of the Convention in the territories of all the States Parties to the Convention requires . . . its application to acts of the European Communities. It would not make sense if acts which, being subject to the binding effect of the Convention as acts of a State Party to the Convention, should be freed from this binding effect for the mere reason that, as a result of that State joining the European Communities they are no longer made on the national level but by the organs of the Communities. I am sure that it was not the intention of the Fathers of the European Communities here to create again a new Space where the Convention does not apply. For this reason, the Federal Government has been recommending for some time that the European Communities should accede to the Convention.

Moreover, if one steps outside of the realm of fundamental rights, it is possible to discern a general process of accession by the Community to the Council of Europe’s various conventions. For

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144 Commission of the European Communities, supra note 9, at 5.
145 This recent memorandum represents an interesting change of position by the Commission. In an earlier memorandum, the Commission had argued that accession was unnecessary. See Commission of the European Communities, supra note 89.
147 23 O.J. EUR. COMM. (No. 6353) 1 (1980).
149 See, e.g., Leuprecht, supra note 143; Leuprecht, supra note 148, at 3. But see Economides & Weiler, supra note 109; E. Cerexhe, supra note 124; Brown & McBride, supra note 135.
example, in December 1981 the Community became a contracting party to the Convention on the Conservation of European Wildlife and Natural Habitats, which it had signed in September 1979 in Berne.\(^{151}\) Protocols are also being negotiated to enable the Community to accede to the three European agreements on medical and customs matters.\(^{152}\) Accession to the Human Rights Convention may therefore be viewed as part of a larger process of accession by the Community to European treaties.

Accession in the human rights field, however, raises a number of difficult problems. This has led some commentators to question "whether the game is worth the candle."\(^{153}\) The next section of the Article will briefly examine the principal arguments for and against accession.

2. Arguments for and Against Accession

The first argument advanced by the Commission in favour of accession is that it would enhance the image of Europe as an area of freedom and democracy in the world. In the words of the Commission, it would "make clear to the whole world that the Community ... is determined to improve in real terms the protection of human rights by binding itself to a written catalogue of fundamental freedoms."\(^{154}\) More importantly, accession would "strengthen the position of Western European democracies as a whole in defending a universal and indivisible concept of human rights in the face of attempts to render the realisation of certain fundamental rights subservient to certain other rights (e.g. 'right to peace,' 'right to development')."\(^{156}\) Additionally, it would provide a set of basic formal criteria for adhesion to and membership in the EEC, underlining the fact that respect for fundamental rights forms an essential element of membership.\(^{158}\)

The Commission also suggests that accession would reduce the risk of national courts' reviewing Community acts by reference to the human rights provisions of their national constitutions.\(^{157}\)

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\(^{152}\) Id. at 256.


\(^{154}\) Commission of the European Communities, supra note 9, at 11.

\(^{156}\) Leuprecht, supra note 143, at 3. The author is in full accord with Mr. Leuprecht's insightful comment.

\(^{157}\) Id.

\(^{158}\) Commission of the European Communities, supra note 9, at 7.
Thus, the risk of "national judicial rebellion" would be minimized. In addition to the above political advantages, accession would have certain legal advantages. It would, if accompanied by acceptance of the right of individual petition, reduce the number of divergent interpretations of the Human Rights Convention by the Court of Human Rights and the Court of Justice.\(^5\) It would also provide greater clarity and certainty.

On the other hand, it has been argued by some that the rights contained in the Convention and Protocols are not especially relevant to Community activities. The Convention deals with the traditional civil and political freedoms rather than with the economic and social rights which are of particular importance to the Community. Nevertheless, the Convention does contain certain provisions that are of potential significance to the Community.\(^6\) Examples of these are the right to respect for private and family life, home and correspondence found in article 8,\(^7\) the right to freedom of peaceful assembly and association in article 11,\(^8\) and the right to property and right to education found in the First Additional Protocol to the Convention.\(^9\) Additionally, the Fourth Protocol to the Convention contains provisions relating to the free movement of persons.\(^10\) Moreover, Community accession might provide further impetus to the idea of incorporating certain economic and social rights in the Convention.

The possibility of extending the scope of the Convention to in-

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\(^{15}\) Leuprecht, supra note 143, at 5.

\(^{16}\) See Commission of the European Communities, supra note 9, at 13; Proceedings of the International Convention on the European Communities and Human Rights, Venice, November 9-11, 1979, at 166; see also Leuprecht, supra note 143, at 8.

\(^{16}\) For the text of article 8, see supra note 103.

\(^{16}\) Article 11(1) reads: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." *Id.*

\(^{16}\) Article 1 of the First Protocol to the Convention, Mar. 2, 1952, 213 U.N.T.S. 262, states, in part: "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." *Id.* Article 2 states, in part: "No person shall be denied the right to education." *Id.*

\(^{16}\) Article 2 of the Fourth Protocol to the Convention, May 2, 1968, in A. Robertson, *Human Rights in Europe* (2d ed. 1977), states, in part: "(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own." *Id.* Article 3 of the Fourth Protocol states: "(1) No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. (2) No one shall be deprived of the right to enter the territory of the State of which he is a national." *Id.* Article 4 adds: "Collective expulsion of aliens is prohibited." *Id.*
clude some of the rights enumerated in the European Social Charter is now under consideration by the Council of Europe. Accession would allow the Community, with its special interest in economic and social rights, to play an important and constructive role in furthering this new development.

The greatest difficulty with the notion of accession is arguably the host of complex technical problems that it engenders. Accordingly, the following section of the Article will explore some of the major technical difficulties which must be resolved if accession is ever to become reality.

3. **Juridical and Institutional Problems of Accession**

The most obvious difficulty is that the Human Rights Convention is clearly intended for participation by sovereign states. This has led jurists to question whether significant alterations to the Convention will be required to enable the Community to adhere. The Commission has argued that no significant amendments would be necessary and that the provisions of the Convention could apply *mutatis mutandis* to the Community. Certain minor adjustments could be made in a Protocol of Accession.

Another aspect of this problem concerns the capacity of the Community, with its limited powers, to guarantee the procedural rights of the Convention. Article 3 of the First Protocol to the Convention, the "free elections" provision, is an example of a stipulation which may cause difficulties in this regard. The Commission has suggested that it may be necessary to enter a reservation under article 64 of the Convention in order to adequately resolve the problem. In addition, another reservation may be necessary with respect to article 14 of the Convention, the non-discrimination provision, in view of the Community's preferential treatment of its citizens within Community territory.

Another difficulty would relate to the individual right of petition.

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166 *Id.* at 15. Leuprecht has argued that the *"mutatis mutandis formula"* carries certain potential difficulties and that "a clearer-cut solution in the framework on an instrument of accession" would be preferable. Leuprecht, *supra* note 143, at 10.
167 Commission of the European Communities, *supra* note 9, at 15.
168 *Id.*
169 *Id.*
established under the Convention. As the Commission has noted:

If accession is to bring about a substantial improvement in the protection of fundamental rights, it would be desirable, if not entirely indispensable, for the Community to recognize not only the competence of the Court of Human Rights but also to allow the individual right of petition provided for in Article 25 of the European Convention on Human Rights.170

Difficulties could arise, however, if a Member State of the Community had not itself accepted the individual right of petition. As a possible solution, the Commission has recommended that a transitional period be established following accession during which petitions would be denied.171 It is suggested, however, that Leuprecht's argument that negotiations toward accession should be "accompanied by parallel political initiatives to secure the recognition and continued acceptance of the right of individual petition by all Member States of the Community"172 is the better position.

In summary, it is clear that accession would raise many technical problems requiring important and complex negotiations. Nevertheless, none of these technical and institutional problems are insoluble, provided that sufficient political will to ameliorate the protection of fundamental rights in Europe exist.

4. Conclusions on Accession

The foregoing analysis of arguments for and against accession leads to the conclusion that accession is a goal to be pursued.173 There is no doubt that formal adherence to the Convention's normative framework and implementation mechanisms would enhance the protection of fundamental rights in Europe. Nor is there any doubt that the juridical and institutional problems of accession are soluble. Accession is a viable policy option.

Is it, however, to be considered merely as "a possible first step, but under no circumstances . . . an end in itself?"174 Should accession be viewed as a first step toward the development of a unique Community catalogue of fundamental rights? To answer these queries, the third possible option for the future, the Community

170 Id.
171 Leuprecht, supra note 148, at 8.
172 Speech by H.J. Vogel, Federal Minister of Justice of the Federal Republic of Germany, supra note 150.
173 Economides and Weiler, supra note 109, at 694.
174 Id.
catalogue of rights, will be examined.

C. A Catalogue of Fundamental Rights

A number of scholars have argued that a catalogue of fundamental rights specifically tailored for the Community would provide the most effective manner of protecting basic rights. Such a catalogue of rights would largely resolve the problems currently surrounding the case method approach of the Court of Justice. The need for certainty would be met, for a catalogue would establish in the clearest fashion the fundamental rights of the Community’s citizens. The problems of “national judicial rebellion” and institutional role conflict would also be largely resolved. Moreover, a catalogue would have a number of positive political implications. It would, for example, stand as a clear symbol to the world of the Community’s commitment to the protection of fundamental rights. Most importantly, however, it would provide a series of norms especially tailored to the Community’s specific needs.

It has thus far been impossible, however, to obtain agreement on the content of such a catalogue. Moreover, the Commission has indicated that such agreement will likely not be obtained for some time. Therefore, the elaboration of a Community Charter appears to be at best a long term proposition.

It would be far better to devote energy to the inclusion of economic and social rights in the Convention rather than to the elaboration of a unique Community charter of rights. The Select Committee on the European Communities of the House of Lords believes that if additional human rights norms, i.e. economic and social rights, are to become generally acceptable in Europe, they should be incorporated in the Convention on Human Rights rather than in rules affecting solely the Community. European unity and the protection of fundamental rights would be better served by the inclusion of economic and social rights in the Convention and by the revision and updating of the European Social Charter. The Community should accede to both documents—the Convention and the Charter—to contribute its expertise to the further de-

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176 See, e.g., Economides and Weiler, supra note 109.
177 Commission of the European Communities, supra note 9, at 5.
178 Id.
179 Sub-Committee on Human Rights of the Select Committee on the European Communities, House of Lords, Session 1979-80, 71st Report, 6724/79 Com (79) 210, p. XVII, noted in Leuprecht, supra note 148, at 6, 16.
development of those instruments. Such a course would contribute more to the protection of fundamental rights than the elaboration of a uniquely Community catalogue of rights.

V. Conclusion

This Article examines the concept of fundamental rights in the context of European Economic Community law. The study of fundamental rights in European Economic Community law is of conceptual importance in a number of respects. First, the notion of fundamental rights in EEC law is intimately related to the socio-economic nature and objectives of the Community, thus providing an opportunity for the clarification and conceptual development of many of the newly recognized economic and social rights. Since there has not yet developed an extensive body of national and international jurisprudence with respect to the more recently formulated economic and social rights, European Economic Community law is in a unique position to play a leadership role in the development of the jurisprudence relating to economic and social rights.

In analyzing the contribution of EEC law, both actual and potential, this Article examines the specific provisions of the Treaty of Rome dealing with fundamental rights. Although many commentators have stated that there are no references to fundamental rights in the Treaty of Rome, the Article demonstrates that the Treaty does in fact contain a number of specific provisions relating to fundamental rights. The analysis of the fundamental rights provisions of the Treaty indicates that some rights, such as freedom of movement, for example, blend both the negative and the positive aspects of human rights. The distinction between positive and negative rights leads to the imposition of an overly mechanistic and lexicographic relationship on rights which are in reality interdependent and inconceivable outside the context of each other. EEC law suggests that the distinctions between these two sets of rights are not as clear or as categorical as many have thought. A new conceptualization and classification of human rights is required to bridge the dichotomy between positive and negative rights. Recently, a number of unitary theories of human rights has been formulated with the specific intention of bridging the dichotomy.

In the European context, a comprehensive unitary approach to human rights would be not only conceptually sound but also the best means of ensuring the optimum protection of the rights of the individual. The Article therefore examines the questions of accession by the Community to the European Convention on Human
Rights and the formulation of a comprehensive Community catalogue of rights. This unitary approach is desirable because certain gaps exist in the current EEC framework for the protection of fundamental rights. Notably, the Treaty of Rome does not provide a comprehensive catalogue of rights. Moreover, while the Court of Justice has done much to extend the protection of fundamental rights, there nevertheless remains a number of unresolved problems, including the continuing potential for national "judicial rebellion," the lack of predictability and certainty in identifying rights in the EEC legal system, and the continuing potential for institutional role conflict. The Article reviews the arguments for and against accession by the Community to the European Convention on Human Rights, concluding that accession is a viable goal which should be pursued with vigor and determination. The Article also suggests that efforts be devoted to the elaboration and inclusion of economic and social rights in the Convention on Human Rights.

Although both European unity and the protection of fundamental rights in Europe would be better served by accession, this could only serve as a first step, a beginning in the re-conceptualization of fundamental rights in Europe. The further challenge will be to turn the unitary theory of human rights into practical reality. Accession would be the first step in that process.

European Economic Community law is now in a position to make an outstanding contribution to the conceptualization of fundamental rights by clarifying the content of economic and social rights and by turning the unitary approach to human rights into practical reality. This Article is intended to highlight the importance of EEC law and its future development for the theory and practice of human rights and to stimulate greater interest in the relationship between EEC law and the field of human rights generally.