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COMMON FUNDAMENTAL RIGHTS IN THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

If the description of fundamental rights as the body of rights and freedoms protected by the Constitutions is undoubtedly not entirely satisfactory in comparative law, that description is quite inappropriate in the Community legal order, which is based not on a Constitution but on international treaties. Although the case-law of the Court of Justice has evolved along constitutional lines at the same time as the Community legal order has gone through a process of constitutionalisation[1] – it is a „Community based on the rule of law" according to the judgement of 23 April 1986[2] – and although the development of those fundamental rights has followed the same direction, the specific nature of the Community has produced particular effects from the outset. Since the objectives and activities of the Community were economic, the Treaties emphasised the economic freedoms, and more incidentally the social freedoms, of the nationals of Members States in order to succeed in establishing a vast market based on the free movement of goods, persons (both natural and legal) and the means of production. The Treaties therefore mention rights which are very similar to fundamental rights but which hinge on the principle prohibiting discrimination on the ground of nationality. Moreover, while the mixed character of the Community legal order leads it to borrow from the techniques (and rules) of international law and those of domestic law,it is by nature an autonomous legal order.

Initially the separation of the Community legal order from the aspect of both national legal orders and the international legal order meant that the necessity for a Community definition and guarantee of fundamental rights was forgotten. Several means of establishing fundamental rights were available to the Community: by revising the Treaties (which was limited to the provisions of the Preamble to

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[1] R. Kovar, *La contribution de la Cour de Justice a l'edification de l'ordre juridique communautaire. Recueil des Courts de l'Academie de Droit Europeen*, 1993, vol. IV-1, p. 25.

[2] Case 294/83, Partie ecologiste „Les Verts" v European Parliament [1986] ECR 1339.

the Single Act and to Article F (2) of the Treaty on European Union), but there was no catologue of fundamental rights and the Community institutions choose to resort to Common Declarations or Resolutions[3]; by acceding to international treaties which were conceived for States (including the European Convention on Human Rights); or by means of judicial decisions, often described as the „judge-made" method. It is the last method that has consistently prevailed.

I. Individual fundamental rights, a category of general principles in Community Law

The judicial thinking that led to the insertion of individual fundamental rights in the general principles of Community law has its origins in the weakness of the Treaty provisions, which contrasts with the constitutional traditions of the Member States: fundamental rights (FGR) constitutionally guaranted rights (Austria), human rights (Finland) or rights of freedom (Denmark and Italy). These rights are inscribed in the constitutional provisions, where they form a catalogue, or laid down in the form of directly applicable guaranties. Although the French Constitution of 1958 lays down only a few fundamental rights, it refers to the Declaration of 1798 and the Preamble to the Constitution of 1946. On which the Constitutional Council has conferred constitutional values[4]. The situation in England is unusual, since there is no written Constitution, but the absence of such a Constitution is compensated by the existence of ancient provisions and by case law. In France the Constitutional Council has used its power of interpretation to confer an extensive and concrete content on written measures[5].

The Treaties establishing the Communities did not contain an exhaustive list of fundamental rights – which led to subsequent demands, that a list be drawn up, or that the Communities should accede to the European Convention on Human Rights[6] – for two essential reasons which were considered complementary at the time when the Communities were established. The first is the technical and economic character conferred on the Communities, especially the ECSC; and the second is the perception of a division of work in Europe following the implementation of the European Convention on Human Rights in application of Article 3 of the Statute of the Council of Europe[7]. Certain provisions of the Treaties, in application of the concept of common market, lay down general principles which are very close to fundamental rights. That is so of the rules on freedom of movement for workers

[3] The most complete of these is the Declaration of Fundamental Rights and Freedoms adopted by the European Parliament on 12 April 1989 (OJ 1989 C 120).

[4] The most complete is the Declaration of Fundamental Rights and Freedoms adopted by the European Parlament on 12 August 1989 (OJ 1989 C 120).

[5] CF. C. Grewe and H. Ruiz Fabri, *Droits constitutionnels europeena*, PUF. 1995, in particular p. 155 et seq.

[6] Cf. Infra.

[7] Namely the acceptance of the „principles of the rule of law and the enjoyment by all persons within the jurisdiction of the member States of human rigts and fundamental freedoms".

(Article 48), freedom of establishment and freedom to provide servive (Articles 52 and 59) and the prohibition on grounds of nationality (Article 6 as amended by the Treaty on European Union) and where pay is concerned, sex (Article 119). However, the degree to which power was transferred to the Community institutions made it necessary to ensure that the fundamental rights were guaranteed at a level equivalent to that attained by the Member States. In the absence of a specific revision of the Treaties, which would have had too evident a constitutional meaning – and would therefore have provoked very strong reluctance – the Court of Justice turned to a systematic construction.

II. Extention by the Court of the general principles of law

1. The general principles on the Community legal order are the product of the methods of interpretation used by the Court and in particular the principle of practical effect (effect utile) or purpose (or teleological) interpretation which dominates the Community construction and which is not inconsistent (apart from the frequency with which the extent to which it is used) with the traditions of international law. Initially a subsidiary source of the law, the general principles have been interpreted in such a way that they have been added to the original law without acquiring a higher value than written law, by the effect of the general clause on the competence of Court of Justice in Article 164 of the EEC Treaty: „The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". In the Opinion 1/91 on the compatibility of the (first) draft agreement on the European Economic Area, the Court reinforced the authority which it derives from Article 164 by rejecting a draft agreement which might have resulted in the Court of European Economic Area interpreting the provisions of the agreement in a way which was incompatible with the internal case-law of the Community[8].

The general principles of international law occupy only a limited place, since they might contradict the structure of the Community legal order, such as the principle of reciprocity of obligations, and member States cannot take the law into their own hands[9]. The principles peculiar to the Community legal system are consequence of the institutional nature of the Community (the principle of institutional equilibrium) or from the functions conferred on it (and in this case they are sometimes an extrapolation of rules in written law, whether primary law or secondary law (for example: the principle of Community preference was derived from the agricultural policy)[10].

Certain general principles are by nature „axiomatic" or „inherent in any organised legal system"[11], such as the principle of lawfulness, respect for the rights

[8] Opinion 1/91 [1991] ECR 1-6079. The Court further observed that an ad hoc revision of the Treaty would not resolve the issue.

[9] Case 80 and 91/63 EEC Commissions v Luxembourg and Belgium [1964] ECR 625.

[10] Case 5/67 W. beus GmbH & Co v Hauptzollamt Munchen [1968] ECR 81.

[11] J. Boulouis, *Grands arrets de la CJCE*, vol. I, Fifth Edition, p. 80.

of the defence or the principles that guarantee the certainty of legal relations. Lastly, the Court of Justice has identified a number of principles common to the laws of the member states, a proces which initially remains consistent with the international tradition in Article 38 of the Statue of the International Court of Justice (the „general principles of law recognised by civilised nations") and by reference to Article 215 (2)[12] on non-contractual liability. This reference is useful but rather indirect, since the „general principles common to the laws of the member States" mentioned in Article 215 refer primarily to the principles governing the liability of the public powers in the various States and not to general principles of law *stricto sensu* and since, furthermore, the court was led to derive an autonomus system of liability when it found no real convergence. The Court has accepted a number of principles: the equality of those subjects to the law, the principle of the right to a court, which has had numerous effects, the principle of the hierarchy of rules, undue enrichment, the principles concerning the withdrawal of measures combined with legal certainty.

This general construction calls for two remarks to which I shall return below. First, it is apparent, even by means of a discursive survey, that general principles and fundamental rights are sometimes closely interlinked where the beneficiary is the person, even though the Member States are also concerned by the same principle: in this sense the extension of general principles to fundamental rights by the case-law was implicit from the outset. This interlinking weakens any attempt at a clear-cut classification. The second observation is that the case-law theory of general principles already contained the problematic of fundamental rights as regard the requirement of a common character, since the Court had shown real flexibility as regards general principles. Moreover, it may be found that one and the same principle may have simultaneously a general (axiomatic) character, a specifically institutional character and a common (or partially common) character in the laws of the Member States.

2. In ECSC cases the Court refused to examine the validity of Community measures in the light of the fundamental rights recognised by the German Constituion on the ground that it did not have power to ensure observance of rules of domestic law, even constitutional law[13]. The Court adopted this position which was consistent with the respective autonomy of the Community and domestic legal orders, in order to ensure that Community law was not subordinated to the constitutional provisions of the Member States. The risk of that happening refers to the theory of structural congruence, which formed the basis of a number of decisions of the German courts. Advocate General Lagrange had already suggested that the Court should agree to examine the validity of Community measures in the light of the general principles common to the laws of the Member States.

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[12] „...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...".

[13] Case 1/58 Friedrich Stork & Co v High Authority [1960] ECR 225 and cases 30-38 and 40/59 President Ruhrkohlen-Verkaufsgesellschsft mbH v High Authority [1960] ECR 423.

The establishment of the case-law on direct effect and the primacy of Community law led to a change of viewpoint, since Treaty law „could not be overridden by domestic legal provisions" (Case 6/65 Costa v ENEL [1964] ECR 585) and it was therefore appropriate to ensure that fundamental rights enjoyed the same level of protection in the Community legal order and under the laws of the Member States. The autonomy of the Community and domestic legal orders was preserved by reasoning which contains a genuine invocation in the rules and the sources of law. In *Stauder*[14] the Court had indicated that: „the provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law and protected by the Court".

The grounds of the Internationale Handelsgesellschaft judgement[15], in which the Court gave a preliminary ruling on a question referred by a Frankfurt Court, are more explicit: „recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independence source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deproved of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure of its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure; However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice".

The Court stated that it was guided by the constitutional traditons common to the member States „within the framework of the structure and objectives of the Community": the process involved was one of the selecton and transposition. The Court subsequently widened that judicial construction to international agreements concluded by the member States: „The international treaties on the protection of human rights in which the Member States have cooperated or to which they have adhered can also supply indications which may taken into account within the framework of Community law"[16].

3. The mechanism of transposition was not immediately accepted by the German Court. In a judgement of 29 May 1974 the Court had held that the fundamental rights guaranteed by the Federal Constitution prevailed over inconsistent measures of secondary Community law. The Constitutional Court's position expressed its

[14] Case 29/69 Stauer v Ulm [1969] ECR 419.

[15] Case 11/70 Internatonale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel [1970] ECR 1125.

[16] Case 4/73 J. Nold, *Kohlen- und Baustoffgrosshandlung v EC Commission*, [1974] ECR 491. The judgment was delivered in the context of the accession of France to the European Convention on Human Rights. The Court subsequently confirmed the reference to the United Nations Covenant on Civil and Political Rights.

mistrust of the extent to which fundamental rights were protected in the Comunity system, given the institutional deficiencied which it indicated: it therefore reserved the right to examine the conformity of secondary Community law with the Constitution after it had referred the matter to the Court of Justice for a preliminary ruling. That restrictive position was abandoned on 22 October 1986, after the Single Act had conferred wider powers on the European Parliament and, according to the Federal Constitutional Court, as long as the Court of Justice ensures that fundamental rights are given a level of protection comparable to that which they enjoy under the Basic Law.

The reasoning by the German Constitutional Court recognises the Community theory elaborated by the Court Justice. That theory led to Article F(2) of the Treaty on European Union, which is worded as follows: „The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional principles common to the Member States, as general principles of Community Law". It should be pointed out that this provision, which is purely declaratory, adds nothing to the existing system according to which fundamental rights are recognised and guaranteed. Furthermore, Article F(2) is aimed at all the parties to the Treaty, including those not covered by the Court's jurisdiction (Titles V and VI on intergovernmental cooperation).

III. The proximity of general principles and individual fundamental rights

The question may be put as follows: may the confirmation of a general principle lead, depending on the person of the beneficiary, to the gradual recognition of a new individual rights?

1. The inclusion of the principle of proportionality in the text of the Treaty on European Union[17] is the consequence of a judicial evolution which has tended to widen its application to all areas of Community law without exception. When the Treaties were originally drawn up such a general provision could not be included because the Court of Justice had not yet developed the theory of the general principles of law[18]. It is still apparent that those who drafted the Treaty on European

[17] Article 3b, third paragraph: „Any acton by the Community shall not go beyond what is necessary to achieve objectives of this Treaty".

[18] The Treaty contained special provisions which helped the Court to elaborate a general principle of law:

-Article 36 on (national) exception to the free movement of goods, which the Court subsequently established must be necessary and proportionate to the aim pursued;

-Article 40 (3), which provides that the common organization of agricultural markets is to be limited to pursuit of the objectives of the common agricultural policy (set out in Article 39);

-Article 85(3) lays down a negative condition for declatations that paragraph 1 is inapplicable: the agreement, decision or concerned practice (or category thereof) concerned must „not... impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives" (positive conditions);

-Article 115, which provides that priority to be given to measures „which cause the least disturbance to... the common market";

-Article 226 lays down a similar condition in respect of protective measures.

Union took care not to place the principle of proportionality on the same level as the principle of subsidiarity, but that they none the less emphasised the link between the two principles, which are complementary as regards limiting the powers of the Community.

When viewed from the aspect of the common heritage the principle of proportionality raises two distinct but complementary problems: is it a general principle common to the laws of Member States and does it lead to the creation of fundamental rights? The first question illustrates the ambiguities of any attempt to categorise general principles on the basis of their origins or the sources which inspired them. Jean Boulois, after amphasising that a principle established as „common" may be maintained as a general principle of law or that a principle which is supposed to be inferred from the nature of the Community may lack specificity and have its origins in various legal orders, chooses to make of such a principle a general principle inferred from the nature of the Community (the concept of a common market)[19]. Other writers prefer to see a principle inferred from the laws of the member States, even though the majority emphesise the German origin of the principle of proportionality. The principle of proportionality is not written but being derived from the first twenty articles of the Basic Law, in particular Articles 2 and 12, it was established by the Constitutional Court as a general principle of constitutional value: in fact it is regarded by writers as one of the esential components of a State governed by law and it is therefore binding on both the executive authorities and the legislative authorities. As Mr Akehurst observes[20], one of the main reasons for its inclusion in the Community legal order is the extend to which the German courts have made use of the preliminary ruling procedure provided for in Article 177 EEC.

Although the principle of proportionality was largely inspired by German law, that was not the only source of inspiration. By its nature the principle of proportionality includes a method of judicial control which reduces the share of discretion of the decision-making authority and may go as far as to introduce a number of assessments which are very close to equality, a new approach which should normally lead the judge to exercise self-restraint. The dimension of the judicial power is essential. It is also possible to suggest that the principle is present in the various national legal orders while the fact that the principle is established at Community level may encourage its adoption in the national legal orders[21]. The evaluation by the English courts of whether conduct is reasonable (the „rule of reasonableness") is inspired by proportionality. Under the influence of Germany

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These references show the plural origins of the same general principle of law which may be inferred from the rules laid down in the Treaty and at the same time for a fuller judicial construction.

[19] J. Boulouis, *Principles generaux, Repertoire communautaire*, Dalloz, 16 and 62 in particular. Well-founded though it may be, this classification is rather inconsistent with the application od proportionality to certain aspects of stuff disputes. For a case concerning the dismissal of stuff, see case 18/63 Estelle Schmitz v Europaen Economic Community [1964] ECR 163.

[20] In the application of general principles of law by the Court of Justice of the European Communities, „Yearbook of Public International Law" 1982, p. 39.

[21] f. infra II. C.

(or even, in anticipation, of the Community), the Spanish Constitutional Court decided on 15 October 1982 that proportionality was a general principle of law. In French law the genesis of the principle of proportionality is inherent in the decisions of the administrative courts and the Constitutional Council: measures of administrative procedure (since 1933), the so-called „cost-benefit" balance (especially since 1971)[22], especially where private property or interests are adversely affected, control of manifest error of appreciation where the administration traditionallly had unfettered power to asses the facts. Sensitive sectors which were originally immune to control of that type (the immigration authorities, disciplinary proceedings, etc.) gradually came within the jurisdiction of the administrative courts. Under the influence of administrative case-law, the Constitutional Coucil extended its control to manifest error, beginning with its decision on the nationalisation laws[23] and the laws on New Caledonia[24].

Without returning at this point to the debate on the extent to which general principles of law must be common, the principle of proportionality may be regarded as being inferred from the national laws concerned.

The second question, which concerns the extent to which proportionality is established in common fundamental rights, calls for qualified remarks. In legal writing, proportionality is not a general rule included among the classifications or lists of fundamental rights, which do not give an accurate (and up-to-date) account of what C. Grewe and H. Ruiz call „the gradual development of fundamental rights"[25]. None the less, the principle of proportionality constitutes a right of defence of the individual as against the public powers, the State or the institutions of the Community. In the judgment in which the theory of fundamental rights was first stated, *Internationale Handesgesellschaft*[26], the Court was faced with the fact that the plaintiff undertaking relied before the German courts on both the rights of property and proportionality, on the ground that the non-recoverability of the deposit payable in agricultural transactions constituted a disproportionate violation of the right of property which was not justified by the objectives of the agricultural regulations. In the same way the principle has been extended to penalties that the institutions may apply to economic transactions and therefore to undertakings and individuals[27].

The principle of proportionality plays a part in reconciling cotradictory rights in the sphere of fundamental rights. It is also going through new developments in connection with relations between private persons in the domestic legal orders as a result of indirect effect, i.e. of an interpretation of the general rules

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[22] Counseil d'Etat 28 May 1971, Societe Ville nouvelle-Est, Rec. 409.

[23] Decision no. 81-132 of January 1982.

[24] Decision no. 85-196 of 8 August 1985.

[25] In Droits cnstitutionnels europeens, P.U.F. 1995, p. 154 et seq.

[26] Cited above.

[27] The Court of Justice established an express link between the right of ownership and proportionality in Hauer concerning a Community regulation on the common market in wine and wine products which prohibited owners from planting additional vines (Case 44/79) Hauer v Land Rheinland-Pfalz [1979] ECR 3727.

of private law[28]. However, the ambivalence of the principle, illustrated by its inclusion in the Treaty on European Union, is clear: it serves to protect both the rights of the States – as a structural principle – and, as it has been pointed out, the fundamental rights of the person.

2. The principle of the right to be heard (droits de la defense), was directly established in the system applicable in contentious proceedings before the Court had declared that it was inspired by the rules of the European Convention on Human Rights and Fundamental Freedoms, in particular Article 6 par. 3, which covers particular applications of the general principle of the right to a fair hearing[29]. It is in the field of non-contentious procedure that the Court has laid down the principle for the benefit of the States (system for control of aids), Community servants[30] and undertaking where the outcome of the procedure may involve a penalty or an act which adversely affects the person concerned.

In Hoffmann-La-Roche, a case concerning the powers and obligations of the Commission in Connection with the abuse of a dominant position, the Court pointed out that: „Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penality payment, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings"[31]. Is the right to be heard a fundamental right common to the Member States? The constitutional laws of the States generally establish concepts which are comparable but more flexible: equal treatment in proceedings, procedual guarantees, *the audi alteram partem* rule. Legal writers in Germany take view that this right has constitutional value because it is presumed to be contained in the fundamental principle of human dignity laid down in Article 1 of the Basic Law. In France the Constitutional Council promoted the principle of the right to be heard to the rank of a fundamental principle recognised by the laws of the Republic in criminal matters in a decision delivered on 2 December 1972 (Law on the development of prevention of accidents at work)[32] and in a decision of 2 July 1977 concerning non-contenious proceedings (deducations from officials' salaries)[33].

Furthermore, the case-law of the organs of the European Convention has had an indirect influence on the case-law of the Court of Justice, even though the

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[28] On this point, see W. Van Gerven, *Principle de proportionnalite, abus de droits et droits fondamentaux*, „Journal des Tribunaux" 1992 (11 April), pp. 305-309. On the effects of fundamental rights in private relationships, reference should be made to C. Grewe and Ruiz Fabri, op. cit., p. 181 et seq.

[29] Although the Strasbourg institutions have given it a wide interpretation, Article 6 par. 1 of the Convention makes provisions for „civil rights and obligations" and „ any criminal charge"; cf. F. Sudre, *Droit international et europeen des l'homme P.U.F.*, Second Edition, p. 202.

[30] Case 35/67 Van Eick v EC Commission [1968] ECR 329: „Although the Disciplinary Board only constitutes an advisory body of the appointing authority, it is bound... to observe the fundamental principles of the law procedure".

[31] Case 85/76 Hoffman-La-Roche & Co AG v EC Commission]1979] ECR 461. Case 40/85 Kingdom of Belgium v Commission [1986] ECR 2321, par. 28: „...observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law".

[32] Decision no. 76-70, 12 February 1972, Rec. P. 39.

[33] Decision no. 77-83, 20 July 1977, Rec. P. 29.

Court of Justice has stated that „the Commission of the EEC... cannot, however, be classed as a tribunal within the meaning of Article 6 of the...Convention"[34]. Clearly, there are differences in interpretation between the Community jurisdiction and the Convention, given the different objects of the two legal orders.

3. The protection of legitimate expectations is not described as a fundamental right by the Court of Justice: the principle is not found in the European Convention on Human Rights and is not always given the same recognition in the domestic laws of the various Member States. A component part of the general principle of legal certainty, the protection of legitimate expectations has to do with whether or not the citizen (or the Member States) can rely on a rule which is advantageous to him being maintained. The question has arisen in cases concerning the withdrawal of administrative measures[35]. Where a situation has been created unlawfully the principle of legitimate expectations may come up against the fundamental principle of lawfulness. While it may be compared with the principle of good face or the rule of estoppel in the international order, the national sources of the principle are most difficult to discern.

Once again, German law provided the principal reference. Like the principle of proportionality, the principle of protection of legitimate expectations forms part of the concept of a State governed by law. Its recognition by the administrative courts (revocation and withdrawal of acts, retroactivity of norms) led the German Constitutional Court, on the basis of an interpretation of Article 20 of the Basic law, to confer constitutional value on the principle in a judgement delivered on 2 February 1978[36].

In comparative European law there are more or less analogous methods of reasoning: the protection of legitimate expectations by the English courts does not amount to a general principle – the same applies in Ireland and in Denmark – while the Netherlands courts use a series of criteria to assess the legitimacy of the confidence realated by the public authorities. Until recently French law did not recognise the protection of legitimate expectations as a general principle[37]. However, Articles L80 A and L80 B of the Fiscal Procedures Book (the former is also found in the General Tax Code) allow a taxpayer, in certain conditions, to rely on an error in law based on a legitimate belief in the event of a change in doctrine by the tax authorities. In other cases outside the field of taxation the administration is liable where a competent official under an obligation to provide information has given inaccurate or incomplete data that individual concerned has behaved prudently and

[34] FEDETAB agreements:Joined Cases 209-215 and 218/78 Heinz van Landdewyck Sarl v EC Commission [1980] ECR 3125.

[35] Joined Cases 7/56 and 3-7/57 Algera v Common Assembly [1957-58] ECR 39: „...The need to safeguard confidence in the stability of the situation thus created...".

[36] See the study by F. Hubeau, *Le principe de la confiance legitimate dans la jurisprudence de la CJCE*, „Cahiers de Droit Europeen" 1983, p. 143.

[37] Cf. Infra, II.c.

reasonably. The same applies in the case of promises which are not kept, although an economic operator is always under a duty to act prudently[38].

These prolegomena of a theory of legitimate expectations have their equivalent in Community case-law: the protection of legitimate expectations cannot be relied on against a manifestly unlawful act or in favour of a situation susceptible of being altered or the object of which, for economic reasons, requires periodic adjustments. None the less, the plea may be submitted in proceedings to have an act set aside and in proceedings to establish liability[39].

IV. A functional limitation

1. The selection of fundamental rights, like the selection of the general principles of which they form part, must be affected in a way that is fully compatible with the Community legal order. It is subject to the requirements of necessity and coherence, „...within the framework of the structure and objectives of the Community" (Internationale Handelsgesellschaft, cited above). That marks a fundamental difference from the practice of the Strasbourg organs, whose functions exclusively concern the definition and scope of the rights and freedoms guaranteed in the State by the Convention. This means that the Court quite naturally applies the general principles and fundamental rights which follow directly from the wording of the treaties and thus removes the distinction between the substantive rules of law and the principles of Community law. The same applies to the principles and fundamental rights which follow from the specific nature of the Community. In this sphere the Court may find it necessary to decide between conflicting principles; thus it held that the principle of solidarity in the Community prevailed over the principle of proportionality and the right of property relied on by undertakings which sought protection on their commercial interests[40].

The recognition of a general principle or a common fundamental right is not sufficient to ensure that it is included in the Community legal order: it may only be included if it is not contradicted. Likewise, rights based on common constitutional traditions or inspired by the European Convention on Human Rights (or other conventions on human rights) are subject to certain limits, which the Court defined in *Nold* (cited above). This leading judgement was upheld in subsequent decisions concerning property[41], freedom to follow an occupation[42] or the right for

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[38] Council of State 24 April 1964, Societe des Huileries de Chauny, Rec. P. 245, submissions of G. Braibant.

[39] The plea is frequently submitted by State in proceedings to have a decision set aside. That was so in one of the first Spanish cases before the Court, case 203/86 Spain v Council [1988] ECR 4563, cited by J. C. Gautron, *L'insertion de l'Espagne dans les mecanismes du contentieux communautaire in Dix anns de democratie constituionnelle en Espagne*, ed. du CNRS 1991.

[40] Case 254/78 Valsabbia v Commission [1980] ECR 907.

[41] Case C-44/89 Georg von Deetzen [1991] ECR I-5119.

[42] Case 265/87 H. Schrader [1989] ECR I-2263.

private life[43]. These limitations are therefore less narrow than the derogations admitted by the Strasbourg organs.

2. A further major difference from the case-law of the origins of the European Convention on Human Rights is that the member States are required to recognise and to guarantee individual fundamental rights within the operative scope of the Treaty, or only where the act of the State in connected with Community law. When the Court of Justice examined a prohibition on residence from the aspect of the principle of freedom of movement for workers laid down in Article 48 of the EEC Treaty („subject to limitations justified on grounds of public policy" (Article 48(3), it held that the „limitations placed on the powers of member States in respect of control of aliens [other than those in Directive 64/221] 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... and in Article 2 of Protocol No. 4 of the Convention..., which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests 'in a democratic society"[44]. More explicitly, Advocate General Trabucchi indicated in his Opinion in *Watson and Belmann*[45], a case which concerned expulsion for failure to comply with certain administrative formalities, that: „the protection of the rights of man accordingly forms part of the Community system, even as against the States, inasmuch as the fundamental right relied upon involves a relationship or a legal situation the regulation of which is among the specific objects of the Treaty".

The Court took up the matter again in *Wachauf*[46]. It ruled that national regulations adopted for the purpose of implementing Community law must respect fundamental rights. The limits of the obligation were defined *a contrario* in a number of judgements: in *Cinetheque*[47] the Court observed that „although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, in this case, an area which falls within the jurisdiction of the national system". However, in that case the Advocate General had suggested that restrictions on the free movement of goods based on the exceptions in Article 36 or mandatory requirements should be constructed in the light of the Convention. As Joel Rideau maintains[48], the *Cinetheque* decision could be distinguished from the *Rutili* decision by its suject-matter (the free movement of goods rather than freedom of movement for persons).

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[43] Case C-62/90 Commission v Germany [1992] ECR I-2575.

[44] Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219.

[45] Case118/75 Watson and Belmann [1976] ECR 1185.

[46] Case 5/88 Wachauf [1989] ECR 2609.

[47] Joined cases 60/84 and 61/84 Cinetheque S.A. v Federation Nationale des Cinemas Francais [1985] ECR 2605.

[48] J. Rideau, *Droit institutionnel de l'Union et des Commaunautes europeennes*, LGDF 1995, p. 132.

As F. Mancini and V. di Bucchi emphesise[49], the Court wished to avoid competition with the organs responsible for supervising the Convention and to preclude any control existing beyond cases where Community law was applicable[50]. However, on a reference from a national court for a preliminary ruling, the Court of Justice may find it appropriate to provide the national court with the points which will enable it to determine whether national legislation is compatible with the European Convention „provided that the legislation falls within the scope of Community law". Furthermore, the scope of the Court's control has been extended to national measures which derogate from Community law: „In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fudamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Article 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court"[51]. Thus the limitation is a strictly but fully operational one.

3. Fudamental rights are subject to limits „justified by the general objectives pursued by the Community, so long as the substance of the right is not impaired" (Nold, citied above). In that regard, the Court is guided by the limits in the constitutional order of the States, since the right of property and the freedom to follow an ocupation are not „absolute prerogatives" and include „limitations relating to the public interest". A number of constitutions refer to its social use. Article 1 of Protocol No. 1 to the European Convention includes a reference to restrictions in the „general interest", while as regards the majority of conditional rights the Convention provides for a general public interest clause which allows statutory restrictions to be imposed in the public interest on condition that they are necessary in a democratic society.

V. Individual fundamental rights, an indication of the common European heritage

The relationship between individual fundamental rights and the common European heritage is dialectical in nature, as is Community law itself. The Community legal order has fed on conceptions and rules that are prevalent in the member States ever since the stage when the Treaties were drawn up. It is for the Community institutions gradually to adopt common rules which are established directly in the internal order of the Member States or transposed by those states in accordance

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[49] Ibidem.

[50] Case 12/86 Demirel v Stadt Schwabisch Gmund [1987] ECR 3719: „[the Court] has no power to examine the compatibily with the European Convention.. of national legislation lying outside the scope of Community law".

[51] Case C-260/90 ERT [1991] ECR I-2925.

with the procedure applicable or the particular features of their legislative systems. In that sense Community law may be perceived as a permanent mechanism of structural adjustment follow which a common European right tends to emerge. It is clear that many other factors play a part and that Community legislation and case-law go hand in hand with changes, which are also brought about by technology, ethics, culture and the internationalisation of the economy, and provoke adaptations and changes in the domestic legal orders[52]. What happens is that Community legislation and case-law reveal them, accelerate them and give form to them in the field to which they apply. Although that very general approach may be applied to the rules on competition, the rules governing the civil service, public markets or, for example, the rules governing the liability of the public powers, the question also arises in connection with individual fundamental rights.

A. from comparative law to Community law

The concept of „constitutional traditions common to the Member States", which was established by the Court of Justice and reproduced word for word in Article F (2) of the Treaty on European Union, is obviously not completely clear. It is less precise that the reference, also made by the Court in the leading judgments cited above, to the „fundamental rights recognised and guaranteed by the constitutions of the Member States". It is possible to see practical reasons in this semantic division. First, although the reference to constitutional traditions has a less precise meaning then the reference to fundamental rights, it allows the Court to go beyond the categories of fundamental rights in the domestic legal systems, where they exist, and to avoid certain purely domestic divisions connected with the distinction between intangible fundamental rights and those subject to review, or to the distinction between rights that can be directly relied on in the domestic order and those which need to be implemented by legislation. It may be that the Court also did so because certain rights are not rigorously set out in the constitutional texts although they have constitutional value (where the courts have so declared) or constitutional scope. Secondly, as Guy Isaac states[53], the Court endeavours to identify a „maximum standard, that is to ensure that the highest national guarantee is applied at Community level". That openly progresive approach allows the Court to dispense with seeking a common denominator which might be nothing more than the expression of the lowest common denominator, which would run contrary to the search for the level that is most advantageous to the beneficiaries (a permanent principle in human right matters) and might lead to objections from the courts in States where the system of defining and protecting fundamental rights more advanced. Moreover, as M. Dauses observes[54], the case-law of the Court of Justice may also include the general principles of administrative law and judicial law, which are very similar to fund rights such as the principle of legal certainty, the protection of legitimate

[52] Of particular interest is analysis by M. Delmas-Marty, in particular the pages which she devotes to the European laboratory, p. 223 et seq. (In *Pour un droit commun*, ed. du Seuil 1994)

[53] G. Isaac, *Droit communautaire, general Masson*, Fourth Edition, p. 155.

[54] M. Dauses, *La protection des droits Fondamentaus dans l'ordre juridique communautaire, Re. Trim de droit de droit europeen*, 1984, no, 3, p. 407.

expectations or proportionality, in view of the constant overlaping of general principles and fundamental rights[55]. There is no strictly positivist definition of „constitutional traditions" in European comparative law.

Similarly, the „common" nature of fundamental rights must be given a flexible interpretation, since, as the Community periodically grows larger, the concept of *jus communis* may constantly be called in question. In his Opinion in Zuckerfabrik, a case concerning the second paragraph of Article 215 of EEC Treaty, Advocate Roemer observed that a principe might be declared a common principle provided that it was „widely recognised", without there being any need for the Court to determine to what precise arthetical extent it was „common". It will be recalled that the extra-contractual liability of the Community, despite the wording of the second paragraph of Article 215, was established autonomously following what F. Fines calls a „fruitless comparative study"[56]. Although one of the applications to attract most attention as regards the right of property and the free exercise of trade, work and other occupational activities was the application in *Nold*, it should be observed that in that case the Court referred both to the common constitutional traditions and to the international treaties on the protection of Human rights. In *Hauer*[57] the Court also referred to the constitutional rights recognised in the Member States and to the European Convention.

In *Johnson*, a leading cas on the right to obtain a judicial determination, following an action based on the infringement of a Council directive of 9 February on the implementation of the principle of equal treatment for men and women as regards access to employment, including promotion and vocational training, the Court ruled that the right to obtain an effective judicial remedy before the national court followed from the general wording of the directive, especially Article 6, but that, more broadly, it reflected „a general principle of law which underlines the constitutional traditions common to the member states"; the Court went to state that [it[„also laid down in ... theEuropean Convention for the Protection of Human Rights and Fundamental Freedoms". In refering to both domestic sources and an international source the Court appears to show a preference for a single document containing clearly expressed provisions. Is it therefore possible to speak of a very clearly decline in the reference to „common constitutional traditions"?

B. From Convention law to Community law

The above-mentioned uncertainties regarding the reference to the „common constitutional traditions" induced the Court, from 1974, to take account of the fundamental rights in certain articles of the European Convention. As it was said before, this new approach has the advantage for the judge of making a comparative research, which may prove uncertain, unnecessary. One of the main rules of the law on „human rights" is that the highest norm must benefit the individual and therefore prevail in every case. The Court of Justice decided along those lines in Opinion 2/91 on the compatibility with thw Treaty of Convention No 170 of the Internatio-

[55] Cf. Suora, I. B.

[56] F. Fines, op. cit., p.107.

[57] Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727.

nal Labour Organisation[58]. Paragraph 18 deserves to be cited in full: „For the purpose of determining whether this competence is exclusive in nature, it should be pointed out that the provisions of Convention No 170 are not of such a kind as to affect rules adopted pursuant to Article 118a. If, on the other hand, the Community decides to adopt rules which are less stringent than those set out in an ILO convention, Member States may, in accordance with Article 118a(3), adopt more stringent mesures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO convention. If, on the other hand, the Community decides to adopt more stringent measures that those provided for under an ILO convention, there is nothing to prevent the full application of the Community law by the Member States under Article 19(8) of the ILO Constitution, which allows members to adopt more stringent measures that those provided for in conventions or recommendations adopted by that organisation".

Apart from the above-mentioned imperfections in the „character common" to tthe member States, the search for the highest norm may lead do contradictory appreciations or discrepancies. The advantage of recourse to the European Convention arise from the unity of the norm throughout the European area because it is accepted in the same way by all Member States. As regards their authority in the Community internal legal order, fundamental rights have the same authority as the principles and are therefore superior to secondary Community legislation and to national measures adopted to implement Community law. In application of their incorporation in Comunity law, the Court makes clear that once the principle is accepted there is no further need to refer to the source, be it domestic or international.

1. The place of the rules set out in the European Convention as regards Community law is rather special, since they have not been incorporated into Comunity law. Although the Court of Justice considers that: „The international treaties on the protection of 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 Community is not bound by the rules of the Convention. None the less, a number of writers had suggested that the Community might be bound by the Convention, on the model of the Gatt[59], provided that all the States had adhered to it. The Court's position has not changed and is consistent with the position adopted by the European Commission of Human Rights, which does not accept the admissibility of an application against a Community measures (CFDT v European Communities, decision of 10 July 1978) but may accept the admissibility of an action against a national measure that implements Community law (Procola v Luxembourg, decision of 1 July 1993) This decision goes some way towards correcting the interpretation which had been given of the M. and Co. Decision of 9 February 1990. Where the Commission declared in-

[58] Opinion C-2/91 [1993] ECR I-1061.

[59] Joined Case 21 to 24/72 International Fruit Company [1972] ECR 1219.

admissible *ratione materiae* an application against a measure implementing a judgement of the Court of Justice (and not a Community measure)[60].

The somewhat unclear scope of the Convention in the Community machinery for the establishment of individual fundamental rights raises a number of questions:

- may Article 6 of the Convention, and therefore the right to a fair hearing, be invoked against a judicial decision refusing to refer a matter to the Court of Justice for a preliminary ruling?[61]
- since the Court of Justice of the European Communities is not bound by the decisions of the European Court of Human Rights, differences in interpretation may arise, the risk of this being increased by the specific features of the Community legal order. It is common knowledge that in *Hoechst* the Court of Justice held that the right to respect for the home laid down in Article 8 of the Convention did not extend to business premises, contrary to the case-law of the European Court of Human Rights[62]. In one situation, in order to prevent possible differences in interpretation, the Court of Justice preferred to wait until the European Court of Human Rights had decided the matter. The case is well known: it concerned the appraisal, from the aspect of Article 10 of the Convention (on freedom of expression and freedom to receive and impart information), of the prohibition in Irland on the distribution of information on clinics performing abortions abroad[63]. On a reference for a preliminary ruling, the Court took the view that although abortion might be decided as a service, the activity of students associations which distributed the information was not economic in nature and, accordingly, since the prohibition of that activity in Irland did not constitute a restriction on the freedom to provide service within the meaning of Article 59 of the EEC Treaty, the Court was not empowered to compare it with the fundamental rights deriving from the European Convention on Human Rights[64]. That case illustrates the differences of the functional limitation mentioned above and also the risk of conflicting decisions. We know that the European Court of Human Rights considered that the relevant Irish domestic law in breach of the principle of the freedom to receive and impart information and thus violated Article 10 of the Convention.

Two solutions, possibly cumulative, have envisaged in order to ensure that the European Convention on Human Rights and, more broadly, fundamental rights are more fully respected in the Community: the so-called „catalogue of fundamental rights", which the European Parliament decided to reject in 1973 but to which it

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[60] J. P. Jacque, *Communaute europeenne et Convention europeenne des droits de l'homme in La Convention europeenne... Commentaire article par article*, „Economica" 1993.

[61] G. Cohen-Jonathan and J. P. Jacque, *Activites de la Commission europeenne des droits de l'homme*, AFDI 1989, p. 514 et seq. The authors draw a comparison with the reasoning of the German Federal Constitutional Court in Solange II.

[62] Case 46/87 Hoechest [1989] ECR 2589.

[63] Case C-159/90 The Society for the Protection of Unborn Children v Grogan [1991] ECR I-4685.

[64] Cf. L. Idot, *A propos de l'interruption volontaire de grossess: premier bilan de la jurisprudence de la Cour relative a la libre prestation de service in 1991*, „Europe" 1991, no. 1 (November), chronique p. 4.

returned when the Treaty on European Union was being drafted, or accession by the Community to the European Convention on Human Rights. Since the project of a catalogue of fundamental rights caused questions to be asked (difficult negotiations between States, the risk of incompleteness or duplication, inappropriateness to the structure and mode of operation of the Community)[65], that left the prospect of accession to the Convention. That approach had received the enthusiastic supported of the Commission and the European Parliament in 1979 and was again taken up by the Parliament when the Treaty on European Union wa being drafted.

The accession rute was provisionally close by Opinion 2/94 delivered by the Court of 28 March 1996 following a request to the Court from the Council of the European Union under Article 228(6) 0f the EEC Treaty. The admissibility of the request for an opinion, in the absence of an agreement framed in sufficiently precise terms, led the Member States to adopt opposing positions. The Court chose to examine the admissibility of the request solely from the point of view of the competence of the Community and from that of its substance, i.e. the compatibility of accession to the Convention with the provisions of the EEC Treaty, in particular with Articles 164 and 219 on the competence of the Court of Justice[66]. In reliance on the principle laid down in Article 3B that the Community only has those powers which have been conferred on it, which may possible to widened by the use of implied powers, the Court states that no provision conferred on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field and that Article 235 did not provide sufficient basis for changing the Treaty to such an extend. Accession could be brought about only by way of amendment of the Treaties prior to the integration of the European Convention in the Community legal order. As Professor Denys Simon points out, the Opinion of the Court has the effect of placing human rights in a classic system in which powers are allocated by area instead of making them, in accordance with its established case-law, into a horizontal principle which would underlie all the activities of the Community[67]. It is true that in the absence of a specific proposal accession would have meant legal change, in particular as regards the judicial architecture of the system, as Opinion 1/91 stated more forcefully. In Opinion 2/94 the Court recalled the classic position of the Community regarding fudamental rights.

2. The scope of the rules of the European Convention on Human Rights as regards the common European heritage may be evaluated in a number of ways. First, the Court of Human Rights describes the Convention as a „constitutional instrument of European public order (*'odre public*)" (the Loizidou v Turkey judgment of 24 March 1995, Series A no. 310). While it is true that the concept of public order is difficult to define, it is generally seen by writers as the expression of values com-

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[65] Cf. Ch. Philip, *La Cour de Justice des Communautes europeennes et la protection des droits fondamentaux dans L'ordre juridique communautaire*, AFDI 1975, especially p. 405.

[66] Article 165: „The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed".

[67] D. Simon, „Europe" 1996, no. 6 (June), chronique 6, p. 1.

mon to a society and in the case of the Convention, a society made up of several national societies. Analysing these common values, F. Sudre emphasises the concept derived by the European Court of Human Rights of principles peculiar to a democratic society and the objective function of fundamental rights which are designed not only to protect the individual but also to guide the organs of the State, and indeed to help establish the internal structure of the States[68]. The structuring function of the Convention is plain where the institutional effects of the right to a fair hearing are concerned (independence and functioning of the courts, means of access to judicial control). In spite of the rarity of state applications, the collective guarantee remains one of the fundamental principles of European public order, while the Commission's power to bring matters before the European Court and the long-term development of the individual petition (Protocol No. 9 and Protocol No. 11) operate in the same sense.

A second approach consists in comparing the rights protected in the system of the European Convention with the rights guaranteed by constitutional norms (the theory of parallelism). A third factor must be taken into consideration, namely the influence exerted by the European Convention on Human Rights on constitutional courts and administrative courts through the authority on the decisions delivered by the Strasbourg Court. In a study of the French administrative courts. Joel Andriantsimbazovina[69] has endavoured to identify three forms of authority of that case-law: binding authority (*autorite de la chose jugee*); what he describes as „persuasive" authority: and authority deriving from interpretation (*autorite de chose interpretee),* which is impregnated with the concepts in force in the Community order but difficult to implement in the case of the Convention unless there is some provision for dialogue between the judges.The Constitutional Courts have also borrowed from the techniques of interpretation used by the European Court of Human Rights in order to ensure the effective protection of fundamental rights or to order the legislature to exercise its power.

3. The capacity of the Court of Justice to be guided by the rules of the European Convention on Human Rights[70] has the advantage of erasing the differences caused by the differences in the status of the Convention in the various national legal orders (it may have been incorporated in the national legal order, or be directly applicable, or have primacy), which might increase even further with the enlargement of the Council of Europe and the corresponding growth in the number of Parties to the Convention. In the field of Community law raising the rules of the Convention in the status of general principles of the Community legal order confers an additional

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[68] F. Sudre, *Existe-t-il un ordre public europeen? In Quelle Europe pour les droits de l'homme?,* Brussels 1996, p. 39 et seq.

[69] J. Andriantsimbazovina, *L'autorite des decisions de justice constitutionnelles et europeennes sur le juge administratif framcais,* Bordeaux 1994.

[70] The principles which the Court of Justice has borrowed from the Convention, apart from the right of ownership and the freedom to exercise professional activities (cited above) concern the inviolability of the home, the non-retroactivity of criminal provisions, the right to a court, the protection of the name and human dignity, the right to a fair hearing, respect for religious belief, the rights of the defence and freedom of expression, i.e.a collection of rights which constitue the common European herritage.

degree of authority on them. As regards their application by the courts, the Court of Justice has an extensive role because of the preliminary ruling procedure, which establishes a direct relationship with the national courts. Furthermore, seen from the aspect of the common heritage, the Court of Justice, because its composition, tends to erase the distinction between the romano-germanic system (which is principally based on binding authority) and the common law system (which emphasises precedent and thus to a large extent the authority of interpretation), and thus brings together binding authority and authority deriving from interpretation[71]. The fundamental issue is undoubtedly the tradition in the continental countries does nor recognise that case-law has a normative role: this is the source of a certain concern as regards the case-law of the Court of Justice in general, and in the area of fundamental rights in particular.

C. Community law and law common to Europe

The fundamental rights established by the Court of Justice are therefore situated at the pivot of three legal orders: the national (constitutional) legal order, the order deriving from the European Convention and the Community legal order. As it was mentioned before, the consequence is a paradigm of complexity that is not ready to fade away, in some way a provisional status, perfectly illustrated by the conditionality in the Solange II judgement or in the M. and Co. v FGR decision of the European Commission of Human Rights, the common inspiration of which has been emphasised. In order to reduce the risk of divergence, a number of writers have suggested that the Court of Justice might refer a question to the European Court of Human Rights for a preliminary ruling on the interpretation of the Convention. That suggestion is not compatible with the current state of the law, since Community may be guided by the Convention but is not bound by it[72]. It would be illusory to imagine that an agreement on accession to the Convention (should the Treaties be amended) or an agreement on cooperation could put the Court of Justice in a position where it could make use of a mechanism not available to courts of the Member States.

The formation of a common body of law in Europe thus encounters both procedural and substantive difficulties which are very characteristic of the political structure of continent. Federal solutions have been simpler. In 1925 the Supreme Court of the United States, in *Gitlow v New York*, extended the scope of the Bill of Rights to the legislative and administrative measures of the federal states, whereas it previously concerned only the federal authorities. In Canada the Constitution of 1867, and then more recently the Charter of 1982, established the status of citizenship consisting of political rights and a few fundamental rights[73]. However,

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[71] Cf. J. Andriantsimbazovina, op. cit. p. 893. The writer cites the grounds of Kruslin judgement of 24 April 1990 delivered by the the European Court of Human Rights: „In a sphere covered by the written law, the 'law' is the enactmenin force as the competent courts have interpreted it".

[72] A number of Governments suggested a similar arrangement when the request for an opinion on the accession of the Community to the Convention was being considered; questions for a preliminary ruling might be ...in order to maintain the autonomy of the Community legal order.

[73] Article 8A of the Treaty on European Union establishes the right to move and reside freely within the territory of the Member States as one of the rights of European citizenship. This is a fundamental right which

while the European Convention has had a countable influence on the fundamental rights recognised and guaranteed in the Member States, the influence of the fundamental rights of the Community legal order cannot be ignored. In different circumstances the theory of the fundamental rights of the Community legal order also exercises two influences: a direct influence, since the Member States are required to respect them when they apply or implement Community law; and an indirect influence in so far as the solutions applied are susceptible of influencing the sphere of the extra-Community legislative or administrative activities of the States (the contagion effect)[74]. The latter effect has paradoxical links with the nature of the Community. As a common public power (G. Isaak), the Community, despite the change of initials in 1992, has as its principal mission to regulate economic situations. According to the European historical tradition, rights proclaimed have primarily concerned the person *in globo*, his rights in political life or in judicial life. It is interesting to note, therefore, that Community law is pressing for the application in economic flelds of concepts which were not initially envisaged from the economic point of view. That explains the inevitable promotion of the rights of undertakings, which are legal persons. Although its bases are subtle, the case-law of the Court of Justice of the European Communities reflects the main tendencies of this common European herritage, which is itself in a state of permanent change.

Community nationals enjoy even if they do not come within the specific provisions of Article 48, 52 and 59 of the EEC Treaty.

[74] J. Weiler, *The European Court at a Crossroads; Human Rights and Member State Action in Liber amicorum Pierre Pescatore*, Kraków 1987, p. 821 et seq.