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Fundamental Rights in the European Union

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INTRODUCTION¹

Peace has prevailed in western Europe since the late 1940's. After centuries of nearly constant conflict, western Europe united along economic lines by forming the European Economic Community.² Economic union quite necessarily leads to political union. Both work together to form the European Union and preserve peace.

But who protects the fundamental rights of the Union's citizens in the context of the Union, its institutions, and the Member States?³ Who ensures or enforces those fundamental rights? A

1. This article is meant to be read in tandem with the authors' earlier article, John P. Flaherty and Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923-1007 (1996) ("First Article"). As stated in the *First Article*, the authors have been instrumental in the development of an academic program on the law of the European Union between the Duquesne University School of Law in Pittsburgh, Pennsylvania and the Law Faculty of the University College in Dublin, Ireland. Indeed, the law schools appear to be the first to co-sponsor continuing legal education on this topic. Additionally, the authors are assisting in the development of a curriculum on the law of the European Union at the Duquesne University School of Law. This Article and the *First Article* have been written to reaffirm both the authors' and the Duquesne University School of Law's continuing commitment to education on the law of the European Union.

The authors conducted extensive research on the Internet and through other electronic media such as LEXIS and WESTLAW. These were often the only sources available for the information presented. Therefore, if original written source documents were not available, Internet sites have been provided for the reader's convenience. Recognizing that such sites change names or sometimes disappear, the authors have copied and preserved the cited electronic information. Readers may view or obtain copies of this material by contacting the Law Library of the Duquesne University School of Law, Pittsburgh, PA 15282-0700. In addition, most of the cases cited are on file at the Duquesne University Law Library.

2. The European Economic Community ("EEC") was created by the Treaty Establishing the European Economic Community ("EEC Treaty" or "Treaty of Rome"). See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 (as amended by the Single European Act ("SEA"), July 1987, 2 C.M.L.R. 741 (1987).

In 1992, the EEC Treaty was further amended by the Treaty on European Union ("TEU" or "Treaty of Maastricht"). See TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1 C.M.L.R. 719 (1992), 31 I.L.M. 247. The TEU established the European Union and made significant changes in the three main predecessor treaties, including the EEC Treaty.

The EEC Treaty, as amended by the TEU, is now called the "Treaty Establishing the European Community" ("ECT"). See TEU art. G.A.(1). See also TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 1 C.M.L.R. 537 (1992) ("ECT") (conveniently compiling the EEC Treaty as amended by both the SEA and the TEU). See *First Article*, *supra* note 1, at APPENDICES ONE AND TWO for a basic explanation of the TEU and the ETC.

3. "Fundamental rights" are defined, for the purpose of this Article, as general legal principles of Community law that may be derived from the rights recognized in Member States. Case 29/69, *Stauder v. City of Ulm Sozialamt*, 1969 E.C.R. 419, and Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-und-Vorratstfel für Getreide und Futtermittel*, 1970 E.C.R. 1125, and international treaties to which the states are parties. Case 4/73, *Nold, Kohlen-und Baustoffsgroßhandlung v. Commission*, 1974 E.C.R. 491. See *infra*

democratic society struggles to define the proper function of government vis-à-vis the protection of individual human dignity. Perhaps, one might say, that in defining that function, creating a sound mechanism to protect the individual from the government itself is essential. The European Union is no different. Although Union citizens do have some rights under various treaties and agreements among the Member States, virtually all individual fundamental rights in the Union have been judicially created.

In this Article, the authors explore fundamental rights in the Union.⁴ Part One briefly examines the European Union's evolution to its present form and reviews relevant provisions of the Treaty of Amsterdam, signed on October 2, 1997. Part Two addresses the European Convention for the Protection of Human Rights ("Convention")⁵ and other international agreements affecting individual fundamental rights. Also, in Part Two, the authors discuss certain decisions of the European Court of Human Rights ("ECtHR"), the court responsible for interpreting the Convention. Part Three focuses on the European Court of Justice ("Court"), which is responsible for adjudicating Community-related issues, and its opinions recognizing fundamental rights in the European Union. Finally, Part Four explores the current status of fundamental rights and the Union's unresolved issues. The authors suggest that a disciplined and consistent interpretation of the Convention and other Union agreements that respect the rights of individual citizens will greatly enhance the possibility that the dream of a

notes 387 and 391.

The focus of this Article is not on rights specifically enumerated in the Community treaties, but on those that are not. The authors recognize that, with the aspired (and anticipated) ratification of the October 2, 1997 Treaty of Amsterdam, it can then be said that fundamental rights are "enumerated." See generally *infra* note 72 and accompanying text.

4. Excellent sources for research into European Union law include: TIMOTHY BAINBRIDGE & ANTHONY TEASDALE, *THE PENGUIN COMPANION TO EUROPEAN UNION* (1996); IAN BARNES & PAMELA M. BARNES, *THE ENLARGED EUROPEAN UNION* (1995); GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* (1993); PAUL CRAIG & GRÁINNE DE BÚRCA, *EC LAW TEXT, CASES & MATERIALS* (1995); JAMES D. DINNAGE & JOHN F. MURPHY, *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION* (1996); HUMAN RIGHTS, *A EUROPEAN PERSPECTIVE* (Liz Heffernan, ed., 1994); MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW* (1990); A.P.H.C.M. JASPERS & L. BETTEN, *25 YEARS OF THE EUROPEAN SOCIAL CHARTER* (1988); A.H. ROBERTSON & J.G. MERRILLS, *STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1993); JOHN TILLOTSON, *EUROPEAN COMMUNITY LAW: TEXT, CASES & MATERIALS* (2d ed. 1996); STEPHEN WEATHERILL & PAUL BEAUMOND, *EC LAW: THE ESSENTIAL GUIDE TO THE LEGAL WORKINGS OF THE EUROPEAN COMMUNITY* (2d ed. 1995).

5. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 1955 U.N.T.S. 220 (effective Sept. 3, 1953). See *infra* note 157 and accompanying text. See APPENDIX ONE for relevant provisions of the Convention.

truly integrated Europe will become a reality.

PART ONE: OVERVIEW OF THE DEVELOPMENT OF THE EUROPEAN UNION⁶

A. *History Prior to the Treaty on European Union*

1. 1951-1958

In 1951, six European countries executed the Treaty of Paris, establishing the European Coal and Steel Community (“ECSC”).⁷ The Treaty represented a momentous first step toward economic integration, presaging the present-day European Union. The ECSC focused on “economic expansion, growth of employment, and rising standards of living in Member States through the development of a common steel and coal market.”⁸ ECSC signified the surrender of domestic control of the signatories’ coal and steel industries to the dominion of institutions created by the ECSC.⁹

The year 1957 heralded a new era of cooperation among the six nations. In March 1957, the six nations agreed to cooperate in both the economic and atomic energy spheres by signing two treaties, both known as the Treaty of Rome: The Treaty Establishing the European Economic Community (“EEC”)¹⁰ and The Treaty Establishing the European Atomic Energy Community (“EURATOM” or “EAEC”).¹¹ EEC united the markets of Europe into one common economic market, free of restrictions.¹² EURATOM, although similar in design to ECSC, was limited to atomic energy. The six nations had, therefore, created three separate European communities with three sets of institutions.¹³ The authors note, for the purposes of this Article, that many nations of Europe were concerned about the preservation of human and economic rights. During this period, the

6. This section provides the reader with a brief overview of postwar developments prior to the European Union as the foundation for the later discussion. See *First Article supra* note 1, at 927-49, for a more in-depth treatment of this period.

7. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140. This treaty is referred to as the “ECSC Treaty” or the “Treaty of Paris.” The six original signatory countries were France, Germany, Italy, the Netherlands, Belgium, and Luxembourg. BERMANN, *supra* note 4, at 5. The ECSC Treaty became effective on July 25, 1952. *Id.*

8. ECSC Treaty, *supra* note 7, Preamble.

9. WEATHERILL & BEAUMOND, *supra* note 4, at 3.

10. See EEC, *supra* note 2, Preamble.

11. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167.

12. EEC, *supra* note 2, Preamble.

13. See *First Article, supra* note 1, at 933-36.

European Convention on Human Rights and Fundamental Freedoms¹⁴ and the European Social Charter were concluded.¹⁵

2. 1958-1992

The next thirty years produced the 1967 Treaty Establishing a Single Council and a Single Commission of the European Communities ("Merger Treaty"),¹⁶ the creation of the European Council, and the 1987 Single European Act ("SEA").¹⁷ The Merger Treaty corrected the obvious inefficiency of three separate sets of institutions by simplifying the structure of the three communities. ECSC, EEC, and EURATOM merged into one common system.¹⁸ Following the merger, Community entities included a Commission,¹⁹ a Parliament,²⁰ a Council,²¹ and a Court of Justice ("the Court").²²

The European Council (as distinguished from the Community's Council) was created at the Hague following a 1969 summit meeting among the heads of state and government of the Member States.²³ The European Council regularly holds intergovernmental meetings on major policy issues of common concern to the Community.²⁴ One of the Council's achievements is initiation of "European Political Cooperation," a program of collaboration on foreign policy issues among the Member States. SEA²⁵ formally

14. See Convention, *supra* note 5. See also APPENDIX ONE and *infra* note 157 and accompanying text.

15. The European Social Charter, executed on October 18, 1961 in Turin, Italy, and effective on February 25, 1965, is the economic and social counterpart of the Convention. JASPERS, *supra* note 4, at 1.

16. TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES ("MERGER TREATY"), Apr. 8, 1965, 4 I.L.M. 776.

17. See *supra* note 2.

18. See *First Article*, *supra* note 1, at 941-42.

19. The Commission, among other things, issues directives pursuant to the policies of the Council. See *First Article*, *supra* note 1, at 963-64.

20. The Parliament participates in the legislative process and enjoys advisory and supervisory powers within the Union. *Id.* at 959-60.

21. The Council develops policy for the Union as well as negotiating and consummating agreements for the Union. *Id.* at 960-63.

22. The Court, including an inferior court, the Court of First Instance, interprets treaties and legislative measures handed down from the Union entities. See *First Article*, *supra* note 1, at 964-72. See also *infra* note 278 and accompanying text. Following TEU, another institution, "the Court of Auditors," was established to examine the financial affairs of the Community. See *First Article*, *supra* note 1, at 973.

23. *First Article*, *supra* at 942.

24. *Id.*

25. See SEA, *supra* note 2.

recognized this program.²⁶

SEA also focused on the completion of a single internal market. SEA implemented important procedural changes in the Community.²⁷ The SEA Preamble reflected the signatory states' concern for fundamental rights by declaring themselves "[d]etermined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."²⁸ Throughout this period, and indeed, into recent years, Community institutions have jointly and individually issued statements on fundamental rights,²⁹ particularly on the subjects of racism and xenophobia.³⁰

B. *The Treaty on European Union ("TEU")*

The 1992 TEU³¹ carried the Community forward into "an ever closer union among the peoples of Europe."³² Member States accepted the concept of a "European Union" founded upon a "European Community" ("EC"), not merely a "European Economic

26. *See supra* note 2.

27. *See First Article, supra* note 1, at 943-44.

28. *See SEA, supra* note 2, Preamble.

29. *See, e.g.*, Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977, 1977 O.J. (C 103) 27.4.; Resolution of the Commission adopting the declaration of fundamental rights and freedoms of April 12, 1989, 1989 O.J. (C 120).

30. Resolution on the Joint Declaration by the European Parliament, the Council, the Representatives of the Member States Meeting within the Council and the Commission against Racism and Xenophobia, 1986 O.J. (C 176) 25.6 (June 11, 1986). Subsequent resolutions of the Council and representatives of the governments of the Member States on the issue of racism and xenophobia include: 1989 O.J. (C 69) (February 14, 1989); 1995 O.J. (C 296) 10.11 (October 5, 1995); 1995 O.J. (C 312) (October 23, 1995); and 1996 O.J. (C 237) 15.8 (July 23, 1996) (designating 1997 as the "European Year Against Racism").

Council, Parliament, Committees of the Commission, and individual representative governments sometimes act by themselves in this area. *See* 1996 O.J. (L 185) 24. 7, at 5 (July 15, 1996) (Council, acting under Article K.3 of the TEU, adopted laws to fight racism and xenophobia); and 1997 O.J. (L 151) (June 2, 1997), Council Regulation (EC) No. 1035/97 of 2 June 1997 (European Monitoring Center on Racism and Xenophobia established).

See, e.g., Parliament's resolutions against racism and xenophobia: 95P O.J. (C 126) 22.6, at 75 (April 27, 1995); 1995 O.J. (C 308) 20.11, at 140 (October 26, 1995). Also, representative governments sometimes act by themselves, as in 1997. *See* 1997 O.J. (C 194) (June 2, 1997) (establishing Vienna as the seat of the European Monitoring Centre on Racism and Xenophobia).

31. *See* TEU, *supra* note 2.

32. TEU, *supra* note 2, art. A. *See also First Article, supra* note 1, at 944-47 and its APPENDICES ONE AND TWO, at 977-1003.

Community."³³

1. *Three Pillars*

Three pillars support the European Union. The first pillar is the European Community (EC, EURATOM, and ECSC) which is composed of the institutional structures and operational procedures of the Union.³⁴ The second pillar is a "common foreign and security policy" ("CFSP").³⁵ The third pillar is cooperation in justice and home affairs.³⁶

The TEU clarified Community policy to emphasize human rights in the area of development cooperation. New ECT Article 130u provides that community policy "shall contribute to the general object of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."³⁷

2. *Human Rights and TEU*

TEU addresses the subject of human rights in at least three of its provisions: Article F, Article J, and Article K. Article F does not amend the provisions of the ECT, but provides that:

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of

33. TEU, *supra* note 2, art. G.

34. *Id.*

35. TEU, *supra* note 2, art. J. Under Article J, the European Council sets specific guidelines for the Council's execution of foreign and security policy. Execution usually requires a unanimous vote and sometimes a qualified majority vote. Under TEU, Article L, the Court does not have jurisdiction (with one exception) over issues arising under Article J. *See also First Article, supra* note 1, at 983.

36. TEU, *supra* note 2, art. K. Article K requests coordination and cooperation by Member States in judicial affairs. The Council may only act pursuant to a unanimous vote, unless the Council decides unanimously to adopt implementing measures by a qualified majority vote. Similar to Article J, the Court does not have jurisdiction under TEU, Article L (with one exception) over issues arising under Article K. *See also First Article, supra* note 1, at 983-84.

37. ECT, *supra* note 2, art. 130u.

community law.

Article J.1(2) also mentions protection and respect for human rights and fundamental freedoms as an objective of common foreign and security policies. Further, in Article K.2(1), human rights and fundamental freedoms appear in the context of justice and home affairs, covering immigration and asylum policies.³⁸

C. *Post-TEU Activities*

“European union” now means economic, social, political, and cultural union. The process of achieving “union” has been dynamic, involving cooperation and compromise by all the relevant “players,” as well as focused guidance by its leaders. Membership in the European Union allows states to achieve greater economic growth as a group than individually. The recognition of this shared progress ultimately preserves peace in Europe.³⁹

Yet, the Union’s success depends on whether individual European citizens are vital and active participants in the Union. This participation, in turn, depends on whether the Union has provided for and protected its citizens as individuals.⁴⁰ Since TEU and the 1994 accession treaties (the *First Article* discussed these agreements in depth),⁴¹ European leaders have engaged in a continuing dialogue on the future of the Union through European Councils. The recent Treaty of Amsterdam reflects their work. An overview of this dialogue is set out below with a particular focus on the leaders’ efforts to protect and ensure fundamental rights.

1. *The European Council Meetings*

The process of union has continued steadily over the past few years. Although the 1992 TEU framed the direction of Europe into the next century, Community institutions and recent European councils added dimension to that framework. Thus, the Treaty of

38. TEU, *supra* note 2, arts. J.1(2) and K.2(1).

39. Débat à l’Assemblée Nationale sur la CIG discours du Ministre Délégué aux Affaires Européennes, M. Michel Barnier, Déclaration du Gouvernement. Paris, March 13, 1996. (Michel Barnier, French Minister of European Affairs, in his address to the French Senate) <<http://europa.eu.int/en/agenda/igc-home/msspeech/state-fr/130396.html>>.

The authors have assembled an extensive store of research materials on the Union’s activities during the period 1992-present. Much of this material is beyond the scope of this Article. This research is available through the Duquesne University Law Library. *See supra* note 1.

40. *See supra* note 1.

41. *Id.*

Amsterdam strengthened the rather delicate pre-Treaty structure.

Integration began in earnest in 1995. Each Community institution prepared a report on its proposed role in the future of Europe.⁴² In December 1995, the Madrid European Council ("Madrid Council") further calibrated TEU's direction by enacting specific timetables for completion of each phase described in the TEU.⁴³ The Turin European Council ("Turin Council"), held in March 1996, focused mainly on the Union's relationship with its citizens and institutional improvements.⁴⁴ In June 1996, the Florence European Council ("Florence Council") added express directives on employment, growth, and competitiveness. The Florence Council also addressed matters relating to justice, home affairs, and external relations.⁴⁵ The December 1996 Dublin European Council ("Dublin Council") dealt primarily with economic and monetary union, improved employment, justice and home affairs, and external relations.⁴⁶ The Amsterdam European Council ("Amsterdam Council") met in June 1997, producing a draft treaty that the heads of state and government signed on October 2, 1997 ("Treaty").⁴⁷ The following section summarizes the integration work of the various Councils.

*a. The Madrid Council: December 15-16, 1995*⁴⁸

The Madrid Council focused on the economic revitalization of Europe in the context of social and political integration.⁴⁹ The Council made several declarations: (1) making set job creation the

42. The 1994 Corfu European Council required these reports in preparation for the Intergovernmental Conference. See generally Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (Luxembourg, May 17, 1995) <http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html>; Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference (May 17, 1995), <<http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/report.html>>; and European Treaty and the Intergovernmental Conference (June 1995), <<http://europa.eu.int/en/agenda/igc-home/eu-doc/parliament/resol.html>>.

43. Madrid European Council, Dec. 15-16, 1995, *Presidency Conclusions*, as reported in REUTERS TEXTLINE, AGENCÉ EUROPE, Dec. 18, 1995.

44. Turin European Council, Mar. 29, 1996, *Presidency Conclusions*, as reported in THE REUTERS EUROPEAN COMMUNITY REPORT, Apr. 1, 1996.

45. Florence European Council, June 21-22, 1996, *Presidency Conclusions*, as reported in REUTERS TEXTLINE, AGENCÉ EUROPE, June 24, 1996.

46. Dublin European Council, Dec. 13-14, 1996, *Presidency Conclusions*, as reported in RAPID, Dec. 14, 1996.

47. See discussion *infra* note 72 and accompanying text.

48. Madrid European Council ("MEC"), Dec. 15-16, 1995, <<http://www.hri.org/docs/madrid95/madr-s.html>>. See also Madrid European Council, Dec. 15-16, 1995, *Presidency Conclusions*, as reported in REUTERS TEXTLINE, AGENCÉ EUROPE, Dec. 18, 1995.

49. MEC, *supra* note 48, Introduction, <<http://www.hri.org/docs/madrid95/madr-s.html>>.

paramount economic objective of the Union and its Member States, (2) affirming the need to involve citizens in the work of the Union, (3) planning for "justice and home affairs", 4) adopting procedures for changeover to a single currency (the "euro" or "ECU") as of January 1, 1999; (5) acknowledging its accomplishments in the context of external affairs; and (6) determining that the Intergovernmental Council ("IGC"), mandated by TEU, would officially begin on March 29, 1996.⁵⁰

The Madrid Council transformed the IGC contemplated by TEU from a single week-long meeting to a series of meetings ending in mid-1997.⁵¹ This transformation resulted from the Madrid Council's charge that, by the end of the century, the treaties should be revised "to create an ever closer union among the peoples of Europe."⁵² The Council charged the IGC to:

- (1) make the transition to a single currency (the "euro") on January 1, 1999 (Stage 3 of the economic and monetary union);
- (2) focus on developing opportunities for employment;
- (3) prepare for enlargement negotiations with the nations of Central, Eastern and Southern Europe who have applied for Union membership;
- (4) create a citizen-friendly Europe;
- (5) implement the commands of the TEU; and
- (6) continue activities in the area of justice in both domestic and external affairs.⁵³

b. The Turin Council: March 29, 1996

The Turin European Council set a broad agenda for the IGC,⁵⁴ focusing on: "a union closer to its citizen"; unemployment; outermost regions; a sustainable environment; the future enlargement of the Union; subsidiarity, transparency, and simplification of the treaties; and creation of more effective Community institutions and procedures to support a "more democratic and efficient Union."⁵⁵ The Council stated that the IGC was to "base its work on the fact that the citizens are at the core of the European construction: the Union has the imperative duty to

50. See *supra* note 2, art. N(2). See also REUTERS TEXTLINE, *supra* note 48.

51. See *supra* note 43.

52. *Id.*

53. MEC, *supra* note 48. See also 74 ABL/INFORM 10 (Chartered Inst. of Mgt. Accountants, Mar. 1996).

54. See *EU Starts Maastricht Revision*, XINHUA NEWS AGENCY, Item 0329252.

55. See *supra* note 44.

respond concretely to their needs and concerns." The Council directed, "As Member States are committed to respect human rights, democratic values, equality and nondiscrimination, and as the Union is a community of shared values, the IGC should consider whether and how far it will be possible to strengthen these fundamental rights and improve the safeguarding of them."⁵⁶

*c. The Florence Council: June 21, 1996*⁵⁷

The Florence Council elevated the Union and its members to a new working level. This Council developed an integrated strategy for increased employment, economic growth, and preparation for monetary union. Florence also saw progress in the areas of justice, home affairs, and external affairs.⁵⁸ The Council announced that to preserve the momentum of integration, the European Council would hold a special meeting in October 1996.⁵⁹

The Florence Council also charged the IGC to create a "general outline for a draft revision of the TEU" addressing these goals:

(1) to bring the Union closer to its citizens through increased employment opportunities and respect for fundamental rights;

(2) to strengthen and enlarge the scope of the Union's "common and foreign security policy";

(3) to assure, in the view of enlargement through increased membership, effective and swift decision-making by the Union's institutions; and

(4) to simplify the treaties so "as to make the Union's goals and operations easier for the public to understand."⁶⁰

The Council articulated specific objectives concerning each goal. As to the first goal, the Council focused on higher levels of employment, environmental protection, greater transparency (i.e., openness) in the Union's work, strengthening Union citizenship without replacing national citizenship, greater respect for fundamental rights, greater attention to the need for security, implying a substantial improvement in the means of fighting terrorism, organized crime, and drug trafficking, as well as matters of asylum, visas, and immigration.⁶¹ Regarding the second goal, the Council articulated seven aims in the area of common foreign and

56. *Id.*

57. *See supra* note 45.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

security policies.⁶² The Council, with respect to the third goal, called for a general reassessment of the unanimity requirement, calling on each Union institution to reassess its methods of decision-making.⁶³ Lastly, the Council asked the IGC to “seek all possible ways” of simplifying the treaties.⁶⁴

*d. Special Meeting of the European Council in Dublin: October 5, 1996*⁶⁵

The European Council convened a special session in Dublin on October 5, 1996 at approximately the midpoint of the IGC's implementation. Although no *Presidency Conclusions* were agreed upon, this special meeting reaffirmed that the timetable for the IGC, particularly the drafting of a new treaty by June 1997, must be met.⁶⁶ Nevertheless, marked differences among the leaders were apparent, especially in the areas of employment and social affairs.⁶⁷

*e. The Dublin Council: December 14-15, 1996*⁶⁸

The Dublin Council made substantial progress, as reflected in its detailed Presidency Conclusions of December 14 and 15, 1996.⁶⁹ Much of what this Council accomplished is reflected in the treaty announced at the Amsterdam Council six months later. (Consequently, the authors have not detailed the work of the Dublin Council here.). Summarizing its achievements, the Council announced that it had (1) made substantial progress toward the January 1, 1999 target for economic and monetary union, by resolving many, but not all, of the technical issues respecting the euro, the Union's currency,⁷⁰ (2) listed measures to enhance employment opportunities, (3) “welcomed the general outline for a draft revision” of the treaties, (4) agreed to measures to combat crime, and (5) focused on the Union's approach to external relations.⁷¹

62. *See supra* note 45.

63. *Id.*

64. *Id.*

65. EUROPEAN INDUSTRIAL RELATIONS REVIEW 1996; ABI/INFORM (Nov. 1996).

66. *Id.*

67. *Id.*

68. *See supra* note 46.

69. *Id.*

70. *Id.* *See also* *Financial Regulation Report: The Dublin Summit: Progress on Economic and Monetary Policies*, THE FIN. TIMES LTD. (Feb. 1997); *Roundup: EU Summit Gives Single Currency Dynamic Boost*, THE XINHUA NEWS AGENCY (Dec. 14, 1996).

71. *See supra* note 46.

2. *The Amsterdam Council: June 16-17, 1997 and the Treaty of Amsterdam*

On October 2, 1997, the heads of state and government of the fifteen Member States of the Union executed the Treaty of Amsterdam, which will supersede the Treaty of Maastricht on January 1, 1999.⁷² The Amsterdam European Council announced the Treaty in draft form on June 17, 1997, concluding the IGC that began in Turin in March 1996.⁷³

The national parliaments of the Member States now must vote whether to accept or reject the Treaty.⁷⁴ Politically, it appears that

72. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS ("Treaty of Amsterdam"); EUROPEAN REPORT (Europe Info. Svc., Feb. 7, 1998). A complete copy of the Treaty of Amsterdam is found on the Internet at <<http://ue.eu.int/Amsterdam/en/amsteroc/en.html>> (The following discussion refers to the materials at this site.)

73. Amsterdam European Council, June 16-17, 1997, *Presidency Conclusions*, as reported in RAPID, June 18, 1997.

74. EUROPEAN REPORT, *supra* note 72. All fifteen current members of the Union must ratify the Amsterdam Treaty before the end of 1998. With the following exceptions, serious ratification problems are not anticipated:

Belgium has expressed concerns over the sharing of power among the member states. Ratification requires that each of the Belgian regional parliaments be consulted and unanimously agree to ratification. The Capital Region (Brussels) Parliament appears strongly opposed to ratification at this time. *Id.*

In France, anti-Europe elements are exerting significant pressure against ratification. A setback for ratification occurred in January 1998, when the French constitutional court held that the treaty is "incompatible" with the French Constitution. Dan McLaughlin, *Some Pot Holes Still Left on the Road*, IRISH TIMES, Jan. 19, 1998, at 17. According to the court, ratification now requires either a 60% majority in the parliament or a majority vote in a national referendum. *Id.* Communists and trade unions are lobbying heavily against ratification. In addition, those who fear the loss of French influence — French will lose its place as an official language and France's status as the predominant cultural influence in the structure of the Union might be jeopardized by the encroachment of the English language and non-French thinking. LONDON TIMES, Apr. 15, 1998, at 15

The outcome of the May 28, 1998 Danish referendum on the Amsterdam Treaty remains too close to call. The bitter national labor strike that began in April continues to place anti-ratification pressure on the government. This is not the first example of anti-Europe sentiment in Denmark. Danes initially rejected the Treaty of Maastricht in a referendum held on June 2, 1992, but in a second referendum in May 1993, Danes withdrew their opposition and ratified the treaty. In Ireland, concerns about loss of traditional Irish neutrality, public apathy, and trade union opposition make ratification uncertain, although when the treaty was signed in October, 1997, Irish public opinion also was thought to be strongly in favor of ratification. Ireland will conduct a national referendum on May 22, 1998.

Germany's parliament was the first to ratify the treaty in March 1998. Overcoming strong Tory opposition to ratification of the European Social Charter contained in the treaty, the British parliament voted to ratify in March 1998. Sweden's parliament followed on April 29, 1998 with an overwhelming vote of approval.

Ratification seems probable later this year by national parliaments in the Netherlands, Italy

they will ratify the Treaty because the heads of state and government have agreed to implement certain provisions of the Treaty before ratification such as those on employment.⁷⁵ The European Parliament has voted to accept the Treaty.⁷⁶ The hope is that the ratification process will be complete by the end of 1998 so that the Treaty becomes effective on January 1, 1999.⁷⁷

The most significant aspects of the Treaty, from the authors' point of view, are that the Treaty: (1) makes human rights reflected by the Convention fundamental principles of Community action;⁷⁸ (2) expands the Court's jurisdiction;⁷⁹ and (3) extends the Court's jurisdiction to areas that the Treaty shifts from the third pillar (Cooperation in the Field of Justice and Home Affairs) to the first pillar (European Communities, e.g., immigration, asylum, visas, border crossings, and police and judicial criminal cooperation).⁸⁰ The following section sets out the content of the Treaty in an abbreviated fashion and critiques and comments on its provisions and implications.

a. Content of the Treaty

The Treaty is divided into three parts: Substantive Amendments, Simplification, and General and Final Provisions.⁸¹ Because the Treaty addresses some issues discussed in this article, the authors provide a brief overview of Treaty provisions dealing with fundamental rights, the relationship of the Union to the citizen, and certain institutional matters.

1) Part One: Substantive Amendments

Article 1 of the Treaty amends provisions of the Treaty on European Union by first, confirming respect for fundamental social rights; second, providing for sanctions for serious violations of

(unless the Brussels European Council decides to exclude it from the euro-zone), Austria, Spain, Luxembourg, Greece, and Finland. A national referendum is scheduled to be held in Portugal this fall, with voters expected to approve ratification. *Id.*

75. *The Treaty of Amsterdam*, STANBROOK & HOOPER'S BRUSSELS BRIEF ("BRUSSELS BRIEF"), Issue 24, June 20, 1997, <<http://www.stanbrook.com/brief/inserts/amster.html>>.

76. EUROPEAN REPORT (Europe Info. Svc., Nov. 22, 1997).

77. *See supra* note 75.

78. TREATY OF AMSTERDAM, *supra* note 72, (amending TEU, article F with a new para. F.1).

79. *Id.* (amending TEU, art. L).

80. Amsterdam Questions and Answers, *supra* note 72, nos. 22, 23.

81. TREATY OF AMSTERDAM, *supra* note 72. Part One (Substantive Amendments) includes Articles 1 through 5, Part Two (Simplification) includes Articles 6 through 11, and Part Three (General and Final Provisions) includes Articles 12 through 15.

those rights; third, ensuring equality between men and women; and fourth, establishing the notion of individual privacy.⁸² Article 2 adds a new title, "Free Movement of Persons, Asylum and Immigration,"⁸³ and has provisions regarding border checks⁸⁴ and "police and judicial cooperation in criminal matters."⁸⁵

The amended TEU Preamble announces the Union's commitment to fundamental social rights as defined in the European Social Charter signed at Turin on October 18, 1961, and in the 1989 Community Charter of the Fundamental Social Rights of Workers.⁸⁶ New TEU Article F.1 provides sanctions for violations of these fundamental principles.⁸⁷ Amended TEU Article O now commands that nations seeking to accede to the Union must respect these fundamental principles.⁸⁸ Under new Article Fa, if a Member State commits a "serious and persistent breach" of the principles, there is now a method by which the Council, Commission, Member States, and Parliament may deal with that state.⁸⁹ Sanctions may include the suspension of the Member State's voting rights for purposes of TEU,⁹⁰ ECT, ECSC, and EAEC.⁹¹

82. *Id.* ch. 1. Specifically, amended TEU Article F provides:

(1) the general principles underlying the Union are the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States"; and

(2) the Union is to respect "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law" and "the national identities of its Member States"; and

(3) the Union is to give itself "the means necessary to attain its objectives and carry through its policies."

Id. (amending the designation of TEU art. F to "arts. F.1 through F.4").

83. *Id.* ch. 2 (adding new Article A to ECT). Article A provides that, within five years of the effective date of the Treaty, the Council is to adopt measures providing "free movement of persons in accordance with Article 7a"; respecting "external border controls, asylum and immigration in accordance with Articles B(2) and (3); C(1)(a) and (2)(a)"; preventing crime in accordance with Article K.3(e); and encouraging "judicial cooperation on civil matters as provided for in Article E," "administrative cooperation as provided in Article F," and "police and judicial cooperation in criminal matters" as provided by the TEU. *Id.*

84. *Id.*

85. TREATY OF AMSTERDAM, *supra* note 72, ch. 2.

86. *Id.*, ch. 1 "The incorporation of the Social Protocol [of the Maastricht Treaty] will allow for a single, coherent, legal basis for action by the 15 countries in the social area." Taoiseach Mr. Bertie Ahern, Statement to Dáil Éireann (Jul. 10, 1997) (transcript available at <<http://www.irlgov.ie/gis/2526.html>>).

87. *Id.* (amending TEU art. F to "art. F.1").

88. TREATY OF AMSTERDAM, *supra* note 72, ch. 1 (amending TEU art. O).

89. *Id.* ch. 1 (amending TEU art. F).

90. *Id.*

91. *Id.* (adding ECT art. 236).

The Treaty bans discrimination against protected classes, equality of men and women, and protection of privacy. New ECT Article 6a authorizes the Community's institutions to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation."⁹² "Equality of men and women" is now a principle of the Community.⁹³ Also, the Community's institutions protect individual privacy concerning the processing and transfer of personal data.⁹⁴

Chapter 1, "Declaration to the Final Act,"⁹⁵ provides that the Union must respect the status "under national law" of churches and religious associations or communities as well as "philosophical and non-confessional organizations" in the Member States.⁹⁶ This declaration abolishes the death penalty⁹⁷ and drafts measures under ECT Article 100a (entitled "Approximation of Laws") which provides equal treatment for disabled citizens.⁹⁸

2) Part II - The Union and the Citizen

Part II addresses employment,⁹⁹ social policy,¹⁰⁰ environment,¹⁰¹ public health,¹⁰² consumer protection,¹⁰³ other Community policies,¹⁰⁴ subsidiarity,¹⁰⁵ transparency,¹⁰⁶ and quality of

92. *Id.*

93. TREATY OF AMSTERDAM, *supra* note 72, ch. 1 (amending ECT art. 2). The Treaty provides, in part: "The Community shall . . . promote . . . a high level of employment and social protection, equality between men and women, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States." *Id.* ECT art. 3 was also amended to read: "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women." *Id.* ECT art. 119 was amended to provide for positive measures benefitting women. *Id.*

94. *Id.* ch. 1 (adding new ECT art. 213b).

95. *Id.*

96. TREATY OF AMSTERDAM, ch. 1 ("Declaration to the Final Act Status of Churches and Non-Confessional Organizations").

97. *Id.* ch. 1 ("Declaration to the Final Act on the Abolition of the Death Penalty").

98. *Id.* ch. 1 ("Declaration to the Final Act Regarding Persons with a Disability").

99. *Id.* ch. 3.

100. TREATY OF AMSTERDAM, *supra* note 72, ch. 4. Chapter 4 provides for new Articles 117, 118, 118a, 118b, 118c, 119, 119a, and 120. Chapter 4 requires the Community to "support and complement the activities of the Member States" respecting, among other things: the improvement of working environment regarding workers' health and safety; working conditions; "information and consultation of workers"; "integration of persons excluded from the labour market, without prejudice to Article 127"; and "equality between men and women with regard to labour market opportunities and treatment at work." *Id.*

101. *Id.* ch. 5.

102. *Id.* ch. 6.

103. *Id.* ch. 7.

104. *Id.* ch. 8.

legislation.¹⁰⁷ A brief discussion of the last four topics follows.

a) Chapter 8 - Other Community Policies

The Treaty addresses concerns of Union citizens. It makes clear that although nationals of Member States are citizens of the Union, citizenship "of the Union shall complement and not replace national citizenship."¹⁰⁸ According to the Treaty, every Union citizen may write to any Community institution in one of the approved languages and expect an answer in the same language.¹⁰⁹

Citizens are to have the "highest possible level of knowledge for their peoples through wide access to education and its continuous updating."¹¹⁰ Cultural aspects are to be considered in Community action;¹¹¹ sports are now a consideration.¹¹² Measures are to be taken to counter fraud,¹¹³ strengthen customs cooperation,¹¹⁴ and to apply the Treaty to "outermost regions."¹¹⁵

Public services ("services of general economic interest") are to "operate on the basis of principles and conditions which enable them to fulfil [sic] their mission," such as equal treatment, and "quality and continuity of such services."¹¹⁶ There are new protocols addressing public service broadcasting, animal welfare,¹¹⁷ public credit, and volunteer work.¹¹⁸

b) Chapter 9 - Subsidiarity

The Treaty establishes a protocol on subsidiarity and proportionality.¹¹⁹ The thirteen-point protocol provides that each

105. TREATY OF AMSTERDAM, *supra* note 72, ch. 9.

106. *Id.* ch. 10.

107. *Id.* ch. 11.

108. *Id.* ch. 8 (amending ECT art. 8).

109. *Id.* (adding a new paragraph to ECT art. 8d).

110. TREATY OF AMSTERDAM, *supra* note 72, (adding a new paragraph to the ECT Preamble).

111. *Id.* (amending ECT art.128(4)).

112. *Id.* ch. 3 (Declarations, No. 29) (Declarations are annexed to the Act.).

113. *Id.* (amending ECT art. 209a).

114. *Id.* (adding ECT art. K.1).

115. TREATY OF AMSTERDAM, *supra* note 72 (amending ECT arts. 227(c) and 130a). *See also* "Declaration to the Final Act on the Overseas Countries and Territories."

116. *Id.* ch. 8 (adding new art. 7d).

117. *Id.* ch. 8, "Protocols to ECT."

118. *Id.* ch. 8, "Declaration to the Final Act on the Overseas Countries and Territories."

119. *Id.* ch. 9, "Protocol on the Application of the Principles of Subsidiarity and Proportionality and Declaration Relating to the Protocol on the Application of the Principles

institution "shall ensure that the principle of subsidiarity is complied with" and the principle of "proportionality," according to which any action by the Community shall not exceed what is necessary to achieve the objectives of the Treaty."¹²⁰ The protocol details the roles of the Court and other Community institutions,¹²¹ decisional standards,¹²² and remedies if no Community action is taken.¹²³

of Subsidiarity and Proportionality."

120. TREATY OF AMSTERDAM, *supra* note 72, ch. 9, "Protocol," para. 1.

121. *Id.* ch. 9, "Protocol," paras. 2, 3, 9, 10, 11, and 12.

122. *Id.* ch. 9, "Protocol," provides, in part:

4. For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying that it complies with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

5. For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

6. The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.

7. Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organization and working of Member States legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

Id. ch. 9, "Protocol," paras. 4-7. In paragraph 5, the Protocol provides that consideration should be given to whether:

[1] the issue under consideration has transnational aspects that cannot be satisfactorily regulated by action by Member States;

[2] actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;

[3] action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

Id. at para. 5

123. *Id.* ch. 9, "Protocol," also provides:

8. Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any

c) Chapter 10 - Transparency

"Transparency," the new Treaty explains, means that Union decisions "are taken as openly as possible" to the citizen.¹²⁴ Transparency is assured through a new Article 191a and an accompanying declaration.¹²⁵ New Article 191 provides that Union citizens have "a right of access to European Parliament, Council and Commission documents" subject to certain principles and conditions,¹²⁶ such as prior authorization of a Member State for disclosure of its documents.¹²⁷

d) Chapter 11 - Quality of Community Legislation

"The quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles."¹²⁸ In this regard, Parliament, Council, and the Commission "ought to: establish guidelines for improving the quality of the drafting of Community legislation and follow those guidelines"; and "make their best efforts to accelerate the codification of legislative texts."¹²⁹

*3) Part III - The Union's Institutions*¹³⁰

Part III addresses procedures applicable to the Union's institutions. Chapter 14 ("Parliament") provides that the "assent" procedure, requiring unanimity, applies to new Article Fa sanctions in the event of a serious breach of fundamental rights by a Member State, as well as to Article O accession, and the "conclusion of certain international agreements."¹³¹ Parliament's simplified "co-decision"¹³² procedure¹³³ applies to new Article 119 (equal

measure which could jeopardize the attainment of the objectives of the Treaty.

Id. at para. 8.

124. *Id.* ch. 10 (amending TEU para. 2, art. A).

125. TREATY OF AMSTERDAM, *supra* note 72 (adding ECT art. 191a).

126. *Id.* art. 191a(1), (2).

127. *Id.* art. 191a(1), "Declaration to the Final Act."

128. *Id.* ch. 11, "Declaration to the Final Act on the Quality of the Drafting of Community Legislation."

129. *Id.*

130. It is beyond the scope of this article to discuss Section III, "An Effective and Coherent External Policy."

131. TREATY OF AMSTERDAM, *supra* note 72, ch. 14.

132. The co-decision procedure is to be simplified by amendments to ECT, art. 189b.

treatment), Article 191a (transparency), and Article 6 (discrimination impermissible on grounds of nationality).¹³⁴ Membership in Parliament is capped at 700 members who must appropriately represent the citizenry.¹³⁵ Finally, Parliament is to “draw up a proposal for elections by direct universal suffrage”¹³⁶ and set conditions for the performance of representatives.¹³⁷

Chapters 15, 16, and 17 address the Council, the Commission, and the Court of Justice, respectively. Chapter 15 deals with the Council’s qualified majority voting and its organization and procedures.¹³⁸ Chapter 16 focuses on the appointment, composition, and reorganization of the Commission.¹³⁹ Chapter 17 expands the powers of the Court.¹⁴⁰ Significantly, the Court now will have jurisdiction under article F.2. (fundamental rights under the Convention) “with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty.”¹⁴¹

b. Comment

The Treaty makes great strides in many areas, particularly considering the need to keep “economic and monetary union” and “future enlargement” on course.¹⁴² Critics generally argue that the Treaty fails to:

(1) resolve key institutional issues of power-sharing and national vetoes, which already stymie EU decision-making in many instances,¹⁴³ such as the co-decision procedure;¹⁴⁴

Id. ch. 14.

133. *Id.* ch. 14 (amending ECT art. 189b). See also “Declaration to the Final Act on Respect For Time Limits Under Co-Decision Procedure.”

134. *Id.* ch. 14.

135. *Id.* (amending ECT arts. 137 and 138(2)).

136. TREATY OF AMSTERDAM, *supra* note 72 (amending ECT art. 138(3), subpara. 1).

137. *Id.* ch. 14 (adding ECT art. 138(4)).

138. *Id.* ch. 15.

139. *Id.* ch. 16.

140. *Id.* ch. 17 (amending TEU art. L).

141. TREATY OF AMSTERDAM, *supra* note 72. Section V of the Treaty adds general clauses to TEU and specific clauses to ETC. The general clauses encourage Member States wanting to cooperate together to use the Union’s institutions, as long as their cooperation is consistent with the objectives of the Union and considers the appropriate interests of other Member States. Section V, *Closer Cooperation - “Flexibility.”* Section VI addresses issues respecting simplification of the present complicated structure of many treaties. Section VI - *“Simplification and Consolidation of the Treaties.”*

142. Taoiseach Mr. Bertie Ahern, Statement to Dáil Éireann, *supra* note 86, at 2.

143. Tom Buerke, *Amsterdam Treaty Scorned as ‘Mediocre’*, INT’L HERALD TRIB, June 27, 1997, at 5, available in <<http://www.iht.com/IHT/TB/97/tb062797.html>>; EUROPEAN REPORT

(2) provide for the inclusion in the Union of former Warsaw Pact countries because it permits only five states to accede as new members in the near future;¹⁴⁵

(3) define the conditions for participation in the Schengen acquis [agreement on border control and checks] by, among others, Austria, the United Kingdom and Ireland;¹⁴⁶ and

(4) achieve a new numbering system for the treaties because some critics,¹⁴⁷ such as Austria and Sweden, argue that the new system could lead to confusion.¹⁴⁸

Certain matters must be resolved before the Treaty can be implemented. One is the execution of an inter-institutional agreement concerning the financing of the Common Foreign and Security Policy; another is the United Kingdom's refusal to participate in the Maastricht Treaty's Social Protocol.¹⁴⁹ Additionally, many guidelines and procedures for both external and internal matters must be drafted following execution of the Treaty.¹⁵⁰ Further, ratification by the Member States must occur. Despite the criticism and the necessary actions remaining, the Treaty reflects substantial progress toward a unified Europe and the hope is that resolution of these issues and ratification will occur soon.

3. *Post Amsterdam Council Activity*

A two-day Luxemborg European Council convened on December 12, 1997, a "European Conference" opened in London on March 12, 1998, and the "accession process" began on March 30, 1998 in Brussels. The Luxemborg Council started the "enlargement process," initiating a comprehensive study of the Union's development and its policies toward a "clear and coherent vision with which to take on the next century," as well as adopting a resolution on economic policy coordination.¹⁵¹

(Europe Info. Svc., July 16, 1997); and Tom Buerkle, *Hopefuls Lobby the EU*, INT'L HERALD TRIB., June 28, 1997 at 2, available in <<http://www.iht.com/IHT/TB/97/tb062897.html>>.

144. *Id.*

145. *Commission of the European Communities*, RAPID (Dec. 15, 1997).

146. ITAR TASS NEWS AGENCY (Mar. 12, 1998); DEUTSCHE PRESSE-AGENTUR (Mar. 11, 1998).

147. EUROPEAN REPORT (Europe Info. Svc., Mar. 11, 1998 and Jan. 7, 1998).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Commission of the European Communities*, RAPID (Dec. 15, 1997).

The European Conference of twenty-six European heads of state and government began the process of the Union's expansion to the East working under a mantra of "Fifteen plus ten and Cyprus": fifteen being the present number of Union Members; ten being the Eastern European countries of Poland, Hungary, the Czech Republic, Slovenia, Estonia, Bulgaria, Romania, Slovakia, Lithuania, and Latvia; and Cyprus.¹⁵² The objectives of the European Conference are to strengthen the fight against transnational organized crime, improve environmental protection and sustainable development, increase foreign and security policy cooperation, and improve economies and regional cooperation.¹⁵³ Turkey declined to participate in the London meeting.¹⁵⁴

Formal talks in Brussels regarding the applications for admission to the EU of the "ten and Cyprus," however, will begin with only six of the above-listed countries (Cyprus, Poland, Hungary, the Czech Republic, Slovenia, and Estonia). None of these countries are eligible to become members of the Union until 2003, at the earliest.¹⁵⁵ According to the Luxembourg European Council, the remaining members of the group may seek admission only after 2010.¹⁵⁶

D. Conclusion

The future of Europe is one of expansion — in the roles of each of the four main institutions of the Union, in the numbers of Member States, in number of matters dealt with at the level of the Union, and in the protection of individual rights. Assuming that the Member States ratify the Treaty of Amsterdam, the Union and its institutions will be defined more clearly, providing direction to the

152. ITAR TASS NEWS AGENCY (Mar. 12, 1998); DEUTSCHE PRESSE-AGENTUR (Mar. 11, 1998).

153. *See supra* note 147.

154. *Id.* Turkey initially applied for membership in 1959, but has been repeatedly denied admission to the Union, ostensibly because of economic and democratic shortcomings. Reginald Dale, *EU Needs to Make Up With Turkey*, INT'L HERALD TRIB., May 4, 1998. Recently, Turkey bristled when Cyprus was included in a list of potential Member States while a proposal for arbitrating their Aegean Sea dispute was still under consideration. John Barham & David Buchan, *Turkish Spectre at EU Enlargement Feast*, FIN. TIMES (USA ed., Mar. 12, 1998). Turkey threatens to annex the northern part of Cyprus that it has occupied since 1974, thus shattering the hope of a peaceful settlement of the dispute. *Id.* Other reasons for Turkish displeasure include the fact that former Warsaw Pact nations have been included in the list of serious candidates for membership, while Turkey, as a loyal member of NATO throughout the Cold War, has not. Dale, *supra*.

155. *Id.*

156. *Id.*

institutions from those within, and providing a clearer understanding of the institutions for those outside.

The strongest point made by the participants in the IGC and the European Councils was the necessity of respect for the individual, whether as a citizen of Europe, a citizen of a Member State, or an individual. Now, human rights are reflected by the Convention and other social protocols as fundamental principles of Community action. The Treaty expands the Court's jurisdiction to encompass cases based on the Convention, in areas such as immigration, asylum, visas, border crossings, and police and judicial cooperation in criminal matters.

If the Treaty is ratified, issues implicating fundamental rights will be resolved, such as the Court's enforcement powers and an enumeration of fundamental rights. Those issues dealing with the Court's jurisprudence, however, would remain unanswered awaiting their "day in court."

The Treaty of Amsterdam may not be ratified. Even if it is, critical unresolved issues of judicial interpretation remain. Therefore, understanding the current state of the law is important. The authors discuss the state of European law today in Parts II and III of this Article.

PART TWO: THE CONVENTION ON HUMAN RIGHTS AND OTHER DOCUMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

A. *Introduction*

A bill of rights will not secure fundamental human rights in the European Union. Nevertheless, the Amsterdam Treaty contains express protection of fundamental rights¹⁵⁷ that will be enforceable

157. TREATY OF AMSTERDAM, *supra* note 72. Two reasons are frequently offered to explain why the Union has no Constitution and no Bill of Rights protecting human rights: (1) the treaties were focused and limited to certain matters (e.g., the EEC Treaty focused on economic matters); and (2) the communities were originally viewed as organizations exercising only the powers delegated to them by the constituent Member States. CRAIG, *supra* note 4, at 284-85; DINNAGE, *supra* note 4, at 97-98. It may not have been foreseen that Community regulation could impinge on traditionally protected fundamental human rights, particularly such civil and political rights as freedom of speech, religion and association, or social security, housing, and health care. *Id.*

Interestingly, the United States Constitution of 1787 did not originally provide for protection of human rights. The Bill of Rights amendments were added in 1791 when it became clear that the powers of the federal government were much greater than originally contemplated by the Articles of Confederation of 1791. See APPENDIX TWO, "Amendments to the Constitution of the United States, 1791-1870." Other jurisdictions following English common law tradition, such as Australia and Canada, either have no provision or have added

by the Court of Justice ("Court").¹⁵⁸ One must recognize, however, that the Treaty has not yet been ratified. Even if it is, the Treaty sets no standards for the Court's enforcement. Unresolved, therefore, is the issue of how the Court should interpret the Convention.

Since 1969, the Court has protected those fundamental human rights enshrined in the general principles of Community law found in the common constitutional traditions of the Member States,¹⁵⁹ international agreements to which the Member States are parties,¹⁶⁰ and express provisions of Community legislation manifesting general fundamental principles of Community law.¹⁶¹ The Court's cases reflect judicial notice of the 1950 European Convention on Human Rights and Fundamental Freedoms,¹⁶² the European Social Charter, the Community's Social Charter,¹⁶³ Labor Conventions,¹⁶⁴ the written constitutions of the Member States, and other international covenants.¹⁶⁵

Section B of this Part examines fundamental rights documented in nonjudicial arenas such as the 1950 European Convention on

formal statements on human rights only recently. DINNAGE, *supra* note 4, at 97.

158. Former TEU Article F(2) was found in a section of the Treaty that the Court has no jurisdiction to enforce. *See supra* note 2, TEU art. L.

159. Case 29/69, *Stauder v. Ulm Sozialamt*, 1969 E.C.R. 419. *See also infra* note 381.

160. Case 4/73, *Nold, Kohlen-und Baustoffsgroßhandlung v. Commission*, 1974 E.C.R. 491. *See infra* notes 387-88 and accompanying text.

161. Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219. *See infra* note 391. The Court held that certain rights, found in Community legislation, limiting the powers of Member States to control aliens are:

specific manifestation of the more general principle, enshrined in Articles, 8, 9, 10 and 11 of the Convention on Human Rights and Fundamental Freedoms 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."

Id. para. 32.

162. *See* APPENDIX ONE for a copy of the relevant provisions of the Convention.

163. *See supra* note 15 and *infra* note 206 and accompanying text for discussion of the Social Charter. *See infra* notes 207-13 and accompanying text and APPENDIX TWO for relevant provisions of the European Social Charter.

164. The Court has also referred to other conventions and charters as sources of fundamental rights. A discussion of these instruments is beyond the scope of this article. One such instrument is Convention 111, International Labour Organization (June 25, 1958). Case 149/77, *DeFrenne v. Sabena*, 1978 E.C.R. 1365 (The Court found that prohibition of sex discrimination is recognized both as a fundamental right and as a tenet of the Labour Convention). *See also* *Horst v. Bundesknappschaft*, 1975 E.C.R. 823, 836 (The Court held that social security is an "internationally recognized principle . . . as set out in Art. 22(2) of International Labour Convention No. 48 on the Maintenance of Migrants' Pension Rights of 1935.").

165. *Id.*

Human Rights and Fundamental Freedoms, the European Social Charter, and the Community's Social Charter. Part II C briefly reviews the activity of the European Court of Human Rights ("ECtHR") that enforces the Convention. Part III examines the Court of Justice ("the Court") and its decisions in this area.

B. The Conventions and Charters

1. The 1950 European Convention on Human Rights and Fundamental Freedoms ("Convention")¹⁶⁶

Presently, the Convention is viewed as the world's most successful system of international law for the protection of human rights, as well as one of the most advanced forms of international legal process.¹⁶⁷ It differs from the United Nations' Universal Declaration of Human Rights in that the Convention provides for a means to enforce human rights through the rulings of the ECtHR.¹⁶⁸

The Convention is a declaration of the Council of Europe, and includes many more members than the European Union.¹⁶⁹ Nevertheless, all the Member States of the Union are signatories to

166. Convention, *supra* note 5. The Convention also allows states to suspend these freedoms during wartime and other emergencies. *Id.* art. 15.

A series of eight protocols provide for freedom from the death penalty, the right to education, the right to vote in free elections, and freedom of movement between states. See *First Article*, nn. 398-99, 401-02, e.g., Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U. N.T.S. 262; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, E.T.S. 46; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1988, E.T.S. 114; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Extending the List of Civil and Political Rights, Nov. 22, 1984, 24 I.L.M. 435.

167. JANIS, *supra* note 4, at 1.

168. "One of the first acts of the General Assembly of the United Nations was the adoption of the Declaration on December 10, 1948." BAINBRIDGE, *supra* note 4, at 275.

169. The Council of Europe was formed in 1949 through the execution of the Statute of the Council of Europe, declaring that the members were devoted to the spiritual and moral values that they shared. See ROBERTSON, *supra* note 4, at 2.

The following countries are members of the Council of Europe: Andorra, Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Jean M. Sera, *The Case For Accession By the European Union to the European Convention for the Protection of Human Rights*, 14 B.U. INT'L L.J. 151 n.15 (citing 1 YEARBOOK OF INTERNATIONAL ORGANIZATIONS 343 (32d ed. 1995-96)). Recently, Albania, Moldova, the Ukraine, Russia and Macedonia became members of the Council of Europe. *Id.* at 451. Thirty-two of the thirty-nine members of the Council of Europe have signed the Convention; seven have not (Albania, Ukraine, Estonia, Latvia, Moldova, Russia, and Macedonia). *Id.*

the Convention.¹⁷⁰ The Convention was signed in Rome on November 4, 1950 and became effective on September 3, 1953 after ratification by eight countries.¹⁷¹ The Convention, amended by additional protocols, now has sixty-six articles guaranteeing many rights. The authors discuss some of these in Part Two B.¹⁷² Three Union nations (Great Britain, Ireland, and Denmark) have not incorporated the Convention into their national law.¹⁷³

The Convention explicitly provides for many civil rights including:

- Article 2: the "right to life";¹⁷⁴
- Article 3: the "right to be free from torture or . . . inhuman or degrading treatment in punishment";¹⁷⁵
- Article 4: the "right to be free from slavery and compulsory labor";¹⁷⁶
- Article 5: the "right to liberty and security of person";¹⁷⁷
- Article 6: the right to a "fair and public hearing in a reasonable time by an independent and impartial tribunal established by law," to a presumption of innocence, and other related rights;¹⁷⁸
- Article 7: the right to not have a law applied *ex post facto*;¹⁷⁹
- Article 8: the right to respect for "private and family life, . . . home, and . . . correspondence";¹⁸⁰
- Article 9: the right to "freedom of thought, conscience, and religion";¹⁸¹
- Article 10: the "right to freedom of expression";¹⁸²
- Article 11: the right to freedoms "of peaceful assembly" and "association with others including the right to . . . join trade unions";¹⁸³
- Article 12: the "right to marry and found a family according to the

170. *Id.*

171. Denmark, Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom. JANIS, *supra* note 4, at 1.

172. *See generally* BAINBRIDGE, *supra* note 4, at 275-78.

173. JASPERS, *supra* note 4, at 2 n.5.

174. Convention, *supra* note 5, art. 2.

175. *Id.* art. 3.

176. *Id.* art. 4.

177. *Id.* art. 5.

178. *Id.* art. 6.

179. Convention, *supra* note 5, art. 7.

180. *Id.* art. 8.

181. *Id.* art. 9.

182. *Id.* art. 10.

183. *Id.* art. 11.

[relevant] national laws";¹⁸⁴

Article 13: the right to "an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity";¹⁸⁵ and

Article 14: the right to freedom from discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."¹⁸⁶

The Convention provides for a European Commission on Human Rights ("ECommHR")¹⁸⁷ and a court (the "ECtHR"),¹⁸⁸ both of which are based in Strasbourg, France. A signatory state may refer a claim that another signatory state has violated the Convention to the ECommHR.¹⁸⁹ An individual may bring a petition against a signatory state, provided that the state "recognizes the competence of the Commission to receive such petitions."¹⁹⁰ The domestic authority must bring complaints within six months of the final decision.

The ECommHR retains certain powers with respect to the petition. It will not investigate a petition submitted anonymously or that is "substantially the same" as one examined previously.¹⁹¹ It must deem a petition "inadmissible" if it is "incompatible with the provisions of the . . . Convention, manifestly ill-founded, or an abuse of the right of petition."¹⁹² It must reject a petition when

184. Convention, *supra* note 5, art. 12.

185. *Id.* art. 13.

186. *Id.* art. 14.

187. *Id.* arts. 19-37.

188. *Id.* arts. 38-56.

189. Convention, *supra* note 5, art. 24.

190. *Id.* art. 25. This, in turn, initiates the process by which the matter arrives at the EctHR:

The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

Id. art. 25. The Convention, unlike ECT art. 177, has no provision allowing invocation by individuals in lawsuits before domestic courts of Member States. JASPERS, *supra* note 4, at 2.

191. *Id.* art. 27(1).

192. *Id.* art. 27(2). See also art. 29.

there has been a failure to exhaust domestic remedies.¹⁹³

Should the ECommHR find merit in the petition, it has the same authority as each signatory state, to attempt to reach a "friendly settlement."¹⁹⁴ If such a settlement is reached, ECommHR prepares a report reflecting the facts and the settlement agreed, sending the report to the "states concerned, the Committee of Ministers, and the Secretary-General of the Council of Europe for publication."¹⁹⁵

If a settlement is not reached, the ECommHR prepares a report containing the facts and its opinion on whether the state has breached "its obligations under the Convention."¹⁹⁶ The ECommHR sends its report to the Committee of Ministers and instructs the concerned state that is not "at liberty to publish [the findings]."¹⁹⁷ If the ECommHR does not refer the matter to the ECtHR within three months of the date the report was sent to the Committee, the Committee decides by a two-thirds vote "whether there has been a violation of the Convention."¹⁹⁸

Only the ECommHR or the concerned signatory state may bring a case before the ECtHR.¹⁹⁹ The ECtHR may address a case after the ECommHR has "acknowledged" its failure to reach a "friendly settlement within the . . . three months."²⁰⁰ The jurisdiction of the ECtHR extends to cases concerning the "interpretation and application" of the Convention.²⁰¹ The judgments of the ECtHR are "final" and binding on the signatory states.²⁰² The Committee of Ministers enforces the judgments of the ECtHR.²⁰³ If the ECtHR finds that a state's decision conflicts with its obligations under the Convention, and that the internal laws of that state permit only "partial reparation," the ECtHR has the power to give just satisfaction to the injured party.²⁰⁴

193. *Id.* art. 27(3). *See also* art. 29.

194. *Id.* art. 28.

195. Convention, *supra* note 5, art. 30.

196. *Id.* art. 31.

197. *Id.*

198. *Id.* art. 32.

199. *Id.* arts. 44 and 48. New Protocol 9 of the Convention provides that individual complainants from states that have ratified the Protocol will also have a right of appeal to the ECtHR. BAINBRIDGE, *supra* note 4, at 277.

200. Convention, *supra* note 5, art. 47.

201. *Id.* art. 45.

202. *Id.* arts. 52-53.

203. *Id.* art. 54.

204. *Id.* art. 50.

2. *The European Social Charter*²⁰⁵

The Convention provides protection for human rights, while the European Social Charter ("Social Charter") provides protection for economic and social rights.²⁰⁶ In 1961, the Council of Europe adopted the Social Charter, which became effective at Turin in 1965.²⁰⁷

The Social Charter binds signatory states to accept at least five of seven fundamental rights: the "right to work"; the "right to organize"; the "right of collective bargaining"; the "right to social security"; the "right to social and medical assistance"; the "right to family benefits"; and the "right of migrant workers and their families to protection and assistance."²⁰⁸ Other rights provided for by the Social Charter address working conditions, special protection for young workers, and vocational training.²⁰⁹ For example, a 1988 protocol recognizes "equal opportunities and equal treatment," "information and consultation," "workers' involvement in questions of health and safety at the workplace," and "special care for the elderly."²¹⁰

Unlike the basic human rights protected by the Convention, rights under the Social Charter are not secured by written rules or enforced by judicial machinery.²¹¹ Consequently, the Social Charter provides no rights to the individual. It depends upon a system of voluntary compliance.²¹² The Convention, however, provides rights

205. European Social Charter, *supra* note 15.

206. See BAINBRIDGE, *supra* note 4, at 224-26. For a discussion of the Community's Social Charter ("Charter on the Fundamental Social Rights of Workers") and the Social Chapter of TEU, that gives this Charter a legal basis, see APPENDIX TWO.

207. BAINBRIDGE, *supra* note 4, at 224. The Social Charter contains thirty-eight articles, an appendix, and two protocols. *Id.*

208. *Id.* at 224-25.

209. *Id.* at 225.

210. *Id.*

211. *Id.*

212. BAINBRIDGE, *supra* note 4, at 225. The Charter is "monitored" by a Committee of Experts. *Id.* The Committee has a maximum of seven members appointed for six-year terms by the Committee of Ministers of the Council of Europe. *Id.* The signatory states submit to this Committee biennial reports that are combined with the Committee's conclusions; these are submitted to a subcommittee of the Council of Europe's Governmental Social Committee and finally to the Committee of Ministers. *Id.* The Parliamentary Assembly may also comment on the conclusions of the Committee of Experts. *Id.* The Committee of Ministers may decide, by a two-thirds majority, to make recommendations to a signatory state deemed to have failed to fulfill its obligations under the Social Charter. *Id.* Lacking a judicial enforcement mechanism, this recommendatory system is severely weakened. *Id.*

that an individual may invoke in certain cases. Therefore, the Convention is more effective than the Social Charter.²¹³

3. *The European Community's Social Charter, or The Charter on the Fundamental Social Rights of Workers ("EU Social Charter")*

The European Council and all Member States (except the United Kingdom and Northern Ireland) adopted the European Community's Social Charter, also known as "The Charter on the Fundamental Social Rights of Workers" ("EU Social Charter") in December 1989.²¹⁵ The Social Chapter of the Maastricht Treaty provides a legal basis for the EU Social Charter.²¹⁶ Although the United Kingdom and Northern Ireland refused to execute the Social Chapter, the United Kingdom has implemented a majority of the proposals under its own "Social Action Programme." Moreover, the United Kingdom has submitted annual reports to the Union detailing its activities in the areas of social and employment rights. Other Member States have completed similar reports.²¹⁷

4. *Conclusion*

In summary, fundamental rights will now be secured at the level of the European Union by virtue of the Treaty of Amsterdam, if ratified. Since 1969, the Court of Justice, has protected fundamental human rights enshrined in international agreements to which the Member States are parties. These agreements include the Convention, the Social Charter, and the EU Social Charter. The following section briefly reviews the activity of the ECtHR (the court that enforces the Convention). Part Three examines the Court of Justice and its decisions in this area.

C. *The European Court of Human Rights ("ECtHR")*

This section reviews the ECtHR's decisions and the standards

213. JASPER, *supra* note 4, at 2.

215. TILLOTSON, *supra*, note 4, at 98.

216. See Protocol on Social Policy and Agreement on Social Policy concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain, Northern Ireland, and Scotland. In those documents, signatory Member States acknowledge a desire to continue along the path laid down in the 1989 Social Charter. TEU, *supra* note 2.

217. See BAINBRIDGE, *supra* note 4, at 224-26.

used in reaching those decisions. Due to the breadth of this Article, however, the ECtHR's decisions discussed here have been limited to cases arising under Articles 6, 8, 10, and 14. The reader should note that the ECtHR views the rights enumerated under the Convention as distinct from one another.²¹⁸ Furthermore, the court interprets these rights in light of tradition.²¹⁹

1. *Article 6: in both civil and criminal contexts, the "right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*

The ECtHR recognizes that both individuals and business entities have due process rights in criminal matters. Criminal defendants have a right to remain silent and a right to legal assistance. Parties generally have a right to a public trial within a reasonable time. The due process rights afforded business entities charged with criminal conduct permits imposition of criminal penalties only after a tribunal with full jurisdiction and decision-making ability hears the case.²²⁰

The rights of an accused under Article 6(1) include the privilege against self-incrimination and the right to legal representation. The privilege against self-incrimination (the right to remain silent)²²¹ does not include the right to be free from any adverse inferences arising from silence.²²² The privilege is infringed when a prosecutor in a criminal trial uses statements obtained from the defendant

218. For example, protection of family under Article 8 is separate from the right under Article 12 of persons of opposite sexes to be united in a legally-recognized union. *Cossey v. United Kingdom*, 13 Eur. Ct. H.R. (ser. A) at 622 (1991).

219. *Id.* (Transsexual's right (as a person of a new gender) to marry was not covered by Article 12 because the traditional concept of marriage in the Member States did not support that interpretation.) *Id.* at para. 46.

220. *Société Stenuit v. France*, 14 Eur. Ct. H.R. (ser. A) at 509 para. 72 (1992) (The ECommHR held that the French government breached Article 6's impartiality provisions when the French administrative agency with jurisdiction over matters of competition acted as both prosecutor and judge. Procedurally, the ECtHR failed to issue a formal opinion because the French Government elected to withdraw.)

221. *Case A/296-A, Funke v. France* [1993] 1 C.M.L.R. (ser. A) at 897 (1990) (Three French customs agents in Strasbourg searched Funke's home pursuant to information provided by French tax authorities. When the agents demanded Funke's foreign bank account statements for the preceding three years, he refused. French customs authorities brought criminal proceedings against Funke, compelling him to pay a daily fine until he relinquished the documents. The ECtHR held that the French authorities violated Funke's Article 6 privilege against self-incrimination.)

222. *Murray v. United Kingdom*, 22 Eur. Ct. H.R. at 29 (1996).

during an earlier administrative investigation²²³ when governmental authorities exercised "inquisitorial powers given them by law."²²⁴ Also, the right to legal representation²²⁵ in a criminal proceeding is triggered when the deprivation of liberty is imminent.²²⁶

The right to a public trial by a competent tribunal exists, even with regard to professional disciplinary hearings.²²⁷ The significance of the right to a public trial is that one cannot be fined pursuant to a summary proceeding without a hearing or the presence of witnesses or after a summary investigation based entirely on a written report.²²⁸ When a party challenges the impartiality of a national court, Article 6(1) requires that court to determine its own impartiality.²²⁹ Finally, situations may arise when the public nature of the trial must be limited, as when the matter involves professional secrecy or privacy issues affecting the defendant or others.²³⁰

A trial within a "reasonable time" is a function of the circumstances surrounding any delay in legal proceedings. Such circumstances must be articulated to the court and the delay justified.²³¹ In a criminal context, fifteen or sixteen years is too long

223. *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. at 313 (1997) (State violated Saunders' right against self-incrimination by passing to the police transcripts and documents obtained as a result of a Department of Trade and Industry interview in connection with an investigation of illegal stock support plan. The police later used these documents in a criminal prosecution against Saunders.).

224. *Id.* (Walsh, J., concurring). Judge Walsh's opinion sets out a most interesting review of the right against self-incrimination in Europe.

225. *Murray*, *supra* note 222, para. 70.

226. *Id.* at paras. 73-74.

227. *LeCompte v. Belgium*, 4 Eur. Ct. H.R. (ser. A) at paras. 59-61 (1982) (Le Compte was suspended from the practice of medicine because he had given an interview to a newspaper, an act amounting to advertising. He refused to comply with the suspension order. A criminal court found him guilty, imposing a fine and sentencing him to imprisonment. The ECtHR found the lower court incompetent to determine whether such advertising violated principles of professionalism in the practice of medicine.).

228. *Weber v. Switzerland*, 12 Eur. Ct. H.R. (ser. A) at 508 (1990) (A journalist was fined in a summary proceeding without a hearing or witnesses because he disclosed the existence of a confidential judicial investigation to which he was a party during a press conference.).

229. *Remli v. France*, 22 Eur. Ct. H.R. at 253 (1996) (A French national of Algerian origin was charged with killing a prison guard during an attempted escape. The trial court refused to take formal note of a racist remark that Remli claimed was made by a juror.).

230. *Id.*

231. *Mitap and Muftuoglu v. Turkey*, 22 Eur. Ct. H.R. at para. 36 (1996) (Right to a timely trial was violated in the case of Turkish citizens (alleged terrorists) arrested in January 1981, found guilty in July 1989, and released in 1995.). On the matter of damages as compensation for detention, *see Georgiadis v. Greece*, 24 Eur. Ct. H.R. 606 (1997) (Jehovah's Witness minister was detained by the government pending trial for refusal to serve in the

for resolution of a criminal case;²³² in a civil context, seven years is too long to process governmental benefits for victims of the human immunodeficiency virus ("HIV").²³³ Yet, regardless of the delay, no right is infringed unless the right is asserted in a timely fashion.²³⁴

Article 6 also protects the right of access to courts in civil matters. Member States, however, may limit access to courts through statutes of limitations "in a manner that does not impair the right so long as the statutes pursue a legitimate aim, and imposes a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."²³⁵

military. After his acquittal, he claimed compensation for the period of his detention under the Code of Criminal Procedure, but the claim was denied. The ECtHR held that the government violated the minister's *civil* rights, even though the alleged violation of military law was tried in criminal court. *Id.* paras. 37-42. The court also held that the government violated Article 6(1) of the Convention because the military court refused to admit testimony on the issue of compensation. *Id.* at para. 55.)

232. *Id.* at paras. 34-37 (15 years' detention); Ferrantelli and Santangelo v. Italy, 23 Eur. Ct. H.R. at paras. 42-43 (1997).

233. *A and Others v. Denmark*, 22 Eur. Ct. H.R. at 458 (1996) (Complainants claimed their rights under Article 6(1) were violated because the government unreasonably delayed in establishing a statutory compensation scheme for persons receiving blood contaminated with the human immunodeficiency virus ("HIV") in the early 1980's. This delay continued for more than seven years. During this delay, some of the infected individuals died of AIDS. The ECtHR held that administrative and judicial authorities were "under a positive obligation to act with exceptional diligence and in failing to do so of their own volition, those authorities failed to act with exceptional diligence.") *Id.* at para. 81..

See also X v. France, 14 Eur. Ct. H.R. (ser. B) at 483 (1992) (Article 10 was violated because an administrative court has an obligation to conduct an inquiry into the liability of the state as soon as an HIV victim's case is referred to it. After instructing the responsible minister to produce a defense, if the minister fails act in a timely manner, the court will render judgement without hearing the state's argument). *Id.*

234. *Hamer v. France*, 23 Eur. Ct. H.R. 1 at para. 78 (1997) (Norgaard, J., dissenting).

235. *See Hornsby v. Greece*, 24 Eur. Ct. H.R. 250 (1997) In 1984, United Kingdom citizens who were English-language teachers ("applicants") petitioned the Greek government for permission to establish a private English-language school on the island of Rhodes where they resided. Greek authorities refused, relying on a law that granted the right to petition the government exclusively to Greek nationals. In 1988, the Court of Justice held that the law discriminated against foreign nationals. *Id.* at para. 9. Applicants reapplied, but were refused. This second refusal was later reversed by the appellate administrative court. A third application received no response from the government. The same appellate court held that this refusal was also unlawful, but refused to award damages. A presidential decree recognized the right of Community nationals to establish private non-Greek-language schools in Greece, but mandated that students attending such schools must either obtain a Greek "school-leaving certificate" (similar to an American high school diploma) or receive a passing score on an examination in Greek language and history. The ECtHR held that this requirement violated Article 6(1) because the applicants did not have the "benefit of effective judicial protection." *Id.* at paras. 57-60; *See also Stubbings and Others v. United Kingdom*, 23 Eur. Ct. H.R. at para. 48 (1997) Applicants' damage claims for childhood sexual abuse were barred by the statute of limitations (claims brought six years after the applicants attained age 18). The Court found no violation under Article 6 (access to court), Article 8

2. *Article 8: the right to respect for private and family life, home, and correspondence*

Questions under Article 8 often involve what constitutes a "home,"²³⁶ private life,²³⁷ family,²³⁸ and whether governmental interference is justified. In determining whether any governmental interference is justified, the ECtHR's analysis usually follows a three-part test: (1) whether the interference is in accordance with the law (promoting a legitimate governmental aim, such as the protection of others or the environment); (2) whether the interference is necessary in a democratic society (mandatory minimal protection of citizens); and (3) whether the interference with the individual's right is not otherwise disproportionate to the legitimate aim pursued?²³⁹ In analyzing "proportionality," the ECtHR inquires whether the scope of the search is limited and consistent with requirements serving the public interest.²⁴⁰

The ECtHR has held that Article 8 applies to the search of a law firm, the search of a business located in a home, and wiretaps. In *Niemietz v. Germany*,²⁴¹ the ECtHR ruled that the notion of "private life" includes the "right to establish and develop relationships with other human beings" and should not exclude "activities of a professional or business nature."²⁴² Thus, the search of a lawyer's office during the course of a criminal proceeding

(interference with private lives) or Article 14 (discrimination) *Id. at paras. 50, 55, 65, and 73.*

236. *Niemietz v. Germany*, 16 Eur. Ct. H.R. 97 (ser. A) at 236 (1993).

237. *Stubbings and Others*, *supra* note 235.

238. *See X, Y, and Z v. United Kingdom*, 24 Eur.Ct.H.R. 143 (1997) (X, a female to male transsexual, lived as Y's partner in a relationship that began in 1979. Y conceived a child by artificial insemination. The state did not permit X to register as Z's "father," although nontranssexual males were granted this permission. The ECtHR held that Article 8 was not violated because the refusal to permit registration did not "amount to a failure to respect family life within the meaning of the article." *Id.* at para. 52. *See also Cossey*, *supra* note 218.

239. *Buckley v. United Kingdom*, 23 Eur. Ct. H.R. at 101 (1997) Buckley, a gypsy, was denied governmental permission to live in gypsy caravans on her own land. She was instructed to remove the caravans, but refused. Buckley was prosecuted under the Town and Country Planning Act of 1990. Upon appeal to the ECtHR, the court found that the state did not violate Buckley's rights under Article 8. The ECtHR held that the legislation furthered preservation of the environment and public health. Therefore, the interference with Buckley's "home" was a legitimate state action. *Id.* at paras. 60-63. The interests of the community outweighed Buckley's right to respect for her "home" because the governmental interference did not otherwise disproportionately impact Buckley. *Id.* at para. 84.

240. *Funke*, *supra* note 221, at Decision, para. II.

241. *Niemietz*, *supra* note 236.

242. *Id.* at para. 29.

against a third party interfered with the applicant's rights under Article 8.²⁴³ In *Chappell v. United Kingdom*,²⁴⁴ the ECtHR held Article 8 applicable to a situation in which a police search warrant for obscene materials was executed simultaneously with a civil injunction against business activities in Chappell's home. Although the searches were conducted with Chappell's consent, the procedures used were found to be disproportionate.²⁴⁵

Wiretaps on business and private lines were addressed in *Huvig v. France*²⁴⁶ in which the ECtHR found Article 8 violated. In *Huvig*, the court determined that the French law did not "indicate with reasonable clarity the scope and manner of exercise of" the discretion of the authorities to wiretap so that the Huvigs "did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society."²⁴⁷

3. *Article 9: the right to freedom of thought, conscience, and religion*

The government is prohibited from imposing its religious convictions to restrict the activities of faiths outside the orthodox church by relying on a legal formality.²⁴⁸ That conviction directly affects the applicants' freedom of religion and cannot be viewed as proportionate to the legitimate aim pursued or necessary in a

243. *Id.*

244. *Chappell v. United Kingdom*, 12 Eur. Ct. H.R. (ser. A) at 1 (1990).

245. *Id.* Chappell argued that the simultaneous execution of a police search warrant for obscene materials and an "Anton Pillar order" violated Article 8. An "Anton Pillar order" is an ex parte injunction designed to preserve trial evidence in the possession of the defendant. *Id.* at para. 11. This order was executed against Chappell to preserve copyrighted documents that Chappell allegedly copied illegally. *Id.* at para. 9. The ECtHR held that the procedural problems inherent in the case "were not so serious that the execution of the order can, in the circumstances of the case, be regarded as disproportionate to the legitimate aim pursued." *Id.* at para. 66.

246. *Huvig v. France*, 12 Eur. Ct. H.R. (ser. A) at 528 (1990). The Huvigs were suspected of tax evasion through use of forged invoices. During the judicial investigation, the judge authorized wiretaps on the Huvigs' personal and business telephones. The ECtHR held that the French system failed to provide "adequate safeguards against various punishable abuses" because it did not enumerate clear conditions under which wiretapping was permissible. *Id.* at para. 17.

247. *Id.* at para. 35.

248. *Manoussakis and Others v. Green*, 23 Eur. Ct. H.R. at 357 (1997). (Jehovah Witnesses were prosecuted for operating a place of worship without first obtaining authorization from the Bishop and the Minister of Education. Caselaw established the Bishop's authority as purely consultative and the minister's power as limited. *Id.* at para. 47. The ECtHR held that the Minister's failure to grant or deny the Jehovah's Witnesses' request violated Article 9. *Id.* at paras. 51-53.

democratic society.²⁴⁹

4. Article 10: the right to freedom of expression

The freedom of expression has been addressed in cases, among others, challenging monopolies on broadcasting, injunctions on publications, professional advertising, and Community workplace restrictions. The Court utilizes a three-part test to analyze compliance with Article 10(2): (1) whether the interference with the freedom of expression is prescribed by law; (2) whether the interference pursues a legitimate aim; and (3) whether the interference is necessary in a democratic society.²⁵⁰ A residual "margin of appreciation" is left to the discretion of national authorities and courts, especially in the arena of commercial speech.²⁵¹

Although Article 10 permits licensing of radio, television, and cinemas, the ECtHR held in *Informationsweerein Lentia v. Austria*²⁵² that Article 10 does not permit public monopolies unless the public monopoly is justified by a pressing need that does not include protection of the state's revenues in advertising.²⁵³ The rationale for the Article's exception to the general rule is that less restrictive means are available to monitor programming content and use of frequencies and channels.²⁵⁴ In addition, a private commercial company has a right to receive television programs by means of satellite without consent of the broadcasting nation.²⁵⁵

Injunctions against newspapers and magazines have been upheld, usually in a commercial speech context, when they serve a legitimate governmental interest, are necessary in a democratic

249. *Id.* at para. 53.

250. *Goodwin v. United Kingdom*, 22 Eur. Ct. H.R. at 123 (1996).

251. *Markt Intern and Beermann v. Germany*, 12 Eur. Ct. H.R. (ser. A) at 161 (1990) (A publishing company and one of its editors argued that the application of an unfair competition act to suppress statements published about the commercial practices of a "mail order shop" violated Article 10. The ECtHR held that the state's "prohibition of the reproduction of the statements in the publication" on grounds of unfair competition violated Article 10 and was not "necessary in a democratic society."). *Id.*

252. *Informationsweerein Lentia v. Austria*, 17 Eur. Ct. H.R. (ser. A) at 93 (1994). The ECtHR held that Article 10 was violated when applicants were denied radio and television broadcasting licenses by the national authority, which held the public licensing monopoly, that merely sought to protect advertising revenues. *Id.*

253. *Id.* at paras. 39-41.

254. *Id.*

255. *Autronic AG v. Switzerland*, 12 Eur. Ct. H.R. (ser. A) at 485 (1990).

society, and are not disproportionately applied to the individual.²⁵⁶ When the governmental interest sufficiently weakens, however, a restraint on free speech is not permitted.²⁵⁷

Under Article 10, persons have the right to criticize politicians²⁵⁸ and the military.²⁵⁹ The ECtHR reasons that interference with free speech in these areas is disproportionate to the government's legitimate aim. Also, Article 10 protects the right to disclose that one is the subject of confidential judicial investigation (imposition of a fine on a journalist for such disclosure violated Article 10 as not being necessary in a democratic society).²⁶⁰

On the other hand, when an individual defames a judge in a periodical, without a sufficient factual basis, so that the remarks are unnecessarily prejudicial or not made in good faith, and a defamation suit is won by the judge, Article 10 is not violated.²⁶¹ Moreover, Article 10 does not require the disclosure of sources unless the necessity for the disclosure is "convincingly established"

256. See also *De Haes and Gijssels v. Belgium*, 25 Eur. Ct. H.R. 1 (1997). Applicants wrote and published articles denouncing four Belgian judges for displaying bias in cases brought before them. The judges succeeded in an action for defamation. The ECtHR found a breach of Article 10 and Article 6(1) because the judgment interfered with the applicants' freedom of expression. Applicants were awarded damages of over a million Belgian francs plus interest. *Id.* at paras. 66 and 86; *Jacobowski v. Germany*, 19 Eur. Ct. H.R. at 64 (1995). After being dismissed from a news agency, an employee who sent articles criticizing his former employer was enjoined from making further mailings. The ECtHR found no violation of Article 10 because the interference by the state was not disproportionately burdensome to the employee because he could have expressed his opinion in other ways. Moreover, the Court held that the state did not exceed its "margin of appreciation" in determining what was necessary to protect commercial entities from unfair competition. *Id.* at paras. 26-29.

257. *The Observer and the Guardian v. United Kingdom*, 14 Eur. Ct. H.R. (ser. A) (1991). British newspapers were enjoined from publishing excerpts of the banned novel, *Spycatcher*, containing details about British intelligence operations. *Spycatcher* had already been published in the United States, but was not available in the United Kingdom. The ECtHR found an Article 10 violation because once the book was published in the United States, the British injunction was rendered unnecessary. *Id.* at para. 70. *Accord Sunday Times v. United Kingdom*, 14 Eur. Ct. H.R. (ser. A) at 14 (1991).

258. *Lingens v. Austria*, 8 Eur. Ct. H.R. (ser. A) at para. 42 (1986). Magazine publisher printed articles accusing the Austrian Chancellor of protecting former Nazis. The Chancellor filed an action and the publisher was found liable for defamation. The court required the publisher to publish the judgment against it in his magazine. The ECtHR held that Article 10 was violated. *Id.* at para. 47.

259. *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, 20 Eur. Ct. H.R. (ser. A) at 56 (1994). Distribution of magazines to Austrian soldiers containing criticisms of military life was prohibited. The court found Article 10 violated although the interference was authorized by law and promulgated a legitimate state aim of preserving order in the military, the interference was not necessary in a democratic society, and thus, was disproportionately burdensome. *Id.*

260. *Weber*, *supra* note 228.

261. *Prager and Oberschlick v. Austria*, 21 Eur. Ct. H.R. (ser. A) (1996).

to be in the public's interest.²⁶²

Although Article 10 generally protects a professional's right to debate, protection of professional advertising is reserved to the Member States. Article 10 protects a professional's contribution to the public debate through criticism, even though the contribution may have an incidental effect upon professional advertising.²⁶³ Conversely, professional advertising is within the "margin of appreciation" left to competent national authorities when they reasonably consider the restrictions necessary at the time, and when the restrictions are not "disproportionate to the legitimate aims of protecting patient's health" and the "rights of others," such as physicians.²⁶⁴

Finally, Article 10 generally upholds community workplace restrictions. A requirement that state civil servants uphold the free democratic system as a condition of employment does not violate Article 10.²⁶⁵

5. *Article 11: the right to freedom of peaceful assembly and association*

The right to participate in a peaceful assembly and freedom of association are protected; however, these rights are balanced against other legitimate interests. For example, when a trade union boycotts an individual, the lack of state protection does not violate the right to peaceful enjoyment of possessions under Article 1 of the Convention's Protocol 1²⁶⁶ or the right to freedom of association

262. *Goodwin*, *supra* note 250.

263. *Barthold v. Germany*, 7 Eur. Ct. H.R. (ser. A) at 383 (1985) (Veterinary surgeon criticized Hamburg's failure to perform emergency services at night in a newspaper interview. The ECtHR held that because the surgeon's comments contributed to the public debate, the comments were protected by Article 10.).

264. *Colman v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 39-40 (1994) (Professional advertising by doctors may be regulated); *see also* *Casado Coca v. Spain*, 18 Eur. Ct. H.R. (ser. A) at 1 (1994) (Injunction on lawyer advertising upheld).

265. *Kosiek v. Germany*, 9 Eur. Ct. H.R. (ser. A) (1987) (Kosiek was dismissed from his probationary civil service post because he was a member of a banned political party that advocated extreme nationalism, racism, and abolishment of human rights. The ECtHR held that the state's interest in regulating unsanctioned political activities outweighed Kosiek's job performance.).

266. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Paris, March 20, 1952, effective May 15, 1954, 1955 U.N.T.S. 260 (no. 2889) ("Protocol"). The Protocol provides, 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

under Article 11.²⁶⁷

6. *Article 14: the right to freedom from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*

Article 14 "complements the other substantive provisions of the Convention and the Protocols."²⁶⁸ When the award of emergency assistance is linked to the payment of contributions to the unemployment insurance fund, Article 14 applies²⁶⁹ in conjunction with Article 1 of Protocol 1.²⁷⁰

The ECtHR interprets Article 14 by inquiring: (1) is the treatment different; and, if so, (2) can it be objectively or reasonably justified?²⁷¹ To constitute discrimination, the difference in treatment must either fail to pursue a legitimate aim or have no reasonable relationship between the means and the aim.²⁷²

D. Conclusion

The ECtHR's decision and the standards used in reaching those decisions reflect the purpose of the Convention. The ECtHR generally uses a balancing test to weigh the government's need for the measure against the interests of the individual.

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.

Id.

267. *Gustafsson v. Sweden*, 22 Eur. Ct. H.R. at 409 (1996). The legitimacy of collective bargaining was validated in international documents, such as Article 6 of the European Social Charter, Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and Conventions Nos. 87 and 98 of the International Labour Organization. *Id.* at 53.

268. *Gaygusuz v. Austria*, 23 Eur. Ct. H.R. at para. 36 (1997) (Turkish applicant was deprived of his Article 14 rights on the basis of his nationality when he was denied emergency payments, even though he had made payments into the Austrian unemployment compensation fund.).

269. *Id.* at paras. 33, 41.

270. Protocol, *supra* note 266.

271. *Gaygusuz*, *supra* note 268, at para. 42. *See also* *Schmidt v. Germany*, 18 Eur. Ct. H.R. (ser. A) (1994) (Male lodged challenge, under Article 14, against German law requiring all males to either serve in the fire brigade or pay a compensatory levy. Since brigades are composed of both male and female volunteers, the ECtHR held that only imposing the nonservice levy on males amounted to sex discrimination.).

272. *Id.* at paras. 42, 51.

The ECtHR has recognized that, under Article 6, business entities have due process rights in criminal contexts, criminal defendants have a right to remain silent and a right to legal assistance, and parties generally have a right to a public trial within a reasonable time. Although the right of access to courts in civil matters is also protected by Article 6, signatory states may limit the access through statutes of limitations in a way that does not impair the right, pursues a legitimate aim, and imposes a reasonable "relationship of proportionality between the means employed and the aim sought to be achieved."²⁷³

Questions under Article 8 often involve what constitutes a "home," a "private life," a "family," and whether the governmental interference is justified. The ECtHR's analysis usually follows a three-part test: (1) whether the interference accords with the law (does it promote a legitimate governmental aim, such as the protection of others or the environment?); (2) whether the interference is necessary in a democratic society (are citizens minimally protected?); and (3) whether the interference with the individual's right is not otherwise disproportionate to the legitimate aim pursued. In analyzing proportionality, the ECtHR asks whether the scope of the interference is limited and consistent with the public interest.

Article 10's freedom of expression has been addressed in cases challenging monopolies in broadcasting, injunctions against publications, professional advertising, and Community workplace restrictions. The Court uses a three-part test in analyzing compliance with Article 10(2): (1) is the interference with the freedom of expression prescribed by law; (2) does it further a legitimate government aim; and (3) is it necessary in democratic society? A "margin of appreciation" is left for the national authorities and courts, especially in the area of commercial speech. Freedom of debate on politics, military life, and aspects of one's profession is also protected. On the other hand, judges are protected from defamatory remarks and the identity of a journalist's sources are protected from *ex parte* injunctions. Also, Community workplace restrictions are generally upheld.

Rights to freedom of peaceful assembly and association under Article 11 are protected, but balanced against other legitimate interests. Article 14 also protects the right to be free from discrimination on the basis of sex, race, color, language, religion,

273. Convention, *supra* note 5, art. 6.

political or other opinion, national or social origin, association with a national minority, property, birth, or other status. The ECtHR asks whether there is different treatment; and, if so, can it be objectively or reasonably justified by demonstrating a reasonable relationship of proportionality between the means employed and the aim sought to be realized? What will be seen is that when the Court of Justice interprets some of the above articles, it may arrive at a different result.

PART THREE: JUDICIAL REALM: THE EUROPEAN COURT OF JUSTICE:
JURISDICTION AND JUDICIAL REVIEW

A. *Jurisdiction*²⁷⁴

The Court of Justice functions in ways that are similar to other supreme courts, but has greater jurisdiction. Its responsibility is to "ensure that in the interpretation and application of this Treaty [of Amsterdam] the law is observed."²⁷⁵ The scope of the Court's jurisdiction includes:

(1) jurisdiction over cases brought by the Commission against a Member State for an alleged failure to fulfill an obligation under the Treaty;²⁷⁶

(2) jurisdiction over cases brought by a Member State against another Member State for an alleged failure to fulfill an obligation under the Treaty;²⁷⁷

(3) the power to require any Member State to "take the necessary measures to comply with the judgment of the Court of Justice"²⁷⁸ and to require such State to pay a penalty;²⁷⁹

(4) jurisdiction to review the legality of acts adopted by the institutions of the European Union in which the proceedings are brought by individuals who are the subject of an institution's acts, or are directly affected by such acts.²⁸⁰ If the

274. See *First Article*, *supra* note 1, at 967-72.

275. See *supra* note 2, ECT art. 164.

276. *Id.* art. 169.

277. *Id.* art. 170.

278. *Id.* art. 171(1)-(2) The article 171 procedure applies without prejudice to art. 170. *Id.*

279. See *infra* Section B.1.(b) of Part III for a discussion of "direct effect."

280. See *supra* note 2, ECT art. 173. Member States, the Council, or the Commission may bring actions under article 173.1 to challenge regulations and other general acts of the Community. *Id.* See also *supra* note 2, ECT art. 177, setting out a procedure for national courts to apply to the Court for preliminary rulings on questions concerning the validity or interpretation of a Community Act if the Act becomes an issue raised in the national court.

Court finds that an act or regulation is not legal, it has the power to declare such act or regulation void;²⁸¹

(5) besides jurisdiction to hear actions alleging that the European Parliament, the Council, or the Commission has unlawfully failed to act, but also the power to require any or all of the institutions to take the necessary measures to comply with the judgment of the Court;²⁸²

(6) the power to deliver legally binding preliminary rulings on questions that have been referred by courts or tribunals in Member States, i.e., "preliminary references," on issues concerning: (a) the interpretation of the Treaty; (b) the validity and interpretation of acts of the community's institutions; (c) the interpretation of the rules of bodies established by the Council; and (d) advisory opinions on the legality of conventions that the Community intends to conclude with Member States or other international organizations;²⁸³

(7) jurisdiction in disputes relating to compensation for damages respecting noncontractual liability²⁸⁴ along with matters between the Community and its servants within the

If an act is of direct or individual concern to a natural or legal person, the Court has review powers under article 173.2. Case 294/83, *Partie Écologiste "Les Verts" v. European Parliament*, 1986 E.C.R. 1339. In this case, the Court held:

What is in fact required is the following: (a) when the institution adopted the contested measure, it must have been aware of the identity of the applicant and there must have been a connection between that knowledge and the measure (citation omitted); (b) also at the time when the measure was adopted, the applicant's situation must have been "definitively determined"; (Case 232/81, *Agricola Commerciale Olio v. E.C. Commission*, 1984 E.C.R. 3881); and (c) the applicant must demonstrate the existence of special circumstances that have caused the institution to regulate the applicant's position in a way different from that of all other persons concerned.

Id. (citations omitted). The Court held that under Article 173(2), European Parliament measures regarding the conduct of elections were "of direct and individual concern to the applicant" political party as producing legal effects vis-à-vis third parties.

But see Case 78/85, *Group of the European Right v. European Parliament*, 1986 E.C.R. 1753. (Parliament's committee of inquiry into the rise of fascism and racism in Europe, inside and outside the Community, held not improper because the committee was set up in accordance with Rule 95 of the Parliament's Rules of Procedure and did not constitute an act intending to produce legal effects vis-à-vis third parties.)

281. *See supra* note 2, ECT arts. 173-174.

282. *Id.* arts. 175-176.

283. *Id.* art. 177. "Mandatory reference" to the Court must occur when a question raised in a case pending before a court or tribunal of a Member State has no judicial remedy under the Member State's municipal law. *Id.* "Discretionary reference" may occur if a question is raised before any court or tribunal of a Member State and that court or tribunal determines that a decision on the question by the Court is "necessary to enable it to give judgment." *Id.*

284. *Id.* art. 178.

limits and established conditions provided in the Staff Regulations or Conditions of Employment;²⁸⁵

(8) jurisdiction over disputes involving the European Investment Bank regarding the fulfillment by Member States of obligations under the Statute of the European Investment Bank and measures adopted by the Board of Governors of the Bank;²⁸⁶

(9) jurisdiction to give judgment: "pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community whether the contract is governed by public or private law";²⁸⁷ or, "in any dispute between Member States that relates to the subject matter of the ECT Treaty if the dispute is submitted to it under a special agreement between the parties";²⁸⁸

(10) jurisdiction to hear special pleas regarding alleged illegal acts²⁸⁹ or "pleas of illegality," a phrase derived from the French administrative law phrase, "exception d'illegalité";²⁹⁰ and

(11) the power to order the suspension of a contested act if the Court deems the suspension appropriate,²⁹¹ to "prescribe necessary interim measures,"²⁹² and to have its judgments enforced.²⁹³

B. *Judicial Review*

The Court's authority extends over Community institutions, Member States, and individuals when the matters involve Community law. This authority is both expressly granted by the

285. *Id.* art. 179.

286. *See supra* note 2, ECT art. 180.

287. *Id.* art. 181.

288. *Id.* art. 182.

289. *Id.* art. 184. Article 184 provides a longer time to challenge regulations adopted by certain Community institutions. Thus, a collateral attack on the regulation is permissible even though a direct challenge under Article 173 is prohibited. *Id.*, art. 184.

290. BERMANN, *supra* note 4, at 118.

291. *See supra* note 2, ECT art. 185.

292. *Id.* art. 186.

293. *Id.* art. 187. ECT, on its face, appears to grant the Court no jurisdiction (with one exception) over matters covered by TEU Article J ("Common Foreign and Security Policy") or TEU Article K ("Cooperation in Justice and Home Affairs"). The Treaty of Amsterdam, as ratified by the Member States, however, does grant the Court jurisdiction over some matters. *See TREATY OF AMSTERDAM, supra* note 72, ch. 17 (amending TEU art. L).

ECT²⁹⁴ and recognized by the Court as necessary to “ensure” Community law (that the necessary purposes and goals of the Community are served). This authority is also reflected in the Court’s recognition of: (1) supremacy (and direct effect); (2) general principles of law, derived in part from the legal standards of administrative law in the Member States; and (3) certain fundamental rights (including basic human rights) that the Court requires all Community institutions to respect. The Court’s recognition of fundamental rights, as in the area of discrimination, is sometimes justified by ECT provisions coupled with the Court’s recognition of general principles of Community law.

1. *Supremacy (and Direct Effect)*²⁹⁵

“Supremacy”²⁹⁶ and “direct effect” describe the relationship between the Community and the Member States, as well as between the Community and individuals in certain situations when the issue involves Community law.²⁹⁷

a. *Supremacy*

The Court made clear in *Costa v. Ente Nazionale Per L'Energia Elettrica*²⁹⁸ that, in the event of a conflict between Community law and previously-enacted national law, Community law is supreme. Thus, when Community provisions are directly applicable to Member States as self-executing provisions of the ECT or as duly-adopted regulations that implement Community law,

294. See *supra* notes 274 through 290 and accompanying text.

295. *First Article*, *supra* note 1, at 969-70.

296. The concept of “supremacy” is reflected in ECT art. 5, requiring Member States to defer to Community law. Article 5 provides:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

ECT art. 5. See also Case 6/64, *Costa v. Ente Nazionale Per L'Energia Elettrica*, 1964 E.C.R. 585, [1964] C.M.L.R. 425 (1964).

297. Case 1/58, *Stork v. High Authority*, 1959 E.C.R. 17 (The Court held that it had no authority to enforce rules or fundamental rights provided in the municipal or constitutional law of a Member State, even if Community law did not contain any express or implied guarantees of those rights.).

See also Cases 36, 37, 38 and 40/59, *Präsident Ruhrkolen-Verkaufsgesellschaft GmbH, et al. v. High Authority of the European Coal and Steel Community*, 1960 E.C.R. 423 (Community law under the ECSC Treaty does not contain any general principle that guarantees the continuation of alleged vested property rights.).

298. *Costa*, *supra* note 296.

Community law prevails.²⁹⁹

Following *Costa*, the Court held that Community law is supreme over national law, including national constitutional law, regardless of whether a Member State's national courts expressly recognize the supremacy of the Court³⁰⁰ or whether a Member State has formally repealed the offending law,³⁰¹ or whether a Member State's constitutional system expressly forbids an individual to challenge a Member State's regulation on grounds that Community law is supreme.³⁰²

299. *Id.* The Court explained that when a Member State ratified the Treaty, it transferred sovereignty to Community institutions, thereby limiting its ability to act in matters of Community law. *Id.* See also Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal, S.p.A.* 1978 E.C.R. 629, 643, [1978] 3 C.M.L.R. 263 (1978), discussed at *infra* note 321 and accompanying text.

300. Germany has resisted recognition of the supremacy of the Court in matters of fundamental rights. See Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-und-Vorratßtel für Getreide und Futtermittel*, 1970 E.C.R. 1125, [1972] C.M.L.R. 255 (1970) and [1974] C.M.L.R. 540 and the discussion at *infra* notes 384-86 and accompanying text. Briefly stated, the German constitutional court in *Internationale Handelsgesellschaft* ruled that Community laws could be annulled if those laws violated fundamental rights provided under the German constitution. Although the German court concluded that the particular Community measure did not violate the fundamental rights set forth in the German constitution, it affirmed the supremacy of the German Constitution over domestic matters.

In 1986, the German constitutional court reversed *Internationale Handelsgesellschaft*, explaining that since the Community had protected human rights both in the adoption of Community measures and the decisions of the Court of Justice, it would no longer claim jurisdiction over the applicability of secondary Community law, or review Community fundamental rights legislation against the standard of the German constitution. See Case 2 BvR 197/83, *Wünsche Handelsgesellschaft v. Germany*, [1987] 3 C.M.L.R. 225. Prior to *Wünsche*, the German constitutional court did not actually find any provision of Community law contrary to the German constitution. For a fuller discussion of these cases, see generally CRAIG, *supra* note 4, at 258-60 and TILLOTSON, *supra* note 4, at 84-86.

In 1994, the German constitutional court applied *Wünsche* in the context of economic integration following the execution of the Maastricht treaty. See Cases 2 BvR 2134/92 & 2159/92, *Brunner and Others v. The European Union Treaty*, *The Bundesverfaßungsgesicht (2 Senat)*, [1994] 1 C.M.L.R. 57 (1994). In those cases, Germany's 1992 amended Constitution authorized transfer of the Bundesbank's functions and powers to the European Central Bank within the context of the European Union. The parties complained that the ratification of the treaty would breach the German Constitution. The German constitutional court disagreed, holding that legislative implementation of that authority (including replacement of the Deutsche Mark by the European Currency Unit ("ECU")) was not contrary to the basic rights contained in the German constitution, particularly in light of the subsidiarity and proportionality requirements of ECT arts. 3b(2) and (3). The Court clearly held that although protection of German citizens' human rights is shared between Germany and the European Union, this sharing does not dilute the protection of fundamental rights guaranteed under the German constitution.

301. Case 48/71, *Commission v. Italy*, 1972 E.C.R. 527.

302. Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651 (Northern Ireland asserted that a certificate stating permissible conditions for derogation of principles of equal treatment of the sexes to protect public safety is conclusive

Further, the Court has held that Community law also extends extraterritorially, such as when professional activities occur outside Community territory, provided that there is a "sufficiently close link" between the extraterritorial activities and the Community.³⁰³ Indeed, the Court has expanded its purview by addressing supremacy issues in the international arena to validate actions by the Community in the Uruguay Round negotiations.³⁰⁴

Supremacy is not activated until a Member State has properly transposed Community requirements into state law or if Community institutions have failed to act. Because a directive is usually not directly effective, the directive imposes no obligations upon an individual until its transposition.³⁰⁵ Moreover, when a matter is not regulated at the Community level, Member States may have conflicting national rules (regarding professional services, as long as the rules do not impinge the Treaty's freedom to provide services³⁰⁶ or the freedom of establishment³⁰⁷). Also, when the

evidence, thus, excluding judicial review. The Court, however, disagreed, and held that regardless of the conclusive nature of the state measure, individuals have a right under Community law to challenge state measures prohibiting the carrying of a firearm by women police officers).

303. Case C-214/94, *Ingrid Boukhalfa v. Germany*, [1996] 3 C.M.L.R. 22 (1996) (ECT art. 48, prohibiting discrimination based on nationality between workers who are citizens of Member States, applies to a Member State citizen who is a permanent resident in a non-Member State, but is employed by another Member State in its embassy in that country pursuant to the laws of the employer Member State.).

304. Case 1/94, *Re Uruguay Round Treaties*, 1994 E.C.R. 5267, [1995] 1 C.M.L.R. 205 (1994). In this case, the Court concluded that, the Community had "exclusive competence" to conclude international agreements only in some areas. Following the completion of the December 15, 1993 Uruguay Round negotiations, the Community (and the 12 Member States of the Community at that time as well as other non-Member States) signed the Final Act of the Treaty on April 15, 1994. On the same date, the parties signed the World Trade Organization Agreement ("WTOA"). The WTOA also incorporated other annexed agreements.

The Commission argued that it had the exclusive competence to execute these agreements; however, the Member States argued that they enjoyed a shared competence. The Court held that when the subject affects international trade, the Community has exclusive competence. If, however, the internationally-related subject matter also affects the internal jurisdiction of the Member States, there is a shared competence between the Community and individual Member States to promote harmonization. *See also* Case C-268/94 *Portugal (Greece intervening) v. EC Council*, [1997] 3 C.M.L.R. 33 (1997) (The Court held that Council Decision 94/578 ("Cooperation Agreement between the European Community and India on Partnership and Development") was valid and that the Community has the competence under art. 130y (cooperation with third countries) to complete an agreement that includes provisions on human rights and democratic principles.).

305. Case C-168/95, *Luciano Arcaro*, 1997 All ER (EC) 82, [1997] 1 C.M.L.R. 179 (1997).

306. Case C-3/95, *Reisebüro Broede v. Gerd Sandker*, [1997] 1 C.M.L.R. 224 (1997) (A German rule forbidding judicial recovery of debts in Germany by an entity of another Member State does not violate Article 59's provision on the freedom to provide services because that activity is reserved to the legal profession.).

Commission fails to act, the Court may require it to do so; however, national courts do not have the power to grant interim relief until the Commission acts.³⁰⁸ Finally, when the Commission acts improperly by notifying Member States of new standards via telex, but not by published regulation, such action is not binding and the Member States may set their own standards.³⁰⁹

When a directive granting rights to Union citizens has not been incorporated into national law within the relevant time period, the Court may order the Member State to incorporate the directive, and may also order that state to pay reparations to aggrieved individuals. The Court views the failure to incorporate as a *per se* breach of Community law giving rise to a right of reparation for individuals suffering injury, provided that four conditions are met: (1) the breached rule of law was intended to confer rights on individuals, (2) the breach was sufficiently serious, (3) a direct causal link existed between the state's breach and the injured party's damages, and (4) the injured person used reasonable care to avoid the loss or mitigate the injury.³¹⁰ The same result may occur with recommendations adopted under the ECSC Treaty and resolutions of the United Nations, as long as the Member State's

307. *Italy, supra* note 301 (Italy's restriction on the conduct of securities activities to only those entities that maintained registered offices in Italy violated Article 52's provision regarding freedom of establishment. The Court found that Article 52 prohibits a Member State from placing nationals of other Member States in a less favorable situation than that accorded its own nationals.).

308. Case C-68/95, *T Port GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung*, [1997] 1 C.M.L.R. 1 (Importer of bananas claimed hardship and interim relief in the German courts under a Community regulation when quotas on non-Member State imports were imposed on his business by the German Agricultural Commission. The Court ruled that the German court lacked jurisdiction over the case.).

309. Case C-371/92, *The State v. Ellinika Dimitriaka AE*, 1996 1 C.M.L.R. 143 (In the absence of binding Community provisions, Member States have discretion to set criteria for judging whether exported goods are marketable, including the maximum level of permissible radioactivity, despite a notice by telex from the Community.).

310. Cases C-178, 179, 188 and 190/94, *Erich Dillenkofer and Others v. Germany*, 1996 All ER (EC) 917, [1996] 3 C.M.L.R. 469 (1996) (Germany's failure to incorporate a Community directive (providing protection for consumers against travel operators' insolvency) into German law justified reparations to the consumers. The Court deemed the omission a *per se* breach of Community law because Germany failed to take necessary measures (under Article 189) to satisfy the directive. The Commission directive granted rights to the consumers that were determinable with sufficient precision. The Court found that the consumers were not negligent because they could have paid just 10% of the package price (instead of the entire amount) before the tickets were issued by the travel operator.).

See also C-213/89, *Regina v. Secretary of State of Transport, ex parte Factortame Ltd. and Others*, 1990 I E.C.R. 2433, [1990] 3 C.M.L.R. 1 (1990). *See infra* notes 314 and 321. *See also infra* note 315 and accompanying text for discussion of "direct effect."

actions are consistent with Community policy.³¹¹

In those situations when national law provides broader rights than those provided by Community law, the Court has held that national law may mandate compliance with those rights. For example, when no requirement exists to harmonize a Community measure with national law, a national court may interpret an international covenant³¹² to require equal treatment of the sexes with respect to pensions.³¹³

In the area of supremacy, the Court is careful to tailor and limit its decision-making. Although the Court cannot determine the validity of a national law under article 177, as it may under Article 169, it provides national courts with the criteria to interpret Community law.³¹⁴ Thus, each preemption-issue case is decided on

311. Case C-18/94, *Barbara Hopkins and Others v. National Power, plc and Powergen, plc*, [1996] 4 C.M.L.R. 745 (1996) (Case under ECSC); Case C-124/95, *R. v. H.M. Treasury and Bank of England, ex parte Centro-Com Srl*, [1997] 1 C.M.L.R. 555 (1997). A 1992 United Nations Security Council resolution banned exports to Yugoslavia (Serbia and Montenegro), except for humanitarian items (medical supplies and food. The resolution also restricted payment for the exempted products to the funds Serbia and Montenegro held in foreign banks. The Community regulation adopting the United Nations resolution required prior authorization to ship exempted items obtained from authorities in the Member State. An Italian company received permission from the United Nations and the Italian government to export medical products to Montenegro. Payment was to be made from Montenegro's account at Barclays Bank in the United Kingdom. The Bank of England granted Barclays permission to pay some bills from the National Bank of Yugoslavia's account, but announced that payments from United Kingdom accounts for exempted exports could only be made for products exported from the United Kingdom. The Bank claimed this would permit United Kingdom authorities to assure that the goods exported were actually humanitarian items. The Court held that even though a Member State retains authority over its foreign and security policies, it must exercise those powers in a manner consistent with Community commercial law. It cannot claim that national laws restricting exports are justified (and thus, outside the common commercial policy of the Community) simply because the law has foreign policy and security objectives.). *Minister for Transport, Energy and Communications, Ireland* [1996] 3 C.M.L.R. 257 (1996); Case C-177/95, *Ebony Maritime SA and Another v. Prefetto Della Provincia Di Brindisi and others*, [1997] 2 C.M.L.R. 24 (1997) *infra* note 436.

312. International Covenant on Civil and Political Rights of 19 February 1966, art. 26.

313. Case C-337/91, *AM Van Gemert-Derks v. Bestuur Van De A Nieuwe Industriële Bedrijfsvereniging*, [1995] 1 C.M.L.R. 773 (1993) (A woman's disability pension was supplanted by a statutory pension for surviving spouses (with lower benefits) when her husband died. The national court interpreted Article 26 of the International Covenant on Civil and Political Rights of 19 February 1966 to require equal treatment of men and women regarding statutory survivors' pensions, as of December 23, 1984. The Community directive, however, provided for a gradual implementation, but did not provide for equal treatment regarding survivors' benefits. The Court held that, in the absence of harmonization, Community law did not prevent a national court from interpreting an international covenant to require equal treatment.).

314. Joined Cases C 74 & 129/95, *Procura Della Repubblica v. X*, [1997] 1 C.M.L.R. 399 (1996). Another case illustrating the discipline of the court is Case 2/92, *R. v. Ministry of Agriculture, Fisheries and Food*, [1994] 3 C.M.L.R. 547 at Decision para. 16 (1994) (The Court

its own merits, after the Court has carefully weighed whether, in the event of an alleged conflict, the Community's interest is significant enough to invoke supremacy.

b. Direct Effect

Two terms are often used to describe "direct effect": "direct applicability" and "direct effect." "Direct applicability" means that a Community law measure becomes part of the legal order of the Member State without any need for that state to formally incorporate the Community measure into the Member State's law.³¹⁵ In a sense, a "directly applicable" measure is "self-executing," creating obligations for Member States.³¹⁶

A Community measure has "direct effect" when it creates rights for private parties that can be enforced in the national courts against the state³¹⁷ or against other private parties.³¹⁸ To have direct

held that fundamental rights concerning property interests and discrimination do not require a Member State to develop a scheme for a landlord's payment of money to an outgoing tenant. The Court reasoned that property rights are grounded in the assets or labor of the tenant. Moreover, "equality" does not demand retroactive modification of a lease relationship between the parties.).

315. BERMAN, *supra* note 4, at 180. *See also* ECT art. 189 and *Simmenthal*, *supra* note 299, at paras. 14 and 21.

316. *Id.*

317. Cases C-6/90 and 9/90, *Francovich and Another v. The Republic (Italy)*, [1993] 2 C.M.L.R. 66 (1991). *See also* *Simmenthal*, *supra* note 299 and *Factortame*, *supra* note 310.

In *Francovich*, the Court held that when a Member State fails to adopt a sufficiently precise and unconditional Community directive within the prescribed time, such failure cannot excuse the state's duty to employees of insolvent employers, thus, reaffirming Case 8/81, *Becker v. Finanzamt Munster-Innenstadt*, 1982 E.C.R. 53, [1982] 1 C.M.L.R. 499 (1982), and explicitly providing that a State could be liable to an individual for its breach of Community law.

See Case C-373/95, *Maso v. Istituto Nazionale Della Previdenze Sociale (INPS) and Italy*, [1997] 3 C.M.L.R. 1244 (1997) (Directive protecting employees in case of employer insolvency should have been implemented by Italy by October 23, 1983, but did not become effective until January 1992. The Court held that Italy's retroactive application of an implementing law compensating losses caused by late transposition of a directive was deemed legally sufficient unless the individual could demonstrate otherwise. *Id.* at Decision, para. 1. *See also* Case C-04-95/95, *Bonifaci and Others v. INPS*, [1998] 1 C.M.L.R. 257 (1997) (similar facts to *Maso*, *supra*); Case C-261/95, *Palmissani v. INPS*, [1997] 3 C.M.L.R. 1356 (Statute of limitations for making application for reparations for belated implementation of a directive can be limited to one year from the date of transposition into national law.).

But see Case C-66/95, *R. v. The Secretary of State for Social Security, ex parte Sutton*, [1997] 2 C.M.L.R. 382 (1997) (A 63-year old female applied for a social benefit (invalid care allowance) while caring for her severely disabled daughter. Under a United Kingdom law implementing a Community directive, she was initially denied the benefit because when she applied, she had already attained the female pensionable age of 60, even though a similarly-situated man would have been entitled to receive the benefit because the law specified male pensionable age at 65. A Commissioner reversed the decision and

effect, a Community measure must be unconditional and sufficiently precise³¹⁹ by clearly stating: "(a) the identity of the persons entitled to the guarantee provided by the directive, (b) the content of the guarantee, and (c) the identity of the person responsible for providing the guarantee."³²⁰

The Court articulated these concepts in *Amministrazione delle Finanze Dello Stato v. Simmenthal*:³²¹

14. Direct applicability . . . means that the rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force.
15. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.³²²

Thus, the *Simmenthal* Court established that national courts must directly apply Community law without enacted implementing legislation, even though conflicting national law exists.³²³ That

retroactively awarded her the benefit one year prior to the date of her claim. She applied for interest on the past-due benefit, arguing that the state owed her money because it had not properly transposed the directive into national law. The Court held that the *Francovich* principle does not apply when the loss claimed is interest on past-due social benefits because social benefits are not reparations for losses actually sustained.). *Id.* at Decision (citing Case-271/91, *Marshall v. Southampton and South-West Hampshire Area Health Authority*, [1993] I ECR 4367, [1993] 3 C.M.L.R. 293 (1993)).

But also see Case C-24/95, *Land Rheinland-Pfalz v. Alcan-Deutschland GmbH*, [1997] 1 All ER (EC) 427 (A German aluminum company faced with closure was granted state aid to compensate it for substantial increases in electricity costs. By Decision, the Commission found the aid illegal and ordered the company to make restitution to the government. The German government refused to enforce this Decision, arguing the existence of legal and political impediments to recovery. The Court held that Germany failed to fulfill its Treaty obligations by refusing to comply with a Decision of the Commission. Germany revoked its grant of aid and demanded repayment. The plaintiff argued that it had a legitimate expectation interest in the aid. The Court disagreed, holding that a company has no legitimate expectation interest unless the state aid is granted in accordance with Treaty procedures.). *Id.* at para. 55.

318. *Simmenthal*, *supra* note 299, at para. 15. *See also infra* note 323 and accompanying text and *supra* note 324, Case C-200/91, *Coloroll Pension Trustees Ltd. v. Russell*, 1995 All ER (EC) 23.

319. *Francovich*, *supra* note 317.

320. *Id.*

321. *Simmenthal*, *supra* note 299.

322. *Id.* paras. 14 and 15.

323. *Id.* paras. 16-18. In addition, the Court held: "[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law

Court also established that Community law may be directly effective for individuals.³²⁴ The Court explained that to rule otherwise would "imperil the very foundations of the Community."³²⁵

Following *Simmenthal*, the Court has ruled that when Member State law conflicts with Community law, the Member State is required to establish legal certainty by either repealing or amending the conflicting state laws; administrative pronouncements are not sufficient to remedy the conflict.³²⁶ On the other hand, in the event of such conflict, all competent national authorities must apply the Court's decision without awaiting repeal by a constitutionally appropriate state process.³²⁷ Moreover, the Court has made clear that a national law that allegedly conflicts with Community law may be enjoined pending the Court's decision concerning the national law's compatibility with Community law.³²⁸

2. General Principles of Law

The general "principles of law" that govern judicial decision making include: (1) proportionality; (2) equal treatment; and (3) legal certainty, including nonretroactivity, vested rights and legitimate expectations. In addition to these principles, the Court considers relevant Community norms as authority in its decision-making efforts.³²⁹

which may conflict with it, whether prior or subsequent to the Community rule." *Id.* para. 21.

324. *Id.* para. 15.

325. *Id.* para. 18.

326. Case 167/73, *Commission v. French Republic*, 1974 E.C.R. 359, [1974] 2 C.M.L.R. 216 (1974) (Court held that Article 48(2)'s prohibition against nationality-based discrimination between workers of Member States was directly effective on Member States. An unamended law favoring French nationals in employment on French sea vessels violated the article, mandating repeal or amendment of the law by the national legislature; oral or administrative directives were insufficient.).

327. *Coloroll*, *supra* note 318, (The direct effect of art. 119 could be relied on by both employees and dependents against trustees of an occupational pension scheme who were bound to observe the principle of equal treatment). *See also* Case C-147/95, *Dimosia Epicheirisi Ilektrismou (DEI) v. Evthimios Evrenopoulos*, [1997] 2 C.M.L.R. 407 (1997) (The Court held that widowers were entitled to pensions under the same conditions as widows.); Case C-57/93, *Vroege v. NCIV Institute voor Volkshuisvesting BV and another*, 1995 All ER (EC) 193 [1995] 1 C.M.L.R. 881 (1995) (The Court held that married women were entitled to join pension plan under same conditions as other workers.).

328. *Factortame*, *supra* notes 310 and 317 (The Court held that a national court properly enjoined a national law despite a procedural rule prohibiting such injunction, pending the Court's determination of the compatibility between the national law and Community law.).

329. *See First Article*, *supra* note 1, at 970-71.

a. Proportionality

The doctrine of "proportionality" determines whether the means employed by the Community are suitable to achieve the desired objective and to ensure that those means do not go beyond what is necessary.³³⁰ Although a Community institution is permitted to exercise wide discretion in an area that involves social policy choices and complex assessments, the Court examines the institution's actions to determine whether there has been manifest error or an abuse of the institution's discretion.³³¹

The Court weighs both the advantages and disadvantages of upholding the challenged system of a Member State or of a Community institution, to determine whether the burdens created are manifestly disproportionate to the goals.³³² When there is a choice between several appropriate measures to achieve the Community objective, the least onerous and nondisproportionate measure is typically chosen.³³³ For example, regulations imposing a disproportionate burden on certain individuals using products produced in the Community were struck down.³³⁴ Challenged

330. Case C-426/93, *Germany v. EU Council*, 1995 E.C.R. I-3723 at para. 42 (1995). See also, Case C-354/95, *R. v. Minister for Agriculture ex parte National Farmers' Union and Others*, [1998] 1 C.M.L.R. 195 (1997) (Farmers innocently violated a Community regulation by overstating the land area of set-asides on their properties by more than 20% on applications requesting financial aid from the Community. Because of this error, the farmers were deemed to have failed to set aside any land and were sanctioned with severe penalties that caused them serious financial problems. The Court held that a later regulation, containing less severe penalties and permitting aid based on the area of actual set-asides, impermissibly applied the rule retroactively because it became official after the farmers' applications were submitted. *Id.* at Decision, para. 1. However, refusal of the state to pay a premium for bovine animals to farmers who overstated acreage was held not to violate principles of legal certainty, non-discrimination, and proportionality.). *Id.* at Decision, paras. 2-3.

331. Case 84/94, *United Kingdom v. EU Council*, 1996 All ER (EC) 877 [1996] 3 C.M.L.R. 671 (1996) (Community directive on allocation of working time was held not to be disproportionately burdensome when balanced against the Community aim of protecting the health and safety of workers. The Court found no manifest error since the Community goals could not be achieved through less restrictive measures.).

332. Case C-241/95, *R. v. Intervention Board for Agricultural Produce*, [1997] 1 C.M.L.R. 675 (1997) (U.K.) (Import quotas for certain categories of frozen beef and other products were challenged as discriminatory. *Id.* at paras. 42-54.).

333. Case C-295/94, *Hupeden & Co. KG v. Hauptzollamt Hamburg-Jonas*, [1996] 3 C.M.L.R. 938 (1996) (Measures imposing financial levies on imports of preserved mushrooms from non-Member States were held invalid as disproportionate.).

334. Case 114/76, *Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG*, 1977 E.C.R. 1211 [1979] 2 C.M.L.R. 83 (1977) (The purpose of Council's regulation was to reduce the surplus of skimmed-milk powder in the Community. The regulation mandated producers of animal feeds to use skimmed-milk powder in preference to soya (approximately three times cheaper). The Court held that the regulation caused a discriminatory distribution

regulations were upheld when they discriminated against products imported from third countries.³³⁵

In the absence of Community rules concerning the marketing of goods at the Community level, Member States may adopt rules that differ from each other as long as the rules apply to both domestic products and products imported from other Member States, relate to consumer protection (if applicable), and are proportionate to a Community goal such as the free movement of goods.³³⁶ As in the case of Community rules, the Court weighs the goals of the Community and the means employed by the Member State or the Community, balancing the purpose and methods against the burdens imposed on the Community businesses or citizens.³³⁷

b. *Equal Treatment*

The Court recognizes a general principle of equal treatment (or "nondiscrimination"). This principle can be found in treaty provisions³³⁸ and in secondary legislation dealing with civil,

of costs between the two agricultural sectors. The Court explained that the regulation was applied disproportionately to other agricultural sectors because it required compulsory purchase of the more expensive product and was unnecessary to diminish the surplus. Thus, the regulation could not be justified for the purposes of attaining the Community's common agricultural policy objectives.)

See also Cases 103 and 145/77, *Royal Scholten-Honig (Holdings) Limited v. Intervention Board for Agricultural Produce (IBAP)*, 1978 E.C.R. 2037, [1979] 1 C.M.L.R. 675 (1978) (Production-refund provisions of a Council regulation did not offend general principles of equality when a refund was eliminated for isoglucose. The Court found, however, that production-levy provisions of the regulation violated principles of equality when imposed on isoglucose during a period of sugar surplus.)

335. Case 5/73, *Balkan-Import-Export v. Hauptzollamt Berlin-Packhof*, 1973 E.C.R. 1091 (The Council's system of compensatory charges on imports of milk products from Bulgaria, a non-Member State, was upheld by the Court.)

336. Case 60-61/84, *Cinétheque S.A. and others v. Fédération Nationale des Cinémas Français*, [1986] 1 C.M.L.R. 365 (French legislation that regulated the distribution of domestic and imported films delayed distribution of videotapes, allowing exploitation in cinemas).

337. Case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, 1982 E.C.R. 3961 (Margarine imported from other Member States was required by Belgian regulation to be shaped into cubes. The Court deemed this a "quantitative restriction" within the meaning of Article 30 of the EEC Treaty, and therefore, invalid. Although the regulation fulfilled the state's goal of protecting and informing Belgian consumers of the difference between butter and margarine, the means chosen to effect that goal hindered the free movement of goods that have been lawfully packaged in another Member State.)

338. *See, e.g.*, ECT art. 40(3), providing that the common organization of agricultural markets "shall exclude any discrimination between producers or consumers within the Community." *See also* ECT art. 119, mandating equal pay for male and female workers. Art. 119 was amended by the Treaty of Amsterdam, *supra* note 72. *See also* ECT arts. 6, 48, 52, and 59-60 (concerning areas of nationality).

social,³³⁹ and economic rights.³⁴⁰ Nondiscrimination is also a fundamental principle of Community law unless "the differentiation is objectively justified."³⁴¹ Nevertheless, in areas reserved to the state, Member States are accorded a "margin of appreciation" to discriminate with respect to the regulation of its professionals.³⁴²

Based upon the Court's history, it is evident that individuals who have allegedly been injured by discrimination are entitled to challenge such state action in a national court³⁴³ pursuant to procedures that do not discriminate on the basis of nationality.³⁴⁴ When the Court has ruled that a measure is discriminatory, the ruling is immediately effective³⁴⁵ and sometimes retroactively

339. Case 1/72, *Frilli v. Belgium*, 1972 E.C.R. 457. (If a foreign worker fulfills relevant conditions to obtain a pension in a Member State, that Member State cannot insist on the existence of a reciprocal agreement with the foreigner's Member State, since such a condition is incompatible with Community equality of treatment principles.)

340. *Honig*, *supra* note 334. See also Case 300/86, *Luc Van Landschoot v. Mera NV*, 1988 E.C.R. 3443, [1990] 3 C.M.L.R. 641 (1990) (A regulation limiting structural surpluses in the cereal market was held invalid because it discriminated between farmer-processors who processed cereal on their own property with the intention to reuse the processed product on their farms and farmers who did not process or recycle.)

But see Case 195/87, *Cehave NV v. Hoofprodukschap voor Akkerbouwprodukten* (1989) (A regulation limiting structural surpluses in the cereal market was upheld because any discrimination between producers and processors and suppliers was deemed neutral and objectively justified.)

341. Case 37/89, *Michael Weiser v. Caisse Nationale des Barreaux Français*, 1990 E.C.R. I-2395. (An action denying a Community official transfer of his pension rights because of his previous occupation as a self-employed French lawyer was held discriminatory.) See also Case 130/87, *Retter v. Caisse de pension des employés privés*, 1989 E.C.R. 865.

342. *Reisebüro Broede*, *supra* note 306 (A German law specified that only a lawyer could represent a creditor in a judicial debt collection proceeding whether or not the proceeding occurred in Germany. The Court found no discrimination because the law applied to all such undertakings regardless of whether they were domestic or foreign. Moreover, the Court explained that a Member State could validly restrict the professional recovery of debts through judicial proceedings.)

343. *Johnston*, *supra* note 302 (Northern Ireland asserted that a certificate stating permissible conditions for derogation of principles of equal treatment of the sexes to protect public safety is conclusive evidence, thus, excluding judicial review. The Court, however, disagreed and held that regardless of the conclusive nature of the state measure, individuals have a right under Community law to challenge state measures prohibiting the carrying of a firearm by women police officers.)

344. Case C-43/95, *Data Delecta Aktiebolag and Another v. MSL Dynamics Ltd.*, 1996 All ER (EC) 961, [1996] 3 C.M.L.R. 741 (1996) (A national rule requiring only non-Member State nationals to post a security bond when filing suit against a national is discriminatory because it may have a direct or indirect effect on trade in goods and services between the states. The Court further held the rule discriminatory on the basis of nationality.) See also *Francovich*, *supra* note 317.

345. *Coloroll*, *supra* note 318. See also Case C-408/92, *Smith and others v. Avdel Systems, Ltd*, 1995 All ER (EC) 132, [1995] 3 C.M.L.R. 543 (1995) (Ages of those receiving retirement pensions must be identical among Member States.)

applied.³⁴⁶

The Court has used the terms "direct" and "indirect" discrimination to describe the proscribed practice. "Direct discrimination" involves a measure that either on its face or as applied, is intended to discriminate on the basis of sex.³⁴⁷ "Indirect discrimination" is demonstrated when a policy or practice causes different treatment of protected classes (a measure that treats one class less favorably than another class that cannot be explained by objectively justified factors unrelated to any prohibited discrimination).³⁴⁸ Sometimes, however, the Court refuses to recognize that a violation of discrimination has occurred, but does recognize that a treaty provision, such as free movement within the Community, has been violated.³⁴⁹

Cases address discrimination based on gender,³⁵⁰ nationality,³⁵¹ groups in the agricultural sector,³⁵² and affirmative action.³⁵³ However, the Court has yet to address the many complicated issues

346. See *infra* notes 368-75 and accompanying text for a discussion of retroactivity.

347. Case 149/77, *DeFrenne v. Sabena*, 1978 E.C.R. 1365. See *infra* note 357 and accompanying text.

348. Case C-317/93, *Nolte v. Landesversicherungsanstalt Hannover*, 1996 All ER (EC) 212 (1995). (When a Member State's law deemed certain part-time employment ineligible for compulsory old-age, sickness, and unemployment insurance contribution computations, the Court held that no indirect sex discrimination occurred even if the law affected many more women than men. The social and employment policy aims of the state outweigh any perceived inequity.)

349. Cases C-245 and 312/94, *Ingrid Hoever and Another v. Land Nordrhein-Westfalen*, [1996] 3 C.M.L.R. 611 (1996) (Although a part-time worker's ineligibility for a child-raising allowance is not deemed sex discrimination, self-employed persons and their families moving within the Community were eligible for the allowance.)

350. See *infra* notes 355-66 for a discussion of gender discrimination.

351. See *supra* note 2, ECT arts. 6, 48, 52 and 59-60. Case 21/74, *Airola v. Commission*, 1975 E.C.R. 221 (An applicant lost her expatriate allowance because she had acquired Italian nationality through marriage. Under Italian law, a foreign woman who married an Italian man automatically became an Italian national, even if against her wishes. A non-Italian man who married an Italian woman, however, did not automatically become an Italian national. The Court ruled that Community law could not take account of nationality acquired involuntarily under a discriminatory provision of national law. *Id.* at paras. 10-16.). See also *Data Delecta*, *supra* note 344.

See Case C-237/94, *O'Flynn v. Adjudication Officer*, 1996 All ER (EC) 541 (Irish migrant worker resident in the United Kingdom was discriminated against when the United Kingdom refused to make funeral payment when his burial took place outside the United Kingdom.)

352. *Bela-Mühle*, *supra* note 334 (inequality of treatment of producers of grains could not be objectively justified).

353. Case C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen*, 1996 All ER (EC) 66 (A Member State's rule provided that if a man and a woman are equally qualified for the same promotion, the woman is automatically given priority in under-represented sectors. The Court held that this rule was discriminatory on the basis of sex.)

surrounding racial discrimination.³⁵⁴ The principle of equal treatment based on gender appears to be the most frequently addressed issue by the Court in this area.

The fundamental principle of equality of the sexes has slowly evolved from a prohibition against discrimination in pay to other gender-related discrimination. The equal pay concept is found in article 119 of the Treaty,³⁵⁵ as well as in Community directives and regulations,³⁵⁶ and has been recognized as a fundamental right since *DeFrenne v. Sabena*.³⁵⁷ The fundamental principle of equality of the

354. See *supra* note 30 (concerning various Community activities in this area).

355. See *supra* note 2. ECT art. 119 provides:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from this employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement, and

(b) that pay for work at time rates shall be the same for the same job.

Id. Art. 119 was amended by the Treaty of Amsterdam. See *supra* note 72 and accompanying text.

356. See Council Directive 75/117, 1975 O.J. (645) 19 (principle of equal pay); Council Directive 76/207, 1976 O.J. (L 39) 40 (no discrimination on the basis of pregnancy, maternity, or in working conditions); Council Directive 79/7, 1979 O.J. (L 6) 24 (progressive implementation of the principle of equal treatment in matters of social security is permissible); Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave, 1996 O.J. (L 145).

See also, Case C-180/95, *Draehmpaehl v. Urania Immobilienservice ohG*, [1997] All ER (EC) 719, [1997] 3 C.M.L.R. 1107 (1997). Male sued for sex discrimination when company advertised for a female worker and refused to reply to male's application. The Court held that Council Directive 76/207 (referred to above) precluded a domestic law conditioning damages on a verdict that the defendant was at fault. *Id.* at para. 22. The Court also held that a law setting a cap on damages equivalent to three months' earnings is reasonable if the defendant can show that, regardless of the discrimination, the applicant would not have been hired. *Id.* at para. 37. However, a law that capped the applicant's damages could not stand if the applicant would have received the vacant position, but for, the discrimination. *Id.* at paras. 37 and 43.

And see Case C-228/94, *Atkins v. Wrekin District Council and Another*, 1996 All ER (EC) 719 [1996] 3 C.M.L.R. 863 (1996) (A public transport benefit given to women at age 60 and to men at age 65 was outside the permissible scope of Directive 79/7.).

357. *DeFrenne*, *supra* note 347. (*DeFrenne* was an air hostess who had been under contract since 1963. In 1968, the air crew agreed, by contract, that contracts held by women members of the crew would terminate on a woman's fortieth birthday. When *DeFrenne* turned forty, in 1968, she left, receiving a 12-month termination allowance. She later claimed damages resulting from sex discrimination. The Court held that Article 119 was not violated when termination occurred at age 40 with respect to either the pension or the termination allowance because Article 119 does not cover discrimination concerning working conditions other than pay. The Court also held that, at the time of the dispute, no general principle of

sexes is now applied to discrimination in the right to receive pensions,³⁵⁸ to join a pension scheme,³⁵⁹ expatriation allowances,³⁶⁰ family,³⁶¹ pregnancy,³⁶² affirmative action,³⁶³ part-time work,³⁶⁴ and

Community law provided that an individual had the right to be free from sex discrimination in working conditions.)

See also, Case C-1/95, *Gerster v. Freistaat Bayern*, [1998] 1 C.M.L.R. 303 (1997) (A part-time civil servant challenged the state's method of calculating time of service. She argued that a national measure defining the manner in which part-time periods of employment were calculated (for the purpose of length of service for promotion) constituted indirect discrimination because it applied to a greater number of women and was applied differently than the calculation for full-time periods. The Court held that part-time workers were discriminated against because full-time employees accrued length of service much faster.). *Id.* at Decision, para. 3.

And see, Case C-246/96, *Magorrian and Another v. Eastern Health and Social Svcs. Bd. and Another*, [1998] All ER (EC) 38 (1997). Part-time mental-health nurses were excluded from mental-health officer status, and thus, were not eligible to participate in an occupational pension scheme. They claimed that the noneligibility was a violation of Article 119 (prohibiting sex discrimination). The national court held that the exclusion constituted indirect discrimination on the grounds of sex since many more women than men were affected by the rule. The Court held that the direct effect of article 119 took place on April 8, 1976, citing *DeFrenne* for a retroactive application to that date.). *Id.* at para. 48.

The Court recently held that the principle of equal pay and treatment of the sexes does not apply to partners in a homosexual relationship. EUROPEAN REPORT, (European Info. Svc., Feb. 21, 1998). Finally, on March 5, 1998, the Commission proposed to extend EU Directives to the United Kingdom regarding the burden of proof in cases of discrimination between the sexes and on part-time work. *Id.* (Mar. 7, 1998).

358. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Group*, 1990 E.C.R. I-1889, [1990] 2 C.M.L.R. 513 (1990) (Article 119 is violated when attainment of a different age for men and women triggers the right to receive pensions, even if the difference patterns that provided by the Member State, and even if the pension system is contracted-out. *Id.* at 1953, para. 32.).

See also Case C-408/92, *Smith v. Avdel Systems Ltd.*, 1995 All ER (EC) 132, [1994] 3 C.M.L.R. 543 (1995) (In an effort to comply with *Barber*, Community law did not permit retroactive reduction of the benefits women enjoyed, but did permit prospective reductions in benefits after *Barber*.).

359. Case C 128/93, *Fisscher v. Voorhuis Hengelo and Stichting Bedrijfspensioen-Fonds Vor Detailhanel*, 1994 1 E.C.R. 4583 (The right to join a non-discriminatory pension scheme applied retroactively to *DeFrenne*.). *Id.* at para. 20.; Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Hartz*, 1986 E.C.R. 1607, [1986] 2 C.M.L.R. 701 (1986) (A worker has the right to receive pension benefits without discrimination).

Case C-435/93, *Dietz v. Stichting Thuiszorg Rotterdam*, [1997] 1 C.M.L.R. 199 (1996) (A female part-time worker has the right to join a protected pension scheme. Even if the government makes such a scheme compulsory, the right could be retroactively asserted (with the duty to pay back contributions) to 1976, the date of *DeFrenne*. Before *DeFrenne*, employers could have reasonably thought the actions were permissible; such rights can be asserted directly against the plan administrators.).

360. Case 20/71, *Sabbatini v. Parliament*, 1972 E.C.R. 345 (A female Community official was discriminated against when she was denied an expatriation allowance because she was not the "head of the family." This term was defined to permit a woman to be a "head of the family" only in exceptional circumstances, such as when her husband was incapacitated by illness.).

361. *Hoever, supra* note 349 (A rule providing that parents who are residents in

gender reassignment (transsexualism).³⁶⁵ Finally, the Court has ruled that, in relations between Community institutions and their employees and dependents, there is also a fundamental right of nondiscrimination. Requirements imposed by the principle of equal treatment on the basis of sex are not limited to those resulting from Article 119 or Community directives.³⁶⁶

In summary, equal treatment based on classifications such as sex, religion, nationality, and, to a lesser extent, race, is assured by the Court through its interpretations of the Treaty and regulations of the Community's institutions, and ultimately, as a fundamental principle of Community law.

c. Legal Certainty: Nonretroactivity and Legitimate Expectations

"Legal certainty" is demonstrated by clarity in the formal statement of the law and in the principles of nonretroactivity and legitimate expectations. The Court has held that in order to ensure legal certainty, national law that conflicts with Community law must be expressly amended or repealed to comply with Community

another Member State could claim the child-raising allowance if he or she worked over 15 hours a week did not amount to sex discrimination because either parent could claim the allowance.).

362. *See also* Case C-32/93, *Webb v. EMO Air Cargo*, 1994 I E.C.R. 3567, [1994] 2 C.M.L.R. 729 (1994) (Woman who was incapable of performing her job because of pregnancy was not the same as a man who was incapable of performing his job due to medical or other reasons.). *But see* Case C-179, *Handels-OG Kontorfunktionabrenes Forbund I Danmark v. Dansk Arbejdsgiverforening*, 1990 E.C.R. I-3979 (Dismissal of female worker because of repeated absences due to pregnancy-related illness did not constitute discrimination.).

See also *Gillespie v. Northern Health and Soc. Serv. Bd.*, 1996 All ER (EC) 284, [1996] 2 C.M.L.R. 969 (1996) (Woman on maternity leave should receive the benefit of any pay raise awarded before or during maternity leave because the benefit is equivalent to a weekly payment based on employment. However, neither art. 119 nor the relevant directive required that women continue to receive full pay during maternity leave.).

363. On November 11, 1997, the Court upheld the German use of affirmative action preferences for women in public sector jobs, provided, the preferences were granted after a case-by-case determination. *Pittsburgh Post-Gazette*, Nov. 11, 1997, at A-4.

364. *Hoever, supra* notes 349 and 361.

365. Case C-13/94, *P. v. S.*, 1996 All ER (EC) 397, [1996] 2 C.M.L.R. 247 (1996) (An individual dismissed because he or she intended to undergo, or had undergone, gender reassignment was treated unfavorably by comparison with a person of the sex to which he or she was deemed to belong before the reassignment.).

366. *Joined Cases 75 & 117/82, Razzouk v. Commission*, 1984 E.C.R. 1509 (Commission decision based on Staff Regulations that treated surviving spouses of officials unequally because of their sex was held invalid. As a result, pension rights for the husbands of deceased female Community officials must be equal to the rights accorded wives of deceased male officials.). *See also Sabbatini, supra* note 360.

law.³⁶⁷ Community measures are usually not retroactive because citizens in the Member States have legitimate expectations concerning the status quo.³⁶⁸ Additionally, penal measures do not have retroactive effect because, as the Court explains, this principle is common to the legal orders of the Member States and is protected by Article 7 of the Official Journal containing the published regulations,³⁶⁹ or by showing the date that the versions at issue were available at the Office for Official Publications (translated into the official language of each Member State).³⁷⁰

When the purpose to be achieved so demands and the legitimate expectations of those concerned are duly respected, a regulation may operate retroactively. In monetary compensation cases, for example, the Court recognizes that measures are often intended to be effective from the date of the event that precipitated the measure, such as the sudden drop in the rate of exchange of a Member State's currency that can be anticipated.³⁷¹ Retroactivity will also be permitted when relevant information was supplied in "good time by other means," such as public announcements and telexes, and that Community reference was made in "good time" to a previous Commission measure accompanied by a statement of its essential content.³⁷² Thus, legitimate expectations in some cases are not disturbed and measures may be applied retroactively.

Other cases approving retroactivity involve instances in which the purpose of the measure could not otherwise be achieved or

367. *French Republic, supra* note 326.

368. *Id.*

369. Case C-178/95, *Wiljo NV v. Belgium*, 1997 All ER (EC) 97. (Regulation intended to reduce structural overcapacity in inland waterway transport that was backdated and published accordingly in the Official Journal infringed the principle of legal certainty because the affected person was not properly notified when the measure came into being and had legal effect.). *Id.* at para 132.

370. Case 98/78, *Firma A. Racke v. Hauptzollamt Mainz*, 1979 E.C.R. 69. (Commission set tariffs on wine, but twice changed the rate in regulations that became effective fourteen days before the regulations were actually published. The Court ruled that the principle of legal certainty requires that the effective date is the date the regulations are available to the public in the Office of Official Publications. On that date, notice is immediately given and a record is entered on a register; however, when tariffs are merely adjusted to compensate for exchange rate variations, there is no actual retroactive effect.).

371. *Id.* The Court upheld the regulation because it merely adjusted the tariffs to compensate for exchange rate variations, the regulation was retroactive for only three days, and involved an abrupt decline in the lire's rate of exchange, so that a person would reasonably expect that the regulation would apply retroactively.

See also Case 99/78, *Weingut Gustav Decker KG v. Hauptzollamt Landau*, 1979 E.C.R. 101. Regulations concerning monetary compensation applied retroactively due to the fall of the lire.

372. *Racke, supra* notes 370-71.

when it is unreasonable to expect that the regulation would not be retroactive. The first situation may occur when the challenged Community activity closed a legal loophole that had permitted speculative profit-making.³⁷³ The second situation may occur when there was a prior, but defective, regulation; thus, the expectation of nonretroactivity was an unreasonable expectation.³⁷⁴ When contracts were entered into after changes were announced in the method of calculation of compensatory amounts, but before the changes became effective, the Court ruled that the contracts were valid.³⁷⁵

When Community policy changes, an aggrieved party often argues that his or her legitimate expectations have been frustrated. The Court appears to require the individual to point to a

373. Case 2/75, *Einfuhr-und-Vorratstelle für Getreide und Futtermittel ("EVGF") v. Firma C. Mackprang*, 1975 E.C.R. 607 (German agricultural agency, EVGF, was obliged to buy grain at intervention prices. In early 1969, due to the expected devaluation of the French franc, German grain dealers sought to buy grain in France and resell it to EVGF. This practice could have exhausted EVGF's capacity to store grain and collapsed the German intervention system. The Commission authorized the German government to restrict EVGF's purchases to grain products grown in Germany, which it did on May 8, 1969. Mackprang was a German grain dealer who had bought wheat in France and intended to sell it to the EVGF. On May 8, his wheat was aboard ships and barges in transit to Germany. He could not make a valid offer of this wheat due to a rule prohibiting such offers while the grain was in transit. When the grain arrived in Germany, EVGF refused to buy it and Mackprang challenged the Commission's authorization, claiming that he had a legitimate expectation of selling the grain to the agency at the time he made the purchase and arranged for shipment. The Court ruled that application of the Commission decision to the grain in transit did not infringe upon the principle of legitimate expectations, as the agency's action was a justified response against speculative activities.).

But see Case 78/74, *Deuka, Deutsche Kraftfutter GmbH, B.J. Stolp v. E.V.G.F.*, 1975 E.C.R. 421. (After first stating that Community regulations that change prior regulations are to be applied in a manner not contrary to the requirement of legal certainty, the Court held that a new wheat regulation that applied to contractual commitments entered before the effective date of the new regulation would not apply to the pending contracts. The Court reasoned that since these long-term contracts had been entered in reference to a crop year, as long as proper appeal procedures had been followed, the legitimate expectations of affected persons should be protected.).

374. Case 108/81, *Amylum v. Council*, 1982 E.C.R. 3107. (A Commission regulation imposing quotas and levies on producers of isoglucose (a sugar) had been annulled in previous proceedings because the European Parliament had not been consulted. The Council passed another regulation (after consulting Parliament) that reinstated the system retroactively. The Court held that the regulation could be applied retroactively because the purpose of the regulation was to ensure that isoglucose producers were subject to the same production system as other sugar producers. This would not be the case if the regulation were not backdated. Also, the legitimate expectations of the isoglucose producers had been respected since, in the circumstances, they had reason to expect the retrospective reimposition of the system.).

375. Cases 95-98/74, 15, 100/75, *Union Nationale des Coopératives Agricoles de Céréales*, 1975 E.C.R. 1615.

contractual arrangement with a Community authority³⁷⁶ or to a course of conduct or assurance by government authorities that created the legitimate expectation.³⁷⁷ Indeed, the Court has enforced this principle in disagreements between Community institutions.³⁷⁸

3. Conclusion

Community institutions, Member States, and individuals are bound by the Court's interpretations of Community law. The Court's power is grounded in both express powers and the Court's recognition of supremacy, general principles of law derived in part from standards of Member States, and certain fundamental rights (including basic human rights) that the Court requires all Community institutions to respect. Although some fundamental

376. Case 120/86, *Mulder v. Minister van Landbouw en Visserij*, 1988 E.C.R. 2321. (Regulation 1078/77 aimed to reduce excess stores of milk by providing a premium to producers who did not market milk for five years. Regulation 857/84 outlined situations when special or additional reference quantities could be allocated by the Member States, but did not cover the situation of a producer who delivered no milk during the reference year because of a non-marketing agreement entered into under Regulation 1078/77. The Court held that the legitimate business expectations of the producers who had entered the non-marketing agreement were violated when the producers were excluded from a quota system that resulted in the producers resuming milk-production activity at the end of the five-year moratorium.)

377. Case C-152/88, *Sofrimport Sarl v. Commission* 1990 E.C.R. I-2477. (A Commission regulation banned the import of Chilean apples, but did not provide for apples in transit at the time of the enactment of the regulation. The Court held that failure of the Commission to make any special provision for goods in transit, as required by the parent regulation, was an infringement of legitimate expectations.)

See also Case 74/74, *Comptoir National Technique Agricole (CNTA) SA v. Commission*, 1975 E.C.R. 533. (Exporter-applicant was entitled to monetary compensation for fluctuating exchange rates when he entered export contracts. Following contract formation, but before performance, the Commission abolished the compensation scheme without notice, causing losses to the applicant. The Court held that an applicant has a legitimate expectation that the system will continue. In the absence of an overriding public interest, the Commission should have had a transitional rule to protect such expectations.)

378. Case 81/72, *Commission v. Council of the European Communities*, 1973 E.C.R. 575. (The Commission staff brought proceedings against the Council claiming that the Council had failed to grant them a sufficient increase in pay in accordance with a prior agreement. The Council's personnel regulations required it to audit and adjust staff salaries annually after reviewing a Commission report and other factors. The Council, Commission, and staff associations agreed to a three-year formula stated in a March 1972 Council decision. The Council, however, failed to follow the formula when the next salary review took place and used new criteria. The Court ruled that Council's actions were a breach of a legally binding agreement because the staff had "legitimate confidence" that the Council would abide by its agreement. Thus, the Court found the new pay scales invalid to the extent they conflicted with the formula.)

rights previously have been discussed in the area of discrimination and retroactivity, a more detailed and thorough discussion follows.

C. *The Court of Justice and Fundamental Rights*

The Court first asserted its supremacy in the area of fundamental rights in the 1969 case of *Stauder v. Ulm*.³⁷⁹ It developed principles protecting fundamental rights by referring to the constitutional traditions of the Member States, as well as the Convention and other international treaties, conventions and policy statements, and occasionally, without reference to any source.

Although the Court initially refused to review the legality of Community action in the context of fundamental rights,³⁸⁰ it reversed that position in *Stauder*. In that case, the Court announced that Community actions are to be viewed in light of the general legal principles of Community law, rather than national law; and that those general principles include a fundamental right of privacy.³⁸¹

Although Member State courts generally accepted the Court's supremacy in other contexts, some (particularly the German courts) resisted the Court's authority in the area of fundamental rights for twenty years after *Stauder*. German lawyers argued that Community law should not prevail over the provisions of the German constitution, the Grundgesetz, especially regarding fundamental human rights.³⁸² In 1987, the German constitutional court finally recognized the supremacy of the Court in the area of fundamental rights.³⁸³

In *Internationale Handelsgesellschaft* (1970),³⁸⁴ the Court ruled that Community laws may be annulled if they violated fundamental rights found in the constitutions of Member States as long as there was a guarantee of those rights contained in the structure and

379. *Stauder*, *supra* note 159. For a more general discussion of supremacy, *see supra* note 291 and accompanying text.

380. *Stork*, *supra* note 297.

381. *Stauder*, *supra* notes 159 and 379. (Commission required recipients of the Community's cheap surplus butter to prove entitlement to welfare benefits. The German and Dutch texts, but not the French or Italian text, required the person to present a coupon bearing his or her name. Court held that *Stauder* had a fundamental right of privacy under the German Constitution that did not require him to reveal his name to those selling the cheap butter.)

382. *See Wunsche*, *supra* note 300.

383. *Id.*

384. *See Internationale Handelsgesellschaft*, *supra* note 300.

objectives of the Community and its law.³⁸⁵ The Court recognized, as a fundamental right, the German constitutional doctrine of proportionality, providing that government authorities may impose on citizens only those obligations that are necessary for attaining the public objective at issue.³⁸⁶

Shortly after its decision in *Internationale Handelsgesellschaft*, the Court announced in *Nold v. Commission* (1973)³⁸⁷ that rights found in international agreements to which the Member States were a party are relevant in the Court's analysis of fundamental rights.³⁸⁸ The Court held that neither the Community, nor national statutes unconditionally protect economic interests, such as property rights and rights to pursue a business; restrictions on those interests may be justified by the overall objectives of the Community.³⁸⁹

The Court also recognizes as fundamental those rights found in express provisions of Community legislation, such as those dealing

385. *Id.* (Applicant's export license for maize meal expired. Council regulation set out a system that provided for a license deposit that would be forfeited if the goods were not exported within the designated time. The German government argued that the deposit system was invalid under the German Constitution because it violated the proportionality principle, and therefore, Community laws should defer to the German Constitution. The Court disagreed, concluding that the restriction on the freedom to trade was not disproportionate to the general interest that the deposit system sought to advance.). *Id.* at Decision, paras. 12-16. Following the Court's decision, the German government requested a ruling from the German constitutional court. The court ruled that, in the absence of a human rights provision in Community law, it was impossible to decide whether the Community standard of human rights was adequate in terms of that found in the German constitution. Therefore, Germany would not accept the rulings of the Court as conclusive and affirmed the supremacy of its own constitution. See [1974] 2 C.M.L.R. 540 (1974). See *supra* note 300. The *Wünsche* court reversed itself in 1986. See also Case 2 BvR 687/85, Re Application of Frau Kloppenburg, Bundesverfassungsgericht, [1988] 3 C.M.L.R. 1 (1988) (German constitutional court affirmed the supremacy of the Court on Community matters by holding that when the Court has preliminarily ruled on a question in an action, German courts either will follow the ruling or resubmit the question to the Court. To do otherwise, the court held, was to act in an objectively arbitrary manner.).

386. *Id.* See also *Cinétheque*, *supra* note 336.

387. Case 4/73, *Nold, Kohlen-und Baustoffsgroßhandlung v. Commission*, 1974 E.C.R. 491 (1974); see *supra* note 160.

388. *Id.* (*Nold*, a coal wholesaler, sought to overturn a Commission decision authorizing the Ruhr coal-retailing agency to adopt criteria for coal to promote competition that eliminated *Nold* as a direct wholesaler. *Nold* claimed the Commission discriminated against it, breaching its fundamental property rights and rights to pursue the business of direct coal wholesaling. The Court held that a Community order does not protect such rights unconditionally, but neither does a national order.).

389. See also Case 234/85, *Staatsanwalt Freiburg v. Franz Keller*, 1986 E.C.R. 2897 (Community rules on placing the sugar content of wine on the bottle's label were justified because such information fell within the general objectives of the common organization of the wine markets.).

with discrimination,³⁹⁰ because express rights are manifestations of more general fundamental principles of Community law that can be found elsewhere.³⁹¹ ("Elsewhere" includes the Convention, the European Social Charter, the Labor Conventions, the written constitutions of the Member States, and other international covenants.)³⁹²

1. *The Convention and the Court*

a. *Introduction*

Before the Court's decisions concerning rights protected by the Convention are reviewed, a few comments are in order. First, the Court has refused to incorporate the Convention as a directly effective source of law. Second, the Court has held that without an amendment to the ECT, the Community is without power to accede to the Convention. Third, the yet-unratified Treaty of Amsterdam has given the Court the power to enforce the fundamental principles expressed in the Convention for the first time.³⁹³

1) *The Court: The Convention Is Not Directly Effective*

Although the Court refers to the Convention as a guide for determining what constitutes a fundamental right, the Court consistently has refused to incorporate the Convention or other human rights declarations into Community law as formal and directly effective sources of law, or to feel bound by the rulings of the ECtHR.³⁹⁴ Rather, the Court looks to "extra-Community instruments under which those States have undertaken international obligations in order to ensure better protection for those rights can, without any question of their being incorporated as such in the community order . . . to establish principles which

390. See *supra* notes 338-42 and accompanying text.

391. *Rutili*, *supra* note 161. (Measures restricting the right of residence to certain sections of a Member State cannot be imposed on nationals of other Member States who are subject to the treaty provisions, except in cases when such measures may be applied to nationals of the Member State, because aliens' rights are found in Community legislation and "are specific manifestation[s] of the more general principle, enshrined in Articles, 8, 9, 10, and 11 of the Convention."). *Id.* at para. 32.

392. There are occasions when the Court discusses fundamental rights without reference to any written source. See *R. v. Ministry*, *supra* note 314.

393. TREATY OF AMSTERDAM, *supra* note 72.

394. Case 118/75, *Watson and Belmann*, 1976 E.C.R. 1185, 1207, [1976] 2 C.M.L.R. 552, 563-64 (1976).

are common to the States themselves."³⁹⁵ Thus, such rights are relevant in the Court's analysis because they represent basic principles of law in the Member States, who are all signatories of the Convention.³⁹⁶

2) The Community's Institutions: The Convention Is Not Directly Effective

The Court's position on the role of the Convention was ratified by the Community's three political institutions in the Joint Declaration of the European Parliament, the Council and the Commission of 5 April 1977.³⁹⁷ The signatories clearly articulated that "protected fundamental rights" are those rights derived from the constitutions of the Member States and from the Convention.³⁹⁸ The Joint Declaration, is not legally binding, but it is symbolic of the Community's institutional respect for fundamental rights.³⁹⁹

Although authority is present in the Treaty of Amsterdam (if ratified), no authority is present in TEU for the Court to enforce the Convention. As stated in Part One, Article F(2) of TEU implores the Union to respect the general principles of law found in the Convention, however, TEU presently gives the Court no power to enforce that "respect."⁴⁰⁰ Ratification of the Treaty of Amsterdam will rectify this omission.

3) The Court: The Union Has No Power to Accede to the Convention

In 1996, the Court was faced with a case challenging the Community's power to accede to the Convention in *Re: the Accession of the Community to the European Human Rights Convention*.⁴⁰¹ The Court ruled that no treaty provision conferred

395. *Id.*

396. *See supra* note 169.

397. Joint Declaration by the European Parliament, the Council and the Commission (signed at Luxembourg, April 5, 1977) O.J. (C 103/1) (April 27, 1977) (Signatories stressed the importance they attached to the protection of fundamental rights derived from the constitutions of the Member States and the Convention.). *See supra* note 29.

The term "political" is somewhat of a misnomer when applied to the Commission; its duties are primarily executive, but it is charged with the responsibility of enforcing the protection of human rights, as well as issuing directives on human rights, among its many other duties. *See supra* notes 16 and 19.

398. *Id.*

399. CRAIG, *supra* note 4, at 295.

400. *See supra* note 2, TEU art. L.

401. Opinion 2/94, *Re* the Accession of the Community to the European Human Rights Convention, [1996] 2 C.M.L.R. 265 (1996).

“any general power to enact rules on human rights or to conclude international conventions in this field” on Community institutions.⁴⁰² The Court concluded that although respect for human rights is a condition for legal Community acts, it had no power under Article 235 to accede to the Convention. The Court held, “Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.”⁴⁰³

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

It must, therefore, be held that, as Community law now stands, the Community has no competence to accede to the Convention.⁴⁰⁴ Thus, the Court made it clear that only a treaty amendment would assure that the human rights contained in the Convention are directly applicable to Community institutions and individuals. By so ruling, the Court carefully sidestepped the difficult issues associated with subjecting the Community’s institutions to the jurisdiction of the ECtHR.⁴⁰⁵ The necessary addition has been made by the Treaty of Amsterdam, providing, of course, that the Treaty is ratified by the Member States.

b. Challenges in the Court Referencing the Convention

The following examines the types of challenges presented to the Court in the arena of fundamental rights and a brief review of the Court’s decisions concerning the Convention.⁴⁰⁶ Generally speaking,

402. *Id.* at Decision.

403. *Id.*

404. *Id.*

405. If the Union ratified the Convention, it would be bound by the rights and procedures set out in the Convention and subject to its jurisdiction. Thus, Union citizens could arguably file complaints with the ECommHR against institutions of the Union and the ECtHR, rather than the Court, would decide the validity of the complaint. DINNAGE, *supra* note 4, at 102.

406. The authors caution that this discussion is not intended to include every decided case. Rather, the intent is to provide an overview of the various kinds of decisions and the principles espoused by the Court in the area of fundamental rights.

the Court prefers to decide an issue raising fundamental rights by first consulting the treaties before citing the Convention as authority⁴⁰⁷ or as support in *dicta*.⁴⁰⁸

1) *Types of Challenges*

The cases usually arise as requests for preliminary rulings by national courts under Article 177⁴⁰⁹ and as actions for annulment under Article 173.⁴¹⁰ Generally speaking, the cases concern claims that state laws provide no remedies for violations of Community law (assuming legal rights protected by the Convention), a state's implementation of Community law is incompatible with said rights, or a state's law that differs from Community law is incompatible with the Community law that protects those rights. The Court generally upholds state law when the state law supports the general welfare of the Community and is not disproportionate or disproportionately applied to the individual.

An example of the first category might involve a situation where a state provides no effective remedy for a violation of a fundamental right found in the Convention. In this type of case, the Court has held that "the principles in which the Convention is based must be taken into consideration in Community law" so that a woman has a right, under Articles 6 and 13 of the Convention, to obtain an effective remedy in a competent state court against allegedly discriminatory state measures in violation of the principle

407. Case 168/91, *Konstantinidis v. Stadt Altensteig, Standesamt E.C.R. and Landratsamt Calw, Ordnungsamt*, 1993 E.C.R. I-1191 (A self-employed Greek masseur working in Germany complained that German authorities were infringing his Community rights by officially mispronouncing his name. Although the Advocate General concluded that Article 8 protected an individual's right to oppose unjustified interference with his name, the Court did not refer to the Convention, but ruled that Article 52 provides for the right of self-employed persons to establish themselves in a Member State without direct or indirect discrimination on grounds of nationality. The Court reasoned that the mispronunciation could cause confusion to the applicant's potential clients.).

408. Case C-368/95, *Vereinigte Familiapress Zeitungsverlage-undVertriebs GmbH v. Verlag*, [1997] 3 C.M.L.R. 1329 (1997) (Restrictions on freedom of the press must be interpreted in light of freedoms enshrined in Article 10 of the Convention.); Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. E.C.R. Dimotiki Etaira Pliroforissis and Sotirios Kouvelas*, 1991 ECR I-2925 (An applicant granted a monopoly under national law to carry on its radio and television activities sought an injunction against two competing businesses. The Court held that Article 59 of the EEC Treaty was violated when the monopoly was granted. In *dicta*, the Court reasoned that the guarantee of free expression found in Article 10 of the Convention limited the application of Greece's public policy considerations.).

409. ECT art. 177 and *supra* note 283 and accompanying text. See also *First Article supra* note 1, at 968 and n.376.

410. ECT art. 173 and *supra* note 280 and accompanying text.

of equal treatment for men and women.⁴¹¹

An example of the second category occurs when the Court refuses to permit a state's penal provisions implementing Community regulations to be applied retroactively.⁴¹² The Court held that a ban on ex post facto penal provisions is "common to all the legal orders of the Member States and is enshrined in Article 7 of the . . . [Convention] as a fundamental right. Accordingly, it takes its place among the general principles of law whose observance is ensured by the Court of Justice."⁴¹³

An example of the third category involves a situation where a Member State seeks to deviate from Community law or to justify a restriction on Community rules in the interest of some conflicting national policy. The Court will not examine the compatibility of non-Member State law with fundamental rights because said law is outside the jurisdiction of the Community.⁴¹⁴ The same principles and rights that bind the Community in its actions also bind Member States implementing Community law. Thus, an implementing state law could not add a requirement missing from the Council regulation that had the effect of depriving applicant of rightfully earned compensation.⁴¹⁵

411. *Johnston*, *supra* note 302, at para. 18.

412. Case 63/83 *Regina v. Kent Kirk*, 1984 E.C.R. 2689 (Kirk, a Danish fisherman, sailed on January 6, 1983, into the United Kingdom's 12-mile fishing zone. Kirk was arrested and charged under a United Kingdom order prohibiting Danish boats from fishing inside the limit. Kirk argued that he had a right (as a Community national) to fish anywhere in Community waters and that the United Kingdom order was a penal provision illegally applied retroactively to him. The Court ruled that a penal act could not be applied retroactively to Kirk. Under Article 100 of the Act of Accession of the United Kingdom to the European Community, the United Kingdom reserved the right to exclude fishing boats of other Member States, including Denmark, from the 12-mile territorial limit until December 31, 1982. (This exclusion was in derogation of Community law.) On January 25, 1983, the Council adopted Regulation 170/83 permitting the United Kingdom to maintain the exclusion for another ten years, making the regulation retroactive to January 1, 1983. The Court decided that because Kirk fished during the time between the initial expiration and adoption of the new regulation, he had a right under Community law to fish in the United Kingdom's territorial waters. The retroactive application validated the ex post facto provisions of the regulation.)

413. *Id.*

414. Case 12/86, *Demirel v. Stadt Schwabisch Gmund*, 1987 E.C.R. 3719 [1989] 1 C.M.L.R. 421 (1987) (A Turkish woman in Germany was ordered to leave when her visa expired. A question about the interpretation of the EC-Turkey Association Agreement was referred to the Court. The Court ruled that because the right to family reunification was not, at that time, covered by the provisions of the Agreement, it lacked the jurisdiction to examine the compatibility of the Agreement with Article 8 of the Convention. Thus, the right to family life contained in national laws outside the scope of Community law was held beyond the Court's jurisdiction.)

415. Case 5/ 88, *Hubert Wachauf v. The State*, 1989 E.C.R. 2609, [1991] 1 C.M.L.R. 328 (1989) (A German tenant farmer requested compensation under German law for

2) *Review of the Court's Cases Concerning the Convention*

The following discussion focuses only on Articles 6, 8, 9, 10, and 14, the primary areas of decision.

a) Article 6: the right to fair and public trial in a reasonable time by an independent and impartial tribunal established by law

Many rights have been recognized within the Article 6 right to a "fair and public trial."⁴¹⁶ When a state uses criminal penalties to implement Community policy on working hours, such penalties do not *per se* violate Article 6; the state's interests are balanced against those of the individual.⁴¹⁷ The concept of a "fair hearing" does not preclude the setting of a three-month time limit for a Community staff employee to institute legal proceedings, even if the national authority permits a longer period of time.⁴¹⁸ That concept also mandates access to the national courts,⁴¹⁹ as well as equal access to those courts regardless of the nationality of the parties.⁴²⁰

Unlike individuals, business entities do not have the right to remain silent or the right against self-incrimination when investigated or indicted for "infringements in the economic sphere," such as infringements of competition law.⁴²¹ The Court has held,

discontinuance of milk production when his lease expired. German law required the lessor to give written consent, but the farmer's landlord refused. The Court ruled that the German law deprived the applicant of the "fruits of his labor" without compensation.). *Id.* at 455.

416. See Convention, *supra* note 5, art. 6.

417. Case 326/88, *Anklagemyndigheden v. Hansen & Son I/S*, 1990 E.C.R. I-2911 (1990) (A Commission directive requiring eight-hour shifts for truck drivers and a Danish statute implementing the directive made employers criminally liable if their drivers worked more than eight hours per day. The Court held that Article 6 did not prohibit states from using such penalties to ensure compliance with directives as long as the remedy did not violate any of the Community's general principles.). *But see* *Regina v. Kirk*, *supra* note 411 (Penal measures cannot be applied retroactively.).

418. Case 257/85, *Dufay v. European Parliament*, 1987 E.C.R. 1561 (Community staff are subject to rules established by Community law.).

419. *Johnston*, *supra* note 302.

420. Case 98/79, *Pecastaing v. Belgian State*, 1980 E.C.R. 691, [1980] 3 C.M.L.R. 685 (1980).

421. Case 374/87, *Orkem v. Commission*, 1989 E.C.R. 3283 [1991] 4 C.M.L.R. 502 (1991) (Plaintiff sought to suppress information (claiming infringement of its due process rights) obtained during an unexpected search by the Commission while investigating violations of competition laws. Since the Commission had requested information regarding meetings of producers and evidence of agreements to fix prices, the applicant claimed the Commission compelled self-incrimination in violation of the Convention. The Court disagreed, finding no such right against self-incrimination for business entities existed under Article 6(1).).

however, that despite the absence of this right, governmental investigation (even the preliminary phases) may not “undermine the rights of defense of the undertaking concerned”; thus, a company cannot be compelled to give the Commission answers that might involve admission of a breach that the Commission has the burden of proving.⁴²² Also, the Court has clearly held that the concept of “fair hearing” includes an entity’s right to notice that must specify the subject-matter and purpose of the investigation.⁴²³

Finally, a business is guaranteed the fundamental “right of defense” extending to the adversarial nature of the hearing and other rights in preliminary matters (such as the right to know the subject matter and purpose of an investigation)⁴²⁴ as well as the right to legal representation and privilege of information exchanged by lawyer and client.⁴²⁵

b) Article 8: the right to respect for private and family life, home, and correspondence

A business entity is entitled to certain rights, but it is not entitled to other protections available to individuals. It is noted that privacy-related rights are accorded business entities through the “right of defense,” discussed above.

The right to privacy in the home under Article 8 applies to private dwellings of natural persons, but not to business

422. *Id.*

423. Case 136/79 National Panasonic (U.K.) Ltd. v. Commission, 1980 E.C.R. 2033.

424. Cases 85/87 and 97-99/87, Dow Benelux NV v. EC Commission; Dow Chemical Iberica SA and Others v. EC Commission, 1989 E.C.R. 3137, 3165, [1991] 4 C.M.L.R. 410 (1991).

425. Case 155/79, A.M. & S. Europe Ltd. v. Commission, 1982 E.C.R. 1575 [1982] 2 C.M.L.R. 264 (1982) (A Commission decision required a company to produce various documents containing suspected breaches of Community competition law, when the documents also contained confidential communications between lawyer and client. The Court held that such production is protected from disclosure on the grounds of professional privilege. Even though the Convention did not specifically mention this privilege, the Court recognized the privilege because the attorney/client privilege was part of the legal interpenetration of the Member States. The Court also set out the procedure for claiming the privilege. If a client wishes to claim privilege, the client must (without revealing the contents of a document) give the Commission sufficient information to demonstrate that the conditions for the privilege are satisfied. If the Commission does not agree that the conditions for privilege are satisfied, it will order production of the document and may impose a penalty for failure to comply. Normally this penalty assesses a fine for each day that the client fails to surrender the document. The client can challenge the Commission order in the Court. The Court will decide whether to uphold the order after inspecting the document.).

premises.⁴²⁶ Consequently, since a business entity has no right to be free from search and seizure without a judicial warrant, Community officials may investigate the entity, provided that the governmental intervention is not arbitrary or disproportionate.⁴²⁷ When the entity opposes a Commission's investigation, the Commission may nevertheless search for necessary information with the assistance of national authorities, in accordance with the Member State's procedural guarantees.⁴²⁸

c) Article 9: the right to freedom of thought, conscience, and religion

The Court has held that Community institutions should "take steps" to respect (although not necessarily accommodate) the requirements of a candidate's religion, as long as the relevant institution was given sufficient notice of these requirements by the candidate.⁴²⁹

d) Article 10: the right to freedom of expression

Although all Member States agree in principle that freedom of expression is a right worthy of protection, they differ as to how the right should be protected.⁴³⁰ This is reflected in the fact that the legal systems of Member States differ as to the nature and content of protected speech, as well as the restrictions that may be placed

426. *National Panasonic*, *supra* note 422.

427. *Joined Case 46/87 227/88, Hoechst AG v. Commission*, 1989 E.C.R. 2859, [1991] 4 C.M.L.R. 410 (1989) (The Commission suspected that several corporations, including Hoechst, participated in price-fixing. When the Commission sought to investigate Hoescht, it refused to cooperate, stating that the Commission violated its fundamental rights by conducting a search without a prior judicial warrant. The Court held that if the investigated entity does not voluntarily cooperate, the Commission may carry out an investigation if it respects the relevant procedural safeguards guaranteed under national law. The Court provided, however, that inquiry can be made to determine whether the Commission's intervention is arbitrary or disproportionate.).

428. *Id.* (Although the national authority could not review the Commission order (except to determine its authenticity), it could determine whether the proposed methods of investigation were arbitrary or excessive under national law.).

429. *Case 130/75, Prais v. Council*, 1976 E.C.R. 1589, [1976] 2 C.M.L.R. 708 (1976) (Council set a date for open competition for a job. Applicant, however, was Jewish and the appointed day fell on a Jewish holiday during which she could neither travel nor write. Court refused to annul the Council's decision under Article 9, but held that when the governmental testing authority is informed in advance, it should attempt (but is not required) to accommodate the religious observances of candidates by trying to avoid scheduling examinations on religious holidays.).

430. CRAIG, *supra* note 4, at 299.

on speech.⁴³¹

The Court examines the compatibility of national measures within the scope of Community law with the fundamental right of free expression. Issues arise when national measures create state-run monopolies that restrict freedom of expression⁴³² or licensing mechanisms that restrict access by nondomestic companies.⁴³³ The underlying inquiry is whether the state measure promotes the goal of Article 10, the preservation of diversity of opinion.⁴³⁴

Journalists are also protected, particularly those employed by the Community.⁴³⁵ The Court has held that freedom of expression is a fundamental right of journalists whose primary duty is to write in complete independence of the views of either the Afro-Caribbean-Pacific States or the Communities.⁴³⁶

*e) Article One - Protocol One: right to hold property*⁴³⁷

Fundamental property rights such as the right to the peaceful enjoyment of property and the freedom to pursue a commercial activity are subject to restrictions supporting the general welfare of the Community that do not disproportionately or intolerably interfere with the rights of the owners. The Court ruled in *Hauer v. Land Rheinland-Pfalz*⁴³⁸ that restrictions on the exercise of

431. *Id.*

432. *Elliniki*, *supra* note 407.

433. Case C-23/93, TV10 SA v. Commissariaat Voor De Media, [1995] 3 C.M.L.R. 284 (The Netherlands refused access to its cable network to TV10, a Luxembourg company, as not complying with Dutch rules. The Court held that a Member State may treat a foreign broadcaster the same as a domestic one when the foreign broadcaster was established in another state to avoid the rules of the domestic state and when the goals of the domestic laws were consistent with those of Article 10 (i.e., to ensure the pluralistic and non-commercial content of programs)).

434. *Id.*

435. Case 100/88, Oyowe and Another v. Commission, 1989 E.C.R. 4285 (Journalists employed by the European Cooperation Agency to work on a publication concerning the relationship between the African-Caribbean-Pacific states and the Community objected when they were not appointed as Commission officials, complaining non-appointment had an adverse effect on their pension rights. The Commission argued the non-appointment was justified because the journalists represented the perspective of the African, Caribbean and Pacific states and thus, could not comply with the duty of allegiance that all Commission officials owe to the Community. The Court disagreed, holding that the duty of allegiance could not be interpreted in a way to infringe freedom of expression.)

436. *Id.*

437. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 266.

438. Case 44/79, Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727.

fundamental rights found in Article 1 of Protocol 1 to the Convention, and in the constitutions of Member States, are appropriate when those restrictions meet the above standard.⁴³⁹ Recently, the Court affirmed these principles when an airplane owned by a Yugoslavian company that was leased to a Turkish airline was impounded by Irish authorities pursuant to a Commission regulation implementing United Nations' sanctions against Yugoslavia.⁴⁴⁰ Thus, a state's restraint on property is legal when the Community's interest outweighs that of the individual.⁴⁴¹

2. *Challenges That Do Not Invoke the Convention*

The Court has also recognized human rights specifically enumerated in European Union law or recognized as common to the traditions of the Member States, but not expressly found in the Convention. For example, the Court has recognized the due process right to a fair⁴⁴² hearing,⁴⁴³ such as the principle of nonretroactivity

439. *Id.* (The plaintiff applied for authorization to plant wine grapevines on a plot of land she owned, but was refused because German law deemed her property unsuitable for wine-growing. During the pendency of her case, the Community issued a regulation that imposed a three-year prohibition on all new planting of vines. She complained that the Community regulation should not apply to her because it was issued after her application for authorization was made and, even if applicable, violated her rights to property and her right to freely pursue a trade or profession, as guaranteed by Articles 13 and 14 of the German Constitution. The Court held that the regulation did not deprive her of property since she remained free to dispose the property or to put it to other uses not prohibited; the Community regulation was in accordance with the general interest (a standard used by other Member States); the regulation, limiting the ban to three years, did not constitute a disproportionate and intolerable interference with the rights of the owners; and the fundamental right to pursue an occupation as a wine-grower was not infringed because the regulation was not unreasonably restrictive because the regulation did not affect her access to the occupation of wine-growing.). *Id.*

440. *See* Case C-84/95, *Bosphorus Hava Yollari Turizm Ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland*, [1996] 3 C.M.L.R. 257 (1996) (The Court found no disproportionality because of the Community's interest in ending the state of war in that region and the incredible violations of human rights.) *and* Case C-177/95, *Ebony Maritime SA and another v. Prefetto Della Provincia Di Brindisi and others*, [1997] 2 C.M.L.R. 24 (1997) (similar facts). *See also* Case C-124/95, *R. v. H.M. Treasury and Bank of England, ex parte Centro-Com Srl*, *See supra* note 311 (compliance with international sanctions against Yugoslavia does not excuse compliance with Community policy).

441. *Staatsanwalt Freiburg v. Franz Keller*, 1986 E.C.R. 2897, [1987] 1 C.M.L.R. 875 (1986).

442. Case C-49/88, *Al-Jubail Fertilizer Co. v. EC Council*, 1991 E.C.R. I-3187, [1991] 3 C.M.L.R. 377 (1991) (Fair hearings are guaranteed, and therefore, provisions of an anti-dumping regulation are invalid because the applicant has the right to a fair hearing during the process leading to the adoption of the measure.). *Id.*

443. Case 17/74, *Transocean Marine Paint Ass'n v. Commission*, 1974 E.C.R. 1063 (Article 85 of the Community competition regulation prohibits agreements that restrict

of penal provisions,⁴⁴⁴ the principle of legitimate expectations,⁴⁴⁵ the right to legal representation and the privileged nature of correspondence between lawyer and client,⁴⁴⁶ the principle of equal treatment of the sexes,⁴⁴⁷ the right to a private life,⁴⁴⁸ and the right to have criminal proceedings take place in one's own language (if nationals of the host Member State have that right) and not merely through an interpreter.⁴⁴⁹

D. Conclusion

Protection of fundamental human rights at the Community level have been achieved through the decisions of the Court of Justice. These rights have been fashioned by the Court's reference to the laws and constitutions of the Member States, the Convention on Human Rights, international treaties and policies, and sometimes, the customs and traditions of the Member States. In the area of fundamental rights, it is true that the Court has made great headway during the past forty years. There are, however, some problems with the Court's current method of recognition of fundamental rights. These problems are addressed in the following section.

PART FOUR: DISCUSSION AND CONCLUSION

Profound respect for the rights of individual citizens is reflected

competition except Commission-exempted agreements. Since the agreement establishing the Transocean Marine Paint Ass'n was *prima facie* contrary to Article 85, the application made to the Commission for exemption was granted, subject to conditions, for a period of ten years. On application for renewal, the Commission informed the Association of new conditions, except one.

The Court voided the undisclosed condition, holding that the right to a hearing is a general principle of Community law and is binding on the Commission, even in the absence of a specific legislative provision. The Court explained that this rule requires companies be clearly informed (in advance) of the essential features of any conditions the Commission intends to impose.). *Id.*

444. See *Kirk*, *supra* note 411.

445. See *supra* notes 368-78 and accompanying text.

446. *A.M. & S.*, *supra* note 424.

447. See *Razzouk*, *supra* note 366 and *DeFrenne*, *supra* note 347.

448. Case C-404/92P, *X v. Commission*, 1994 E.C.R. I-4737 (The Commission's decision not to appoint X to its staff was invalid because X's right to respect for his private life was violated when his refusal to take an AIDS test was the reason for the Commission's failure to appoint.).

449. Case 137/84, *Ministere Public v. Mutsch*, 1985 E.C.R. 2681, [1986] 1 C.M.L.R. 648 (1985). The Convention only requires an interpreter be provided to criminal defendants. Not all Member States agreed to the result in *Mutsch*. See CRAIG, *supra* note 4, at 299.

both in the yet to be ratified Treaty of Amsterdam and the work of the IGC. The Treaty would transform the human rights found in the Convention into "fundamental principles of Community action" and would give the Court of Justice the power to enforce those rights.⁴⁵⁰ The Treaty would also make compliance with these human rights, now recognized by the Convention, a condition for accession to the Union.⁴⁵¹ Furthermore, the Treaty would require the Union's institutions to be more "transparent," or open and accessible to citizens.⁴⁵² Thus, assuming the Treaty is ratified,⁴⁵³ protection of the rights set out in the Convention would be elevated to a new status because those rights would become "fundamental principles" of all Community action, and therefore, enforceable by the Court.

There are problems with the Court's current method of recognizing fundamental rights that are not solved by the Treaty of Amsterdam. The most obvious deals with the differences in decisions between the Court and the ECtHR. The Court's interpretations of fundamental rights under the Convention have not always been consistent with those recognized by the ECtHR. This situation may continue. Also, the Court's method of recognizing human rights through reference to the traditions of the Member States is unworkable for states seeking Union membership who have a weak record on human rights.

A. *The Jurisprudence of the Court Versus the ECtHR*

The Court's interpretations of fundamental rights under the Convention sometimes conflict with the interpretations of the ECtHR. For example, the Court recognized no right of privacy in business premises under Article 8 of the Convention in *Hoechst GmbH v. Commission*.⁴⁵⁴ The ECtHR has recognized the privacy in business premises in at least three cases discussed above: *Niemietz v. Germany*;⁴⁵⁵ *Chappell v. United Kingdom*⁴⁵⁶; and *Huvig v. France*.⁴⁵⁷ The Court recognized no right against self-incrimination for business entities under Article 6(1) of the Convention in *Orkem*

450. TREATY OF AMSTERDAM, *supra* notes 78 and 79, ch. 1 (amending TEU arts. F and L).

451. TREATY OF AMSTERDAM, *supra* note 88 (amending TEU art. O).

452. TREATY OF AMSTERDAM, *supra* notes 109 and 127-30.

453. Ratification by all Member States is not assured. *See supra* note 74.

454. *See Hoechst, supra* note 426.

455. *See Niemietz, supra* note 236.

456. *See Chappell, supra* note 244.

457. *See Huvig, supra* note 246.

v. Commission.⁴⁵⁸ The ECtHR has recognized this right against self-incrimination for business entities in *Funke v. France*.⁴⁶⁹

The Treaty gives no direction as to how to resolve the conflict between the decisions of the ECtHR and the Court. Although the Treaty provides that human rights found in the Convention are “fundamental principles of Community action,” it fails to make clear how those rights are to be defined. To date, the Court’s interpretations have, for the most part, been more restrictive than those of the ECtHR.

Consistency between the decisions of the two courts is an admirable goal for the Union to pursue. Consistency would create an atmosphere of certainty, predictability, and clarity for the citizen. If the Convention’s rights are to serve as a “bill of rights” for Union citizens, it should not matter whether the citizen is before the ECtHR or the Court. If the common definition of fundamental rights is now provided under the Convention to both courts, an effort should be made to make interpretations of those rights consistent, whenever possible.

B. Standard of Traditions of the Member States

The Court may have to modify one of its standards for recognition of fundamental rights — traditions of the Member States. There is now the possibility that additional nations may accede to the Union, some of which have a poor history in the area of respect for human rights. Although the Treaty of Amsterdam provides that nations seeking to accede must agree to abide by the Convention, they may have no tradition of protecting human rights. Stated another way, many of these states do not share in the human rights customs and traditions of the current Member States. The challenge to the Court will be to determine whether a right is fundamental when more than one Member State does not recognize that right in their written constitutions or in their traditions.

C. Conclusion

The Treaty of Amsterdam now gives the Union citizen a minimum level of civil rights that the Member State cannot violate, at least in implementing Community policy. The Treaty’s “fundamental rights” amendments to TEU are “win-win”

458. See *Orkem*, *supra* note 420.

459. See *Funke*, *supra* note 221.

propositions. First, they correct the weakness of piecemeal recognition of single rights by adopting all the rights found in the Convention as "fundamental principles of Community action." Second, they deal somewhat with states whose national laws do not protect fundamental human rights to the degree that other Member States do. Third, they help to promote transparency and predictability for the Union citizen. Problems remain, but can be resolved if addressed in a disciplined manner.

The European Union is evolving toward a closer confederation. Greater emphasis is now placed on harmonizing the laws of Member States in the context of just and equal treatment of the citizens of Europe. Before the twenty-first century arrives, and assuming the Treaty of Amsterdam is ratified, Europe will once again undergo profound change both externally and internally. Indeed, there is now both an outreach by the Union to new nations and a quest for a greater role in international matters, as well as an inward growth involving a heightened respect for the citizen.

The most important aspect of the Treaty of Amsterdam deals with fundamental rights. A thriving democratic society is built upon respect for, and protection of, a citizen's civil rights. Protections at the Union level for individual rights will be the foundation of a thriving European Union in the twenty-first century.

We are witnesses to a significant historical transition. Perhaps what is unfolding is the Great Charter of Europe. Quite relevant here is Section XLI 31 of the Magna Charta Regis Johannis, "Nulli vendemus, nulli negabimus, aut differimus, rectum aut iustitiam." ("To none will we sell, to none will we deny, to none will we delay right or justice.") It is to this principle that the authors dedicate this work.