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**The protection of fundamental rights
as Community law
is created and developed**

(Report of the Commission of 4 February 1976
submitted to the European Parliament and the Council)

Commission of the
EUROPEAN COMMUNITIES

Abbreviations

OJ	Official Journal of the European Communities
Bull. EC	Bulletin of the European Communities
CJEC	Court of Justice of the European Communities
ECR	European Court Reports

The protection of fundamental rights,
as Community law is
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Introduction and scope of the subject matter

*Grounds **

1. In its Resolution of 4 April 1973,¹ based on the report of the Legal Affairs Committee,² the European Parliament invited the Commission

‘to submit to [the Parliament] a report as to how it intends, in the creation and development of European law, to prevent any infringement of the basic rights embodied in the constitutions of Member States, the principles of which represent the philosophical, political and juridical basis common to the Community’s Member States.’

2. The presentation of this report has been delayed for several reasons. On the one hand, both the Court of Justice as well as several national courts have, in the meantime, decided a number of cases involving the problem of fundamental rights.³ On the other, it is only now that some interim stocktaking on the subject is emerging in academic circles.⁴ Finally the Commission itself, in its report on the European Union, has given its views on the protection of fundamental rights in the construction of this Union.⁵

Limited scope of the Commission’s responsibility

3. In this report, which in no way claims to be exhaustive, the Commission will first of all naturally consider its own position. It will, however, also make some general comments which apply to both the other Community institutions and the Member States as these bear an equal, if not greater, share of the responsibility and authority for the protection of fundamental rights.

4. In so far as Community law is not affected, the Member States alone are responsible for the protection of fundamental rights within the framework of their national legal systems. As it has repeatedly stated in reply to Parliamentary questions,⁶ the Commission is, to this extent, not competent to intervene or pass judgment. Where, however, bodies in the Member States apply Community law, they

are bound to act in accordance with the guarantees of fundamental rights which apply under Community law.

There is, therefore, no scope for examining Community law provisions using as a yardstick the fundamental rights guaranteed under the national constitutions because Community law can be applied in the Member States only on a uniform basis and must necessarily be judged according to the same standards. Furthermore, where Member States adopt national measures to implement Community law, national fundamental rights as such are ruled out as a control standard, at all events in so far as mandatory provisions of Community law, including those of Directives, are involved.

5. The Commission exercises the right conferred upon it by the Treaties to make proposals and for this purpose takes part in the deliberations of the Parliament and the Council. In addition, it has to exercise the powers of decision conferred on it by the Treaties or the Council. Finally, the Commission is responsible for supervising the application of Community law and therefore also plays a watchdog role in respect of fundamental rights.

In all its activities the Commission must prevent and, if necessary, oppose possible infringements of fundamental rights.

* The intermediate headings do not form part of the Report of the Commission.

¹ OJ C 26 of 30.4.1973.

² Doc. 297/72 (EP 30.941/fin.) by Mr Jozeau-Marigné, rapporteur.

³ Points 9 and 10 below.

⁴ See the results of the special session of the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe of 12.6.1975 in Strasbourg on the protection of fundamental rights within the framework of the European Communities, the results of the 7th International Congress of the International Federation of European Law (FIDE) of 2 to 4.10.1975 in Brussels and the 4th International Colloquium on the European Human Rights Convention of 5 to 8.11.1975 in Rome.

⁵ Supplement 5/75 — Bull. EC, points 82 to 85.

⁶ Cf. e.g., Written Question No 1/75 by Mr Amendola and Mr Ansart, OJ C 170 of 28.7.1975; Written Question No 282/75 by Mr Bordu, OJ C 242 of 22.10.1975.

Survey

6. The following text indicates:

- (i) how the standard of fundamental rights has developed in the Community legal order; in other words according to which yardstick the Community institutions should base their actions (Points 7 to 12);
- (ii) the conclusions the Commission has drawn from this in pursuing its activities and the extent to which it has attempted to contribute towards further developing the protection of fundamental rights (Points 13 to 20);
- (iii) the conclusions to be drawn by the Commission with regard to future developments (Points 21 to 38).

The standard of fundamental rights in the Community

Fundamental rights as an essential part of the Community legal order

7. There are provisions in the Treaties themselves whose aim, or at least effect, is to guarantee and improve the position of the individual in the Community: e.g., Articles 7, 48, 52, 57, 117, 119 EEC. It is on the basis of some of these articles that the Court of Justice has been able to give important judgments as regards the protection of fundamental rights.

At the same time, it must not be forgotten that the creation of the Common Market has had the effect of extending beyond national frontiers the area over which the freedoms of the citizen, especially in the economic sector, may be exercised.

8. Turning to fundamental rights, strictly speaking, the Community institutions have, since the beginning of the Community, been faced with the question of their existence and with a precise definition of their scope under the Community legal order. Today, fundamental rights—however they may be defined¹—undeniably constitute an essential part of the Community legal order.

The individual citizen should not be without protection in the face of official power. He must have certain inviolable rights. This is one of the fundamental elements in the identity and cohesion of the Community.

In its report on European Union² the Commission has already stated that it sees democracy as one of the basic conditions for coexistence and integration of the Member States within the Community. An essential part of any democracy is protection of and respect for human rights and fundamental freedoms which alone enable the individual citizen freely to develop his personality. There can be no democracy without recognition and protection of human rights and guaranteed freedom of the citizen. This is equally true of the Community.

Even if the basic principles are clear it has nevertheless been difficult to secure agreement on the scope and effect of the various fundamental rights.

The case law of the Court of Justice

9. The Court of Justice of the European Communities was faced with the question of fundamental rights for the first time in 1959. Its case law is sufficiently well known and may be summarized as follows:

- (i) In two judgments in 1959 and 1960³ the Court of Justice initially held that it was not competent to examine the legality of acts of the Community institutions according to the yardstick of national fundamental rights.
- (ii) The subsequent cases of *Stauder* (1969) and *Internationale Handelsgesellschaft* (1970)⁴ reveal a new attitude in the jurisprudence of the Court when it held that 'respect for fundamental rights forms an integral part of the general principles of law of which (it) ensures respect'.

¹ Point 9.

² Supplement 5/75 — Bull. EC.

³ CJEC 4.2.1959 — *Stork v High Authority*, 1/58, [1958-59] ECR 43; CJEC 15.7.1960 — *Ruhrkohlenverkaufsgesellschaften v High Authority*, 36-38, 40/59, [1960] ECR 857.

⁴ CJEC 12.11.1969, 29/69, [1969] ECR 419; CJEC 17.12.1970, 11/70, [1970] ECR 1125. For a translation in English, see respectively [1970] CMLR 112 and [1972] CMLR 255.

(iii) In 1974, in the *Nold* case¹ the Court of Justice went one step further. It seem to have moved towards a sort of optimum standard of fundamental rights by holding that 'in safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot, therefore, uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States'. In addition, the Court of Justice draws from international treaties on the protection of human rights in which the Member States have collaborated or of which they are signatories guidelines for determining general legal principles which apply in the Community legal order.

The abovementioned decisions concern the right to human dignity and freedom in general (*Stauder*) and the principles of the freedom to develop and deal with property from an economic standpoint (*internationale Handelsgesellschaft*). The *Nold* case concerned rights of ownership in the economic sense and freedom to choose and practise a profession or trade.

The Court of Justice has, however, recognized that fundamental rights are not to be considered as absolute. As in all legal systems, there are no fundamental rights which are not subject to limitations, the extent of which depends on the nature of the right involved.

In this way the Court of Justice has already held in the *Internationale Handelsgesellschaft* case that 'the protection of (fundamental) rights, while inspired by the constitutional principles common to the Member States, must be ensured within the framework of the Community's structure and objectives'. In the *Nold* case, the Court decided that even if the fundamental rights at issue in the case were protected, nevertheless these were to be considered 'in the light of the social function of the property and activities protected thereunder' so that it is legitimate 'that these rights should if necessary be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched'.

Furthermore, other judgments of the Court have recognized a number of important general principles of law as essential elements of the principle of the rule of law in order to secure an effective protection of fundamental rights. These include the principle

of proportionality,² the requirement of legal certainty and the protection of confidence thereby,³ observance of the principle of the right to be heard and to defend one's rights in legal proceedings,⁴ the prohibition of conviction of a single offence twice,⁵ the general obligation to give reasons⁶ and the principle of non-discrimination.⁷

Furthermore the Court of Justice has not only paid attention to the substantive standard as regards the protection of the citizen against public authority: it has also considered the problem of the access of the individual to the Community court.

On the one hand, by developing a more and more favourable jurisprudence on the subject of the direct effect of Community provisions, it has considerably widened access to the national courts and thereby broadened the scope of application of Article 177 EEC. On the other hand, the cases decided by it since 1971 involving Article 215 EEC⁸ enable the individual citizen to go before the Court of Justice even where the damages alleged arise out of Community legal acts which cannot be directly attacked.

In this way access to the Court as laid down in Articles 173 and 175 EEC has been substantially extended.

Role of the courts of the Member States

10. It is well known that the effectiveness of the protection of fundamental rights is based not so

¹ CJEC 14.5.1974 — *Nold v Commission*, 4/73, [1974] ECR 491; CJEC 28.10.1975 — *Rutili v The French Minister for the Interior*, 36/75, [1975] ECR 1219.

² CJEC 12.6.1958 — *Compagnie des Hauts Fourneaux de Chasse v High Authority*, 15/57, [1958] ECR 155.

³ CJEC 4.7.1973 — *Westzucker v Einfuhr- und Vorratsstelle für Zucker*, 1/73, [1973] ECR 723.

⁴ CJEC 22.3.1961 — *Société Nouvelle des Usines de Pontlieue v High Authority*, 42 and 49/59, [1961] ECR 101.

⁵ CJEC 14.12.1972 — *Boehringer Mannheim GmbH v Commission*, 7/72, [1972] ECR 1281.

⁶ CJEC 15.3.1967 — *SA Cimenteries CBR, Cementbedrijven NV et al. v Commission*, 8-11/66, [1967] ECR 75; CJEC 28.10.1975 — *Rutili v the French Minister for the Interior* 36/75, [1975] ECR 1219.

⁷ CJEC 24.10.1973 — *Merkur-Aussenhandels-GmbH v Commission*, 43/72, [1973] ECR 1055.

⁸ CJEC 2.12.1971 — *Zuckerfabrik Schöppenstedt v Council*, 5/71, [1971] ECR 1975.

much on written legal guarantees as on judicial protection in individual cases. Accordingly it is necessary to underline the important role which the courts of the Member States have played towards clarifying the fundamental rights standard which is to apply in the Community, above all by referring questions for preliminary ruling to the Court of Justice.

In this connection, the courts of the Member States may be faced with a conflict in cases relating to Community law if the national standard of fundamental rights that they are required to protect were to go beyond that recognized under Community law. Competition to obtain the best protection of fundamental rights may have some positive effects for the citizen. However, he is also affected if Community law is not applied everywhere on a uniform basis.

Recently, the supreme courts of the Member States have adopted various positions with regard to this undoubtedly more theoretical than real conflict.

The Italian Constitutional Court described such a conflict as 'aberrant' and extremely improbable.¹ Whilst refusing to examine secondary Community legislation according to the fundamental rights in the Italian Constitution it nevertheless reserved the right, in an extreme case, to question, in respect of Italy, the law of the Treaty itself if the effect of this were to permit substantial infringement of fundamental rights.

In its decision of 19 May 1974,² it is true that the German Federal Constitutional Court was unable to establish any substantive conflict between secondary Community legislation and national fundamental rights. However, it justified the right it claimed to examine secondary Community law by basing itself on the fundamental rights embodied in the German Basic Law³ and by stating that in its opinion the fundamental rights standard achieved in the Community was inadequate. In its view this was because there was no written catalogue of fundamental rights enacted by a democratically elected Parliament.

Public opinion

11. At first, a prime concern of the public was that the citizen in the Community would be subjected to

a new authority bound neither by national fundamental rights nor by a catalogue of fundamental rights at Community level.⁴ Meanwhile the more recent decisions of the Court of Justice in favour of fundamental rights have silenced the original criticisms to a considerable extent. The frequently asserted danger of massive infringements of fundamental rights by the Community institutions has at no time materialized. This must be attributed, first, to the mechanisms adopted by the Community institutions to prevent any conflict between Community legal acts and fundamental rights recognized in the Community legal order and, secondly, to the limited competence of the Community: the powers of intervention written into the Treaties can by the very nature of things come into conflict only with a relatively limited number of fundamental rights. The debate about the deficiency of Community law as far as the protection of fundamental rights is concerned has therefore proved to be, to a considerable extent, theoretical even though the Community institutions' awareness of fundamental rights may thereby have been considerably increased.

Although there are still sporadic assertions that fundamental rights are inadequately protected in the Community, the views of those concerned are usually based on the universal application of their own national systems of fundamental rights. The opinion of most, however, is that the approach indicated by the Court of Justice provides sufficient guarantee that the fundamental rights of the Community's citizens are recognized and effectively protected.⁵

¹ Judgment of 18/27.12.1973 — Frontini 183/73; *Giustizia civile* 1974 III, 410; *Journal des tribunaux*, 1974, 412.

² *Internationale Handelsgesellschaft*, BVerfGE 37, 271.

³ Cf. a corresponding theoretical reservation BVerfGE 22, 293, 298, Decision of 18.10.1976.

⁴ Cf. e.g., the debates in the German Bundestag on the ECSC Treaty (Parliamentary reports of the German Bundestag, 1st term, 183rd session of 10.1.1952) and on the EEC Treaty (Parliamentary reports of the German Bundestag, 2nd term, 208th session of 9.5.1957 and 224th session of 5.7.1957). Here, anxiety with regard to a lack of democracy in the Community was expressed with particular intensity. Similar fears were expressed in the Parliaments of the new Member States during the debates on accession to the Community.

⁵ See the many critical observations on the decision of the Federal Constitutional Court of 29.5.1974.

Summary

12. Summarizing the above it can be said that the legal protection of fundamental rights at the Community level is guaranteed by the procedures laid down in the Treaties. As to the substantive standard of fundamental rights, this is based, first, on the fundamental rights and similar guarantees laid down in the Treaties and, secondly, on the general principles of law to be determined according to the criteria set out in the Nold judgment.

The position taken by the Commission on the question of fundamental rights to date

13. The Commission has certainly influenced the development of fundamental rights as described above. It has also adopted in its own sphere a number of preventative measures to meet the requirements necessary to protect fundamental rights.

Development of the freedoms laid down in the Treaties

14. The creation of the Common Market has extended the freedom of Community citizens. As framework Treaties, the Community Treaties call for permanent and continuous enactment of legislation, for example, in the field of freedom of movement and freedom of establishment. The Commission plays a decisive role in this law-making process. The respect and protection of fundamental rights is therefore a permanent task for it. In the field of agricultural policy in particular, where decisions that have a direct effect on the individual citizen have to be taken almost daily, the Commission has constantly to consider how it can safeguard him against discrimination, interference with duly acquired rights and excessive encroachments.

The instrument at the disposal of the Commission, the Treaty infringement procedure, can in certain cases serve to counter breaches of Community law through national measures which adversely affect

the citizen. This does not mean that only direct infringements of the fundamental rights of citizens are involved.¹ Disturbances in the free movement of goods, for example, by the levying of unauthorized taxes or the granting of aids which are incompatible with the Treaty, can also limit the citizen's freedom to engage in the trade or profession of his choice.

Contribution to the case law of the Court of Justice

15. The Commission also plays a role in almost all proceedings before the Court of Justice. By this means it is able through its written opinions to contribute towards resolving the question at issue, even when it is not itself one of the parties. In particular, it has always made use of the possibility of presenting its observations in Article 177 EEC procedures. In this way it has contributed in the working out of a jurisprudence which has become increasingly more favourable in the sphere of fundamental rights and as regards the economic liberties and down by the Treaties.

Attitude towards Parliament and public opinion

16. In cooperation with the European Parliament the Commission has had many opportunities to express its views on the protection of the fundamental rights of citizens. In various statements to the Parliament^{1,2,3} and in reply to many written and oral questions,⁴ the Commission has stated that 'every contravention of human rights and every violation of democracy no matter where it may be, is adhorrent'.⁴ In this way it intervenes with all the means at its disposal in favour of the respect of fundamental rights in the Community legal order.

¹ CJEC 4.4.1974 — Commission v French Republic, 167/73, [1974] ECR 359.

² Cf. e.g. statement by Sir Christopher Soames on 14.3.1973 in reply to questions by Mrs Caretoni Romagnoli and Mr Cifarelli, OJ Annex 160.

³ Statement by Mr. Scarascia Mugnozza on 30.4.1973, re protection of fundamental rights of citizens of Member States OJ Annex 161.

⁴ See the following more recent examples: Written Question No 213/75 by Mr Giraud and Mr Schmidt, OJ C 242 of 22.10.1975; Written Question No 285/75 by Mr Seefeld, OJ C 264 of 18.11.1975; Oral Question No H-40/75 of 14.5.1975 by Mr Bordu, EP Debates of May 1973.

This agreement between the views of the Commission and those of the European Parliament was recently shown in the assessment of the effect that the abovementioned decision of the German Federal Constitutional Court of 19 May 1974 may have on the Community legal order and in particular on the protection of fundamental rights. The Commission shares the conclusions drawn by the Legal Committee of the European Parliament in its draft Resolution contained in the report of Mr Rivierez.¹

17. In addition, one aspect which is also of importance in developing the freedom of the citizen should not be overlooked, namely informing him of his rights. Only when the citizen himself is convinced that the freedoms which are given him by the Treaties will be extended in the course of European integration and that he can count on effective protection of his rights will integration be successful. The Commission is endeavouring to inform the public of those measures which affect the citizen directly.

As part of its public relations work the Commission has promoted scientific examination of the question of fundamental rights through organizational and financial assistance. It is precisely because the Court of Justice refers to 'the fundamental rights embodied in the constitutions of the Member States' as the expression of general principles of law that surveys comparing laws and constitutions are essential.

The Commission summarized its views and aims in respect of the protection of fundamental rights and put them forward for public discussion in its report on European Union of June 1975.

Organizational provisions

18. A system of preventative legal checks which extends to safeguarding fundamental rights exists within the internal decision-making procedure of the Commission. Right from the initial stages of working out a legal act of the Commission the various interested services are on their guard to avoid a conflict between the measure in question and the fundamental rights of the individual.

In addition the Commission has created a special organ, the Legal Service—as has the Council—to examine the legality of drafts of legal acts which are

submitted to it. Pursuant to a decision of the Commission of 1958 it was laid down that 'all documents intended for the Commission, either with a view to their forming the subject of a proposal to the Council or for the adoption of one of the measures laid down in Article 189, are first to be referred to the Legal Service.'² The Opinion of the Legal Service is to be forwarded to the Commission at the same time as the documents in question.

Because of the cohesive way in which it works, the flexibility of its organization and the means at its disposal, this Service, whose members come from the various legal circles of the Member States, is in a position to clarify any fundamental rights question which may arise with regard to general legal principles or the constitutional traditions of one or more Member State.

In this way, the Commission considers that it has been able up to now to come up with solutions which conform to fundamental rights.

19. Proposals from the Commission for the enactment of a legal instrument affecting the citizen, and the Commission's own instruments, are, of course, preceded by preparatory work. Here there is always adequate opportunity to examine fundamental rights questions. The views of, and meetings with, experts from the Member States, consultations within the framework of the various committees, and contacts with associations representing, *inter alia*, the interests of persons affected by such instruments enable additional checks to be carried out.

Cooperation of Community institutions

20. As regards Community acts, in respect of which the Commission has only the right to make a proposal, responsibility to respect fundamental rights is also in the hands of both the Council, which decides, and the European Parliament, to the extent it is consulted.

In this case the Parliament is able to raise any question concerned with fundamental rights by asking

¹ Doc. No 390/75 (EP 41.913/fin.).

² Decision of 1.10.1958 Doc. COM (58) Minutes 31.

the Commission to reconsider its proposals and to modify them pursuant to Article 149(2) of the EEC Treaty. The Commission, which has undertaken to look at its proposals again in the light of the opinion of the Parliament is naturally ready to modify them every time that the parliamentary debates bring to light an incompatibility of these proposals with the fundamental rights of the citizen.

The Council is then able at the final stage, with the Commission and all sorts of experts from the Member States participating in the work, to make sure that problems bound up with fundamental rights receive a satisfactory solution.

Programmes and objectives

Tasks for the future

21. The Commission is convinced that the conclusions set out above¹ and the preventive measures it has adopted should be sufficient to avoid infringements of the fundamental rights of citizens. Protecting fundamental rights is not, however, a static task. The potential for extending the freedom of citizens within the Community is by no means exhausted. The increasing mass of Community law affecting the individual citizen calls for constant and increased attention. As regards its future activities the Commission has set itself the following tasks:

- (i) extending knowledge of the sources and bases of fundamental rights to be safeguarded by the Community;
- (ii) pursuing short-term projects concerning the improvement of the position of the citizen in the Community; and
- (iii) developing general objectives.

Increasing the knowledge of the theoretical bases

22. If, in the field of fundamental rights, one goes back to national constitutional traditions, the most immediate task from the comparative law standpoint is to acquire detailed knowledge of these traditions. The Commission will support and promote

efforts undertaken in this direction. Until very recently there were no detailed comparative surveys of the constitutional traditions of all Member States. The comprehensive preparatory work for the seventh FIDE Congress and a study requested by the Commission on the problems faced by the Community in drawing up a catalogue of fundamental rights² now make it possible to gain an insight into the various systems which have been set up in the Member States to protect the fundamental rights of citizens. Alongside many points in common there are at times profound differences.

23. The abovementioned study comes essentially to the conclusion that the method used at present by the Court of Justice to protect fundamental rights, that is to derive general legal rules from the constitutional traditions of the Member States, ensures adequate protection of fundamental rights. It considers this method to be suitable for the institutional safeguarding of fundamental rights given the present Community structure. On the other hand, a catalogue of fundamental rights embodied in a treaty is hardly likely to improve the protection of fundamental rights in the present state of integration. The study refers in particular to the possibility of using international conventions and legal rules, even where they are not binding in all Member States, to derive general principles of law.

Also according to the study, should there be a structural transformation of the Communities into a European Union or into a subject of international law, analogous to a federal State, it would be 'difficult to imagine that a new European constitution could, contrary to all contemporary trends and demands, dispense with an express and detailed guarantee of fundamental rights'.

Individual programmes

24. Apart from attempts to find solutions to basic problems, the Commission is also pursuing, in the creation and further development of European law, various individual projects (some pursuing objec-

¹ Points 13 to 20.

² Drawn up by Professor R. Bernhardt, Director of the Max-Planck Institute for Foreign Public Law and International Law, Heidelberg, together with several colleagues. See Annex.

tives already laid down in the Treaties, others being steps on the path towards European Union) which should bring appreciable improvements in the position of the individual citizen within the Community.

25. In connection with extending the freedom of individual citizens laid down in the Treaties the Commission has, for example, recently submitted to the Council an action programme designed to reinforce the social situation of migrant workers.¹

At the beginning of 1975 the Council, on a proposal of the Commission, adopted a directive putting into concrete form the principle of equal pay for men and women contained in Article 119 of the EEC Treaty.²

Finally, on 18 December 1975, the Council has given effect, to a large extent, to a proposed directive which the Commission submitted to it on 12 February 1975³ designed to achieve equality of treatment for men and women as regards access to employment, vocational training, promotion and working conditions.⁴

26. Furthermore, on the road towards European Union, the Commission is participating in the progressive creation of a European citizenship. It has submitted two concrete proposals drawn up on the invitation of the Heads of State or Government at the Paris Summit meeting in December 1974⁵:

(i) on the establishment of a Passport Union, which proposes progressive harmonization of legislation affecting aliens and the abolition of passport controls within the Community;

(ii) on the granting of special rights in each Member State to nationals of other Member States on the principle of treating such persons in the same way as nationals of the host Member State. The special political rights are, in particular, to include the right to vote, to stand for election and to hold public office at the local and possibly regional level.⁶

Survey of general objectives

27. The general objectives of the Commission as regards the development of fundamental rights in the Community are determined above all by three problem areas:

- (i) due regard for the European Human Rights Convention in the Community;
- (ii) the guarantee of a standard of fundamental rights which is as comprehensive as possible;
- (iii) the manner in which the institutions are to safeguard this guarantee.

Meaning of the Human Rights Convention

28. In the Nold case the Court of Justice rules that 'similarly, international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'.⁷ The Commission is of the opinion that this approach is particularly relevant with regard to the Human Rights Convention. The Human Rights Convention sets out, as far as the 'classic' fundamental rights are concerned, that is, certain of the fundamental rights to be protected in the Community, a catalogue of principles of law recognized as binding in all the Member States. It therefore also has binding effect on the activities of the Community institutions.

The Commission does not consider it necessary for the Community as such to become a party to the Convention. The fundamental rights laid down as norms in the Convention are recognized as generally binding in the context of Community law without further constitutive act.

Necessity for a comprehensive standard of fundamental rights

29. The second problem area concerns the guarantee of a standard of fundamental rights which is as comprehensive as possible. It is true that many

¹ Supplement 3/76 — Bull. EC.

² Directive 75/117/EEC, OJ L 45 of 19.2.1975.

³ OJ C 124 of 4.6.1975.

⁴ Directive 76/207/EEC, OJ L 39 of 14.2.1976.

⁵ Cf. points 10 and 11 of the final communiqué, Bull. EC 12-1974, point 1104.

⁶ Supplement 7/75 — Bull. EC.

⁷ In the Rutili case the Court has for the first time expressly referred to certain articles in the Convention. CJEC 28.10.1975 — Rutili v The French Minister of the Interior, 36/75 [1975] ECR 1219.

basic rights can be involved only in exceptional cases in view of the powers conferred upon the Community institutions.¹

Fundamental rights are, however, regulatory principles of a pluralistic society and should be taken into account as such by the Community institutions even if it is unlikely that they may, in a specific case, be infringed.

30. On the other hand, a dual tendency of Community law makes the protection of civil and political rights as well as economic and social rights appear more necessary than before:

(i) the tendency to adopt increasingly detailed and specific rules which, by virtue of this fact, affect the individual more directly, and this not only in the field of economic activity;

(ii) the extension of the powers of the Community institutions as part of the dynamic development towards European European Union.

Extension of the area of protection of fundamental rights

31. These tendencies increase the need for the protection of fundamental rights which the Commission will meet in two ways.

Firstly, it will, in its legislative actions and in exercising its right of initiative *vis-à-vis* the Council, pay particular attention to the development of economic and social fundamental rights. It considers this field of fundamental rights to be of particular significance since the activities of the Community institutions are mainly in the economic sector. The Commission is aware that these types of fundamental rights need in particular to be put into concrete form and complemented by being given effect on the Community as well as the Member State level. It can only confirm its intention increasingly to encourage developments in the direction indicated.

Secondly, in interpreting the decisions of the Court of Justice, the Commission proceeds from the basis that the substantive content of the fundamental rights recognized under Community law must be defined in accordance with the national standard that affords the maximum protection to the individual whilst taking into account the general interest, in order to achieve an optimum standard of protec-

tion of fundamental rights in the Community. In considering the legal positions of the individual and of the Community the Commission will, on every occasion, align its activities on the optimum standard in question and not on the lowest common denominator of the standards of fundamental rights achieved in the Member States. A high standard of fundamental rights at Community level will constitute an element in the Community legal order that will encourage integration.

Safeguarding of fundamental rights by the institutions

32. The last problem area, mentioned under paragraph 27, concerns the question of the best method of safeguarding of fundamental rights from the technical point of view. As already indicated, expert opinions expressed recently on this question in legal academic circles have been overwhelmingly to the effect that protection of fundamental rights by the judicial authority is preferable to an attempt to codify the rights to be protected. The Commission, although being in favour of a Community catalogue in its report on European Union, considers that in the present state of integration the reasons put forward in favour of a judicial solution are conclusive.

Advantage and disadvantages of a catalogue of fundamental rights

33. A written Community catalogue of fundamental rights would have many advantages: such a catalogue would improve legal certainty and would lend solid support to the law-making by the judiciary. In addition it would emphasize the importance of fundamental rights and remove any remaining doubts about their relevance in Community law. Finally it would enable the exercise of economic and social rights, most of which require legislative measures to make them effective, to be more completely assured.

34. The advantages of codifying fundamental rights can, however, hardly be realized in the short term. If the legal systems of the Member States do indeed have many fundamental points in common,

¹ Cf. the views of Mr Jozeau-Marigné in his report referred to above, Doc. No 297/72 (EP 30.941/fin.).

certain differences nevertheless remain. The fundamental rights, and bound up with them the freedom of action of the State *vis-à-vis* its citizens, are based on the structural principles of the individual constitutions. It might be difficult for certain Member States to accept a codification of fundamental rights, binding in its entirety, especially if this differed considerably from their own constitutional traditions. The establishment of a catalogue of fundamental rights would require, in the present state of the Community, an intergovernmental negotiation and would have to receive the unanimous agreement of the Member States. Defining the fundamental rights to be included in the Community catalogue could therefore result in compromises and deletions. There would be a real danger that the result of such efforts would be a minimum consensus on the matters to be included.

35. Any catalogue of fundamental rights must, moreover, provide for the possibility of limitations and involve making an inevitable choice between the protection of individual rights and the necessity of safeguarding the common good. In the present political and institutional structure of the Community an undertaking of this kind could only be realized on the basis of concepts which often differ among the Member States. There could be a risk of working out formulas which would be too general to have any value or of different reservations by different Member States. Legal security, which is the objective of a catalogue, would therefore not really be achieved.

36. In every case in which a problem is raised as regards fundamental rights the Court of Justice can, at the present time, be guided by the optimum level of these rights. A catalogue would not greatly improve the material position of the citizen in the Community if, being drawn up under the conditions mentioned above, it ended up on a lower level.

37. On the other hand the position would be completely different on the totality of relations between the Member States being transformed into a European Union. Both the powers and the means of action of the Union, even if, although attributed, they were not immediately fully exercisable, would apply over a much larger area and would reveal a much more political quality than those of the present Communities.

Undertaking the action involved will affect individual citizens even more in their daily lives. Just as it is difficult to imagine that the constitutional law of democratic States would not have provisions covering the protection of fundamental rights, so it would be difficult for the European Union to avoid this. Furthermore, in the construction of the European Union there will certainly be political pressure to emphasize fundamental rights: this will facilitate the work preparatory to the establishment of a Community catalogue.

Moreover it is clear that a predominant role would fall on a European Parliament elected by direct universal suffrage in the establishment of this catalogue: this would conform to the traditions of all the Member States.

Proposal for a common declaration

38. For the time being the Commission feels that the idea already put forward to confirm, by a solemn common declaration of the three political institutions of the Community, respect for fundamental rights in the Community, merits serious consideration. Such a declaration could underline the importance of the Human Rights Convention and the indispensable nature of the protection of these rights by the Court of Justice. In this way a reply would be given to certain objections directed against the present system, objections which, based on the principle of the separation of powers, take exception to its exclusively judge-made character.

However, such a declaration would have to be adopted without giving rise to long discussions on its contents. If there is not immediate agreement between the institutions involved on the declaration such an attempt would be of no use and even dangerous. It might create doubts—not justified—as to the credibility of the Community institutions in the field of fundamental rights.

Conclusions

39. In view of developments so far, the Commission is of the opinion that the present standard of protection of fundamental rights, as this can be

taken from the more recent decisions of the Court of Justice, is satisfactory.

Furthermore, it considers that the protective machinery at present available within the institutional structure of the Communities is sufficient to prevent and counter infringements of fundamental rights through Community acts and, following the implementation of these acts, at the national level. However, it feels that while the European Union is being set up access by the individual to the Community Court should be improved.

The Commission considers that it has a constant duty, in the further development of the common market, to safeguard and extend the freedom of the individual citizen. It will accordingly pursue its efforts in this area.

As already stated in the report on European Union, express embodiment of fundamental rights in a future European constitution remains desirable, if not essential.

As regards the present and the near future, however, the Commission shares the opinion of the Parliament that in the light of the present structure of the Community, the most complete protection of fundamental rights is ensured by the Court of Justice which guarantees a maximum level of protection. Nevertheless the Commission considers it desirable to stress by a declaration to this end the importance of fundamental rights in the Community.