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The problems of drawing up a catalogue  
of fundamental rights  
for the European Communities

(A study requested by the Commission  
and drawn up by Professor R. Bernhardt,  
Director of the Max-Planck-Institute for Foreign Public Law  
and International Law, Heidelberg)

Commission of the  
EUROPEAN COMMUNITIES

*ANNEX*

## The problems of drawing up a catalogue of fundamental rights for the European Communities

A study requested by the Commission and drawn up by Professor Rudolf Bernhardt, Director of the Max-Planck-Institute for Foreign Public Law and International Law, Heidelberg

The contributions relating to the individual legal systems of the Member States have been produced by colleagues from the Max-Planck-Institute for Foreign Public Law and International Law, namely by Dr K. Oellers-Frahm for Italy, by Mr A. Berg for Denmark, Dr M. Bohe for Ireland and the United Kingdom, Dr K. Hailbronner for France, Mr H. Krück for Luxembourg and the Netherlands and Professor H. van Mangoldt for Belgium.

The Commission of the European Communities, represented by the Director-General of the Legal Service, has asked me to submit a study on the problems of a catalogue of fundamental rights for the European Communities. The task of the study has been defined as follows:

‘The study commissioned should show, on the basis of existing knowledge of comparative law and codification in the field of international law, the problems posed by the elaboration of a catalogue of fundamental rights for the European Communities.

It should start with a short survey of the protection of fundamental rights within the different Member States and the present protection of fundamental rights under Community law. More detailed research on some specific fundamental rights having special relevance to Community law (for instance, the protection of legitimate confidence placed in a legal position already established, in relation to economic matters, or the freedom of trade or occupation) should then illustrate by way of comparative techniques the level of protection of fundamental rights in the nine Member States.

Finally, it will have to be considered whether it is desirable, given the current degree of integration, to elaborate such a catalogue, and, if so, what procedure in terms of legal methodology is appropriate.’

Due to the lack of time available, it has not been possible to carry out an examination to compare the law in all countries to the same degree. Not only in details, but also in examples were differences unavoidable. In other respects *individual* shortcomings and occasional mistakes are unavoidable in the course of an attempt to deal with a large number of different legal systems and to understand their basic problems. The study was terminated in the autumn of 1975.

# Contents

I — <i>Introduction</i> . . . . .	25	III — <i>Comparative legal study of certain fundamental rights</i>	52
1. The problem . . . . .	25	Preliminary . . . . .	52
2. Evolution of fundamental rights . . . . .	26	1. Freedom of economic activity . . . . .	52
3. Comparative law and creation of law in the field of fundamental rights . . . . .	27	Belgium . . . . .	52
4. The conduct and limits of this study . . . . .	28	Denmark . . . . .	53
		Federal Republic of Germany . . . . .	53
		France . . . . .	54
		Ireland . . . . .	56
		Italy . . . . .	56
		Luxembourg . . . . .	57
		The Netherlands . . . . .	57
		United Kingdom . . . . .	58
		Assessment . . . . .	58
II — <i>The general position in relation to fundamental rights in the legal systems of the Community and its Member States.</i>	29	2. Protection of the legal rights to rely on an established legal position . . . . .	59
1. Fundamental rights in the legal systems of the nine Member States: A survey . . . . .	29	Belgium . . . . .	60
Belgium . . . . .	29	Denmark . . . . .	60
Denmark . . . . .	31	Federal Republic of Germany . . . . .	61
Federal Republic of Germany . . . . .	33	France . . . . .	62
France . . . . .	34	Ireland . . . . .	63
Ireland . . . . .	38	Italy . . . . .	63
Italy . . . . .	39	Luxembourg . . . . .	64
Luxembourg . . . . .	40	The Netherlands . . . . .	64
The Netherlands . . . . .	42	United Kingdom . . . . .	65
United Kingdom . . . . .	43	Assessment . . . . .	65
Assessment . . . . .	45		
2. Protection of human rights in international law, in particular in the ECHR. . . . .	46	IV — <i>Summary and outlook</i> . . . . .	66
3. Recognition of fundamental rights in the Treaties of the Communities and by the Court of Justice of the European Communities. . . . .	47	1. Protection of fundamental rights under existing Com- munity law . . . . .	66
4. General legal principles and the fundamental rights common to all Member States as necessary components of the law of the European Communities . . . . .	49	2. Basic questions in relation to a catalogue of funda- mental rights in the European Communities . . . . .	67
		3. Outlook for future legal development . . . . .	68

## Abbreviations

AB	Administratieve en rechterlijke beslissingen
AJDA	Actualité juridique, Droit administratif
AöR	Archiv des öffentlichen Rechts
Bull. EC	Bulletin of the European Communities
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
CC	Conseil constitutionnel
CE	Conseil d'État
CJEC	Court of Justice of the European Communities
D	Recueil Dalloz
DÖV	Die Öffentliche Verwaltung
D.Sir	Dalloz Sirey
DVBl.	Deutsches Verwaltungsblatt
ECHR	European Convention on Human Rights
ECR	European Court Reports
EuGRZ	Europäische Grundrechte-Zeitschrift
Gem.St.	Gemeentestem
ILTR	Irish Law Times Reports
IR	Irish Reports
J	Jurisprudence
JCP	Juris classeur périodique (Semaine juridique)
JORF	Journal officiel de la République française
JöR NF	Jahrbuch des öffentlichen Rechts, Neue Folge
JZ	Juristenzeitung
NJ	Nederlandse jurisprudentie
OJ	Official Journal of the European Communities
Pas. Lux.	Pasicrisie luxembourgeoise
RDP	Revue du Droit Public et de la Science Politique
Rec.	Recueil
RSV	Rechtspraak sociale verzekering
Sir.	Sirey
v.	versus
WLR	Weekly Law Reports
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

# I — Introduction

## 1. The problem

The European Communities exercise sovereign authority through their institutions. Making regulations, directing, intervening, they are arrayed against the individual, and set limits to his potential for development and achievement, especially in the economic field. Although it is the objective of the Communities and of the Treaties on which they are founded to extend the scope for the economic activity of 'citizens of the Common Market' ('Marktbürger')<sup>1</sup> beyond the frontiers of the individual Member States, and thereby to create a greater freedom, none the less this freedom requires in many respects to be regulated and subjected to limitations. In many important fields and questions this is no longer—or no longer solely—effected by the state and its organs, but by virtue of Community authority (*Gemeinschaftsgewalt*). There is no need here to consider how the European Communities may be classified within traditional categories, that is: whether they are to be viewed more as members of the family of international organizations, or as supranational organizations *sui generis*, or even as having, to some extent, the configuration of a State itself; what however cannot be ignored or disputed is that powers to regulate and to intervene, hitherto exercised by the States alone, are now asserted by Community organs.

The limiting of State authority (*Staatsgewalt*) by the fundamental rights (*Grundrechte*) and human rights of the individual is one of the most outstanding achievements of the modern constitutional State. The extent, form and means of protection of these fundamental rights vary from State to State and reflect the influences of history and different traditions; we shall revert to this below. However, in the States with which we are concerned the fact that there is this fundamental constraint upon State authority is not in question. At national as well as international level, efforts are continually being made to make good deficiencies in the protection of human rights. Such deficiencies are currently being picked up and discussed with particular emphasis in the field of Community law. The Community Treaties contain no catalogue of fundamental rights (*Grundrechtskatalog*), but only certain disparate and incomplete reference points for fundamental rights and the corresponding constraints on Community authority. This creates dangers both for the individual and for the Community itself: the protection of the individual seems insufficiently secured; in so far as it is—and that is the case to a not inconsiderable extent—considered to be inalienable, there is the danger that measures taken at the national level in the interest of fundamental rights could run contrary to, and take effect against, Community authority. Protection of the individual could therefore operate in a manner inimical to integration.

To resolve this difficulty various means and measures are proposed. Ranging from embodying a formal and detailed catalogue of fundamental rights in Community law, to dispensing with any provisions in express terms—combined with confidence in a Community Court exercising its jurisdiction in a manner both constitutional and sympathetic to the Community—there are a variety of ideas and possible solutions. Only in relation to the general aim does there seem to be at least a broad consensus. The individual requires protection against Community authority, and this protection must be found within Community law, since recourse to purely national guarantees and procedural machinery must jeopardize the existence and further development of the Community.

The present study is intended as a contribution to the discussion from the point of view of legal science. The question is how, in terms of law, the aim, namely, to guarantee and develop the protection of fundamental rights by Community law, can best be achieved. In finding the answer, a comparative study of the various national catalogues of fundamental rights, and provisions of law relating thereto, will be as valuable a contribution as a glance at general international developments and tendencies. It is for those having the power and the responsibility of political decision to draw the conclusions, both from previous experience and from the political requirements of the present time. In this study our purpose is simply to survey and assess from the point of view of legal science, which itself cannot in the nature of things be immune from personal assessment and political evaluation.

At any given moment, fundamental rights have to be seen in the context of the legal and constitutional systems in which they subsist or are to be inserted. This affects the present study in the following way: the problem of the protection of fundamental rights will have to be considered in the context of the European Community as it now exists, and as it continues to develop on the basis already created. We are concerned with the subsistence or insertion of fundamental rights in the existing structure of the Community, which can of course be developed and modified, but which can be assumed for the foreseeable future to be likely to remain in essence the same. If a European federal State or a European Union were to come into being, with a fundamentally different 'constitutional' basis, the protection of fundamental rights would also have to be viewed differently and thought out afresh.<sup>2</sup> It is hard to imagine that a new European 'constitution' could, contrary to the trends and demands of the times, dispense with an explicit and detailed guarantee of fundamental rights; but this is not our problem. We are solely concerned with the protection of fundamental rights within the current legal system of the European Communities which, although capable of development, will retain its basic structure.

<sup>1</sup> Expression of *Ipsen*; cf. his *Europäisches Gemeinschaftsrecht*, 1972, p. 187 and *passim*.

<sup>2</sup> Cf. the comments in the Report of the Commission on European Union of 25.6.1975, Supplement 5/75 — Bull. EC, point 82 *et seq.*

## 2. Evolution of fundamental rights

Any consideration of the protection of fundamental rights within the European Communities cannot disregard the question of how far the classical fundamental rights, and the inherited concepts of such rights, are in process of change and evolution.<sup>1</sup> The discussion of fundamental rights within individual States as well as on the international level has recently undergone a change of emphasis; and no end to this search for new or modified approaches and solutions can yet be discerned.

The classical fundamental and human rights were and are intended to protect the individual from undue interference by State authority in his personal and individual development. Belief and conscience, property, personal freedom, freedom of opinion and assembly should be safeguarded against State intervention and statutory regulation. This was, and still is, the basic premise, and even nowadays remains an especially important concern of fundamental rights. This view of fundamental rights is closely related to a social order in which private initiative and individual freedom are accorded considerable scope, with a high degree of tolerance for the differing circumstances of actual cases.

'Social fundamental rights' have little place in the classical catalogue of fundamental rights. It is true that the French catalogue of fundamental rights of 1793 did mention public welfare and stressed the duty of society to protect citizens in need of help, and since then the right to work or to receive social protection from the State has found its way into the catalogue of fundamental rights in many constitutions; but the legal systems prevailing in States of the Western constitutional type have only made constitutional provision for social fundamental rights in a sporadic and eclectic fashion. On the other hand, social security has, outside the catalogue of fundamental rights, found its way in many instances into the national or international legal system. Modern legislation relating to the protection given to employees and social security are, like other services provided by the State for socially disadvantaged persons, characteristics of modern legal development. At the international level, numerous agreements of the International Labour Organization, the European Social Charter of 1961 and the International Convention of the United Nations of 1966 on Economic, Social and Cultural Rights make provision for significant social guarantee. Some countries are discussing the adoption of social fundamental rights into their constitution.<sup>2</sup> This development is probably still incomplete. It will have to be borne in mind in any consideration of the protection of fundamental rights within the European Communities.

The same applies in the case of a further tendency in the current discussion on fundamental rights. There are indications and evidence to suggest that the discussion of fundamental rights is linked more strongly than before to overall democratic demands. Partly by stressing the principle of equality and the demand for citizens to enjoy equality in the real, and not merely in the legal sense, and partly by invoking the general principles of democracy

there is a demand for more active participation and involvement (Teilhabe und Teilnahme) on the part of the citizen in establishing what interests of the community are to be.<sup>3</sup> From various quarters the democratization of the administration, the economy and other social areas is sought after, and set out as a requirement. It is hard to judge how far this tendency will prove both lasting and justified; we do not intend to express any view on this aspect.

In any discussion on the protection of fundamental rights within the European Communities a decision has to be reached as to whether the classical protective fundamental rights alone should be codified and strengthened or whether social and democratic fundamental rights—the word 'democratic' being used in the broad sense—should also be included within the strengthened protection. Contemporary social and intellectual trends speak in favour of such inclusion, but there are strong reasons to the contrary. Social and democratic fundamental rights and rights of participation are not only less capable of being formulated in a clear and unequivocal manner than protective rights, but they are also less susceptible to direct application and enforcement by the courts. The discussion on fundamental rights within the European Communities has hitherto been conducted from the point of view of the requirements of the rule of law (unter rechtsstaatlichen Gesichtspunkten); predominantly, the search has been, and is, for rights on the part of the individual which can be protected by the courts. If the protective rights against undue encroachment by State authority are supplemented by rights in relation to the performance of statutory duties by the State (Leistungsansprüche) and to democratic participation, the discussion will acquire new dimensions both in theory and in practice: the actual conferring and guaranteeing of fundamental rights by the legislature, the executive and the judiciary must clearly differ in relation to protective rights from what it would be in relation to social fundamental rights and democratic rights of participation. This is merely mentioned in passing. In my opinion, there is however a dilemma to consider here: the insertion of social and democratic basic rights into a catalogue of fundamental rights accords with a contemporary trend, but if it is to be followed, the price will probably be a surrender of some degree of judicial protection.

<sup>1</sup> Cf. among many others *Friesenhahn*, Der Wandel des Grundrechtsverständnisses, Sitzungsberichte des 50. Deutschen Juristentages 1974, G 1 *et seq.*; and *Saladin*, Grundrechte im Wandel, 1970, each with further references.

<sup>2</sup> Cf. e.g. for Switzerland *Jörg P. Müller*, Soziale Grundrechte in der Verfassung? Schweiz. Juristenverein, Referate und Mitteilungen, 107 (1973) No 4; and *Benz*, Die Kodifikation der Sozialrechte, Zürcher Beiträge zur Rechtswissenschaft, 419 (1973) each with further references.

<sup>3</sup> Cf. discussions in Germany e.g. *Martens-Häberle*, Grundrechte im Leistungsstaat, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 30 (1972).

### 3. Comparative law and creation of law in the field of fundamental rights

Any consideration of the guaranteeing of fundamental rights at a European level must obviously and unavoidably have regard to the fundamental rights already entrenched in the legal systems of the Member States. In view of the fact that the catalogue of fundamental rights and guarantees in respect thereof of the Member States of the European Communities differ so appreciably, one of the most difficult questions is the extent to which national legal concepts and provisions should be incorporated into 'European' law. Between two unacceptable extremes—incorporating the catalogue of fundamental rights of only one Member State into Community law, and aggregating all national guarantees in respect of fundamental rights with the consequence that Community authority would be closely hemmed in by a diversity of constraints—there lies a large number of possible structures, between which those bearing political responsibility will have to make their choice. This choice can, to a certain extent, be made easier by comparative legal survey.

Comparative public law is not only a relatively young discipline but also gives rise to special difficulties and problems.<sup>1</sup> First, studies on comparative law are more productive according to the extent to which the legal systems compared are in accord on questions of principle, or approximate to each other thereon; on the other hand, comparisons between constitutional systems which are unlike, such as a constitutional system exemplifying the rule of law and separation of powers and the constitution of a people's democracy, are particularly difficult. This difficulty may be disregarded below, since in the case of the Member States of the European Community we do find agreement as to basic questions on the organization of the State, despite all the differences on particular aspects.

A mere comparison of the texts of the constitutions and of the ordinary statutes (*einfache Gesetze*) giving expression to fundamental rights under the national laws in question may be interesting and valuable from a philological or semantic point of view, but for exploration in the field of comparative law such mere textual comparison is inadequate and unproductive. The subsistence, significance and scope of provisions of law can only be accurately perceived if the actual exercise of authority by the State, not least through the courts, is explored. In comparing legal systems it is not normally appropriate to consider first one particular system and its structure, and then to compare the provisions obtaining in other systems by reference to it. Rather, comparisons of law will normally proceed on a practical basis (*zweckmässig*), from the matter of fact in question, from the issues of actual fact to be resolved, and will then inquire as to what legal solutions and provisions for dealing with these issues are available under the various national systems. Not infrequently it will be apparent that different legal systems pursue, and achieve, the same objec-

tive in quite different ways. Herein lies one of the particular difficulties of comparative legal studies, and in this field of fundamental rights it is aggravated by the fact that the problems relating to fundamental rights are at the same time eminently 'political' problems, because they are highly relevant to the structure of State and society.

These difficulties require further clarification, and we shall revert to specific aspects in due course. As is well known, most, though not all, countries of the European Community have a written constitution. In so far as written constitutions exist, some contain no provisions, or scarcely any, relating to fundamental rights; others contain detailed catalogues of fundamental rights which present notable differences of detail. There are furthermore important differences between the powers vested in the courts to review alleged violations of these rights (*Kontrollbefugnisse*). Many constitutions provide for the courts of the legislature (by means of a constitutional court or by the ordinary courts in the broader sense), while other constitutions such as the (unwritten) British one regard the legislature as omnipotent. Such important structural differences may well prove largely irrelevant for the purpose of practical questions of fundamental rights and for considering the policy of the law on the establishment of a European catalogue of fundamental rights. It may well be that some fundamental right, e.g. the freedom of conscience, or the protection of property, is more effectively and extensively secured within a constitutional system having only minimal guarantees for fundamental rights and deficient provision for judicial review, than in a State with an elaborate catalogue of fundamental rights and jurisdiction to review on the part of constitutional courts; in one State certain rights may as a rule be respected by reason of tradition and the prevailing social order without any formal constitutional guarantees, whereas in another State having a catalogue of fundamental rights statutory reservations (*Regelungsvorbehalt*) attaching to the rights secured in the constitution may deprive the fundamental rights in question of a large measure of their efficacy. The structural differences between the constitutional systems can in other contexts become extremely important, that is, where we are concerned with readiness to accept basic changes: a national legislature which is constitutionally omnipotent but which in practice respects certain fundamental rights may be less willing to surrender its virtually absolute powers of regulation than a legislature whose acts are subject to review by a constitutional court. These overlapping questions and considerations must be identified and borne in mind in any search for European guarantees of fundamental rights conducted on the basis of an exploration of comparative law.

In this context we must take into account yet another fundamental difficulty, which is hitherto largely without historical

<sup>1</sup> Cf. e.g. the remarks on 'Vergleichung im öffentlichen Recht' by *Kaiser, Strehel, Bernhardt and Zemanek*, *ZaöRV*, 24 (1964), p. 391 *et seq.* and the colloquia on comparative law of the Max-Planck-Institut on 'Verfassungsgerichtsbarkeit in der Gegenwart', 'Haftung des Staates für rechtswidriges Verhalten seiner Organe' and 'Gerichtsschutz gegen die Exekutive', *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, 36 (1962), 44 (1967) and 52 (1969) with introductions by Mosler.



parallel. Fundamental rights, and catalogues thereof, have hitherto always been intended to set limits to the sovereign and inherently boundless authority of the State. In principle, all fields of personal activity and life in society are potentially vulnerable to intrusion by State authority. The comprehensive powers for interference on the part of the State are countered by the individual's entitlement to protection (Individualpositionen) of his fundamental rights (such at least is the traditional constitutional concept of the Western democracies, as opposed to the meaning given to fundamental rights in the people's democracies). The usual content of any catalogue of fundamental rights now becomes entirely clear: protection is afforded above all in those areas of individual activity wherein the dignity and freedom of the individual is particularly affected and protection from the omnipotent State is seen as a matter of particular urgency. The catalogues of fundamental rights which have been evolved on the level of international law during these last three decades, and which have in part become legally binding, have also pursued in essence the same objectives as the systems of fundamental rights under national law: they are intended to protect the individual against interference and undue intrusion by the State, and principally in the particularly important field of the individual's choice as to how he leads his life in relation to freedom of the person, of belief, of conscience, of home, etc.—as witness the freedoms contained in the European Convention of Human Rights ('the ECHR').

Within the ambit of the European Communities, the initial question is different. At present, and for the foreseeable future, Community authority can only to a limited extent be compared to national authority. Freedom of belief and conscience, protection from unjust arrest and prosecution, postal secrecy, freedom of the press and of artistic endeavour and many other freedoms are scarcely, if at all, affected by Community authority. This statement is not free from qualification, and occasional interference by Community authority with certain of these rights can by no means be ruled out; but this will be demonstrated at a later stage. Nevertheless it is not in doubt that the traditional fundamental rights appear to be jeopardized only to a slight degree by the authority wielded by the European Communities. This concerns perhaps chiefly the freedom to carry on a trade or occupation, the protection of property, the right to equal treatment, and also those guarantees for the protection of the individual which can be described as essential features of the constitutional State or of 'due process of law'. We shall revert to this. It does, however, given the current structure and current powers of the Community, seem doubtful whether the question of fundamental rights should be gone into in its entirety and to its traditional extent, or whether it is not preferable to restrict discussion to those fundamental rights which are more likely to be jeopardized and violated by the Community.

This would have the following consequences for any relevant comparison of law. First, it must be considered which individual rights and possible fields for individual activity seem to be most endangered by the Community organs (and by national organs acting pursuant to Community law). These dangers will have to be set against the appropriate fundamental rights of the national

legal systems, and it must then be considered whether, and, if so, to what extent, common rules of national legal systems should be incorporated into Community law, or whether an independent catalogue of European guarantees of fundamental rights could be evolved, perhaps loosely founded on existing national models, or whether we should, for the time being at least, refrain from seeking to embody Community fundamental rights in legal rules at all.

#### 4. The conduct and limits of this study

The following study is chiefly concerned with making a survey and arriving at conclusions as to the extent to which fundamental rights are currently guaranteed and embodied in national legal systems, and in the legal system of the Community. This can be no more than a cursory portrayal, since a complete discussion of fundamental rights and related problems in nine Member States and in Community law is manifestly impossible. We shall start by examining and describing in a general way the entrenchment (Verankerung) of fundamental rights in the legal systems of the nine Member States; in doing this, it will scarcely be possible to discuss current trends in the direction of a fresh interpretation of fundamental rights, and the emphasis will be on the traditional view of fundamental rights and their protection by the courts up to the present time. This will be followed by conclusions as to how far fundamental rights are recognized within the present legal system of the Community. These findings will include a discussion of the question how far Member States of the Community have obligations under international treaty, in particular the ECHR, to respect fundamental rights, and how far these obligations have effect in relation to the Community and its organs. The contrast between the protection of fundamental rights within the Member States on the one hand and safeguarding them within the legal system of the Community on the other hand, may indicate to what extent, if any, protection of fundamental rights in the Community is deficient.

In a further section we shall discuss, by way of example, one particular fundamental right—the right to freedom of economic activity (Gewerbefreiheit)—and a constitutional duty having the characteristics of a fundamental right—the duty to respect an individual's vested rights and interests (Gebot zur Respektierung erworbener Rechte und Interessen des einzelnen). These two fundamental rights, if they are in fact fundamental rights, have been selected since they can be of particular significance for the European Community, and are at the same time suitable for demonstrating the possibilities and limitations of regulating such matters at European level on the basis of a comparison of national legal concepts. In this context also, it will not be possible to follow all the ramifications of national legal systems and to do complete justice to all problems arising. To evolve a complete set of findings in full detail, omitting nothing and free from any inaccuracy, would require considerably wider and more time-consuming preparatory work, and consultation with experts from the various Community countries. It should however be possi-

ble, on the basis of this conspectus, to identify the possibilities and limitations of introducing a European catalogue of fundamental rights on the basis of studies in comparative law.

This paper will conclude with an attempt to summarize and assess, accompanied by some reflections on questions of legal policy.

## II — The general position in relation to fundamental rights in the legal systems of the Community and its Member States

### 1. Fundamental rights in the legal systems of the nine Member States : A survey

As has already been said, an exploration in comparative law should not in principle be restricted to a comparison of individual provisions and their wording, but should rather consider how rules are entrenched in the legal systems in question, their most important characteristics, and the efficacy of the written rules. This applies especially in relation to the comparative survey of fundamental rights in the Member States of the European Communities. We shall seek to outline below the extent to which, if at all, fundamental rights are entrenched in the legal systems of the Member States, whether and if so, to what extent, they are at the mercy of the legislative body having power to enact constitutional amendments or ordinary statutes, and to what extent the national courts review and guarantee respect for fundamental rights.

#### Belgium

The Belgian Constitution of 1831 contains in its Title II a series of fundamental rights. With the exception of the particular prohibition of discrimination incorporated into the Constitution in 1970, these fundamental rights are still valid in the form given to them by those enacting the Constitution in 1831. They bear the stamp of the liberal thought of that period. They are therefore almost exclusively rights of freedom, intended to protect the human being as such, and they hardly consider him at all in his relations with society. We therefore find the guarantee of individual freedom (Article 7) combined with safeguards in the event of prosecution and arrest, and also the prohibition of certain forms of punishment (Articles 12, 13); then there is the inviolability of the home (Article 10); equality before the law (Article 6); inviolability of property (Article 11); and constitutional provision for cases of expropriation 'pour cause d'utilité publique'; free use of languages (Article 23). Of no small importance, moreover, is the protection of the various aspects of freedom of opinion, which according to the Belgian Constitution embraces the protection of religion (Articles 14, 15), the freedom of assembly (Article 19), and the freedom of association (Article 20), and, moreover, extends to the freedom of education (Article 17), press freedom (Articles 18, 19), postal secrecy (Article 22), and the right of petitioning (Article 21). These fundamental rights are in part subject to a general reservation that they may be amended by law. This

applies especially to the guarantee of individual freedom, the inviolability of the home, the freedom of education and the freedom of assembly. But even in respect of those fundamental rights not subject to such reservation, limitation by enactment of Parliament is thought to be permissible, as for instance regarding postal secrecy.<sup>1</sup>

From this and from the fact that no clear limitations can be established on the restriction of fundamental rights by the legislature, one might infer that the idea in the minds of those enacting the fundamental rights of the Belgian Constitution, and which continues to make itself felt, is that the protection of the individual must primarily be secured against the executive, since it is most directly concerned with the individual and would be most likely to be in a position to infringe individual rights in the interests of effective administration. For this reason, the maintenance of liberties was entrusted primarily to the legislature and the courts.<sup>2</sup>

Although fundamental rights are binding on all State authority and therefore in principle on the legislature as well, according to constitutional practice hitherto the legislature nevertheless has the power, in enacting statutes having constitutional implications, to interpret and apply, free from any kind of constraint or review, the fundamental rights thereby affected and therein to be answerable only to itself.

Nor does the Belgian Constitution contain any limitations as to constitutional amendments in relation to fundamental rights. Any constitutional amendment is however subject to a rather complicated procedure. Pursuant to Article 131 of the Constitution, any constitutional amendment requires first of all a declaration by the legislature showing cause that the constitutional provision should be amended. After such declaration both chambers are dissolved by law. It is only the newly elected chambers which then have the power to amend the Constitution, together with the King and by a qualified majority. In this way it is ensured that by means of the fresh elections the electorate is indirectly able to assert its views on the proposed constitutional amendment.

Outside the Constitution, guarantees of fundamental rights are found principally in the ECHR which came into force in Belgium as part of the law of the land by virtue of the Law of 13 May 1955. According to recent developments in Belgian case law, and especially after the judgment of the Cour de Cassation of 27 May 1971,<sup>3</sup> the courts may review the compatibility of a statute resolved by Parliament with international law embodied in treaties having directly applicable legal effect in Belgium, and can, if they find such statute incompatible with such a provision of international law, set it aside. In derogation therefore from the principle that the courts have no jurisdiction to review statutes as to their compatibility with the Constitution, the individual is, in this regard, placed in a position where he can bring before the Belgian courts breaches of fundamental rights arising by virtue of ordinary statutes, at least in so far as there is a breach of the ECHR or even of the EEC Treaty.<sup>4</sup>

Fundamental rights are only partly subject to the protection of the courts. For the review by the courts of the constitutionality of statutes, the provision to be relied on, pursuant to the decided cases and the prevailing opinion of learned writers, has hitherto without exception been Article 107 of the Constitution, which reads: 'Les cours et tribunaux n'appliqueront les arrêtés et règlements généraux, provinciaux et locaux, qu'autant qu'ils seront conformes aux lois'. From this provision the negative inference has hitherto always been drawn, particularly by the Cour de Cassation, that it is no part of the courts' jurisdiction to review the constitutionality of statutes.<sup>5</sup> According to the statute relating to the Conseil d'État of 23 December 1946, all that is possible is a preliminary review by the Section de législation of the Conseil d'État in proceedings for an opinion (Gutachtenverfahren). This review is mandatory only where legislative proposals are introduced by the executive, and then only in cases which are not matters of urgency—and the executive determines what is urgent. Moreover, this preliminary review does not derogate from the power of the legislature to interpret and apply the Constitution in sovereign manner. Certainly the principle of immunity from review applies only to the statute itself and not to subordinate instruments nor to royal decrees, which can of course only be applied if they are compatible with the law, even the highest kind of law (the Constitution). A judgment of the Cour de Cassation of 3 May 1974 and in particular the opinion of Procureur général Ganshof van der Meersch in that case, have now given rise to doubt as to whether the courts are still disposed to maintain the principle whereby statutes are immune from review.<sup>6</sup> A bill accepted by the Senate on 26 June 1975 and now transmitted to the House of Representatives is an attempt to counter this. The provision accepted by the Senate reads: 'Les cours et tribunaux ne sont pas juge de la constitutionnalité des lois et des décrets'.<sup>7</sup> The outcome of the parliamentary process remains to be seen.

Legal protection against undue intrusion by the executive in the field of constitutionally guaranteed fundamental rights is not restricted to that arising merely incidentally from an application of Article 107 of the Constitution, when the courts refuse to give effect to an unconstitutional provision of a subordinate instrument; in so far as the claim for legal protection is not directly aimed against the Crown, the courts and the Conseil d'État will also always grant judicial protection directly where the party affected can show that his fundamental rights have been breached by the executive.<sup>8</sup>

<sup>1</sup> Cf. *Wigny*, *Droit constitutionnel*, 1952, p. 320 *et seq.*; *id.* *Cours de droit constitutionnel*, 1973, p. 154.

<sup>2</sup> Cf. e.g. *Wigny*, *Cours de droit constitutionnel*, p. 138.

<sup>3</sup> *Journal des tribunaux* 1971, pp. 471 to 474; also extracts in *ZaöRV* 32 (1972), p. 529 *et seq.* with notes by *Bleckmann*, *op. cit.*, p. 516 *et seq.*

<sup>4</sup> See also *Wigny*, *Cours de droit constitutionnel*, p. 140.

<sup>5</sup> See *Wigny*, *Droit constitutionnel*, p. 195, with further references to decided cases. See also the report of *de Stexhe*, *Sénat*, 1974-1975, Doc. 602, No 2, p. 2 *et seq.*

<sup>6</sup> Cf. *Journal des tribunaux* 1974, p. 564; and the report of *de Stexhe*, *Sénat*, 1974-1975, Doc. 602 No 2, p. 4 *et seq.*

<sup>7</sup> Cf. *Sénat*, 1974-1975, Doc. 602, Nos 1 and 2; *Chambre*, 1975, Doc. 637.

<sup>8</sup> Cf. the detailed report of *Velu*, *Gerichtsschutz gegen die Exekutive*, Vol. 1, 1969, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 52 (1969), p. 60 *et seq.*

## Denmark<sup>1</sup>

The Danish Constitution of 5 June 1953 contains a fairly large number of fundamental rights, which can be subdivided into three main groups: protective rights; rights of political freedom; and rights against the State to require performance of public obligations (*Forderungsrechte*). Both the administration and the legislature are bound to observe these fundamental rights or rights of freedom. If a citizen considers his fundamental rights to have been breached by the executive or the legislature, he can bring proceedings in the courts in respect thereof.

In Chapter VII of the Constitution, Articles 67, 68, 70 guarantee freedom of religion; every citizen thus on the one hand has the right freely to practise his religion (Article 67) and on the other hand he may not be forced to perform specific religious observances (Article 68). Finally, his religious convictions or his origin may not set him at any disadvantage (Article 70).

Chapter VIII of the Constitution grants a number of fundamental rights, defines their actual content, and identifies in part the possible limitations thereto. Article 71(1) protects personal freedom, though not as a general freedom for personal activity, but only as opposed to deprivation of freedom.<sup>2</sup> The further paragraphs of the Article set out the circumstances under which—on the basis of statute or of court order—personal freedom may be restricted, and what legal protection is available. Article 72 guarantees the inviolability of the home, and the secrecy of the postal and telephone services. These may be curtailed by statute or by court order. According to Article 73 the right of property is inviolable. Under certain conditions—statutory authority, demands of public interest, guarantee of compensation—expropriation may take place; it can be challenged in the courts, as can the quantum of any compensation. Article 74 enjoins the legislature to abrogate any discriminatory statutes relating to the taking-up of a trade or occupation and not justified in terms of public interest. Article 75 contains in paragraph (1) a general right to work, and in paragraph (2) a right to social assistance from the State. Article 76 relates to compulsory education and the right to education. Article 77 guarantees freedom of expression and prohibits the reintroduction of censorship or similar measures. The freedom of association is entrenched in Article 78; in addition, it states in what circumstances association may be prohibited, and the preconditions therefor. According to Article 79 citizens have the right without prior notification to assemble without arms. The police nevertheless retain a right of supervision over public assemblies; they may even disperse open-air assemblies. Article 80 contains rules of conduct for the armed forces in case of civil commotion. Article 81 obliges all men capable of bearing arms to contribute to the defence of the country. Article 82 contains the right of social councils to administrative autonomy. Article 83 guarantees, so far as the legislative process is concerned, equality of treatment, irrespective of title or rank, whether inherited or not. Article 84 prohibits the introduction of feudalism and entails. Article 85 finally provides for a possible restriction of personal freedom such as of the rights of association and assembly, in the case of members of the armed forces.

This conspectus shows that the Danish Constitution contains an impressive catalogue of fundamental rights, including social fundamental rights (the right to work, the right to social assistance, to education).

In principle, these fundamental rights are available both for Danish nationals and for foreigners. It is only occasionally that foreigners are explicitly denied the protection of fundamental rights (for instance Article 71(1)(2)).

The Danish legal system lacks amongst other things a codified general requirement of equality of treatment or a prohibition on discrimination. Although some parts of the Constitution (Articles 70, 71(1), 83) do contain a prohibition against treating an individual by reference to specific personal circumstances on his part, it is doubtful whether any general principle can be deduced from these provisions. Some commentators leave the whole question open;<sup>3</sup> others affirm the duty of the administration to observe a general principle of equality of treatment.<sup>4</sup>

According to Article 88 of the Constitution every constitutional provision, and therefore every fundamental right, can be changed or abrogated, and new provisions can likewise be incorporated into the Constitution. There is no inviolate core in the Danish Constitution, either as a whole or in individual provisions thereof.<sup>5</sup> Nevertheless Article 88 sets out rather a ponderous procedure for constitutional amendment. Any proposed amendment must first of all be accepted by Parliament. A new Parliament must then be elected, and it must likewise approve the proposal. Finally a referendum is held, in which a majority of all persons voting and at least 40 % of the electorate must approve the constitutional amendment.

Although Denmark ratified the European Convention on Human Rights in 1953, the provisions thereof have not yet become the law of the land.

In principle, fundamental rights in Denmark are reinforced by judicial protection. There is one single jurisdiction which is competent in actions under both private and public law, and also in actions for constitutional review of statutory rules.

Any person who has a legitimate interest in a statute or who is likely to be affected to his detriment can challenge a statute in the courts on the ground that it is in breach of one of the aforesaid fundamental rights. This independent power of review of statutory rules, which is entrenched neither in the Constitution nor in any other statute, has been recognized generally since a judgment of the Supreme Court in 1921. The introduction of such a right to review was founded on the one hand on the considera-

<sup>1</sup> The description of the legal situation is based substantially on *Andersen, Dansk Forvaltningsret*, 5th ed. 1966; it is not possible to deal with more recent trends in the interpretation of fundamental rights.

<sup>2</sup> *Sørensen, Statsforfatningsret*, 1969, p. 321.

<sup>3</sup> *Sørensen, op. cit.*, p. 318.

<sup>4</sup> *Andersen, Dansk Forvaltningsret, op. cit.*, p. 426 *et seq.*

<sup>5</sup> *Andersen, Dansk Statsforfatningsret*, 1954, p. 439.

tion of legal theory that higher-ranking constitutional law must prevail over lower-ranking ordinary statutes, and on the other hand on the desire to protect the citizen from decisions of the legislature which were contrary to law.<sup>1</sup> Procedure and judgment in an action for review of a statutory provision follow the rules applicable generally. There is however controversy as to whether the right of judicial review of statutory provisions deriving from the common law has the status of constitutional law,<sup>2</sup> or whether it can be abrogated by an ordinary statute.<sup>3</sup> In practice, there has not been any case in which a court has declared a statutory provision to be unconstitutional. This is particularly connected with the fact that the legislature is allowed by the courts extensive scope for the exercise of political discretion.<sup>4</sup> Only in a case of undoubted violation of the Constitution may the provision in question be declared unconstitutional. Also, the principle of interpretation in conformity with the Constitution applies.<sup>5</sup>

In addition to the independent power to review statutory provisions, it is recognized that the courts also have the right to exercise such review in cases where constitutionality is not the substantive issue (Inzidentkontrolle). What is not entirely free from doubt is whether the court in this respect is also entitled to proceed to such review of its own motion; in any event this does not happen as a matter of practice.<sup>6</sup>

In respect both of the independent power to review statutory provisions and of the power to exercise such review in cases where constitutionality is not the substantive issue, any judgment rendered will only have effect in the future and between the parties involved. However, the administration and the courts generally follow judicial precedent, and it may be assumed that they will thereafter refrain from applying any provision declared unconstitutional.

A fundamental right expressed in the constitution in the form of a right to require the performance of some public obligation (Forderungsrecht), e.g. a right to work or to social assistance, cannot be asserted in the courts solely on the basis of the constitutional provision. The relevant constitutional provisions (Articles 74, 75, 76) are of importance merely as a programme—as evidenced by the history of the development of the Constitution.<sup>7</sup>

If an international treaty entered into by the State interferes with the rights of the individual, a similar action may be brought against the statute concerning its relation to the treaty.

Regulations promulgated by the administration may also be reviewed, both independently and in cases where constitutionality is not the substantive issue, as to their compatibility with statute or Constitution.

According to Article 63 of the Danish Constitution, the courts have the right to determine all questions as to the extent of the powers of administrative authorities. While in principle any executive action, e.g. even an act of the Government (Regierungsakt), can be reviewed as to its legality, the legislature can exclude the right to bring an action in the courts by adding to the statute a provision whereby the terms of that statute are to be conclusive. The power of the courts to review is likewise removed if the administration was given scope for the exercise of discretion in

making its decision. Despite more recent trends—the courts do to a certain extent review administrative acts notwithstanding clauses declaring them conclusive or conferring discretion—this is still basically the position today. An action can be brought not only against provisions of general application, e.g. regulations, but also against individual administrative acts. If a citizen seeks specific action by the administration, and the administration refuses, or fails to do anything, he may bring proceedings in respect of such omission. In certain circumstances, the citizen is bound to respect a particular preliminary procedure; and this is normally done without the need for any statutory requirement to that effect, since this can usually bring about a satisfactory outcome more expeditiously and cheaply than recourse to the courts.

The Danish administrative authorities are bound by the principle of administration in accordance with the law,<sup>8</sup> that is, that their acts must be based on law, which in turn cannot be contrary to the Constitution. It also holds good that individual administrative acts may not be contrary to the Constitution.

Danish administrative law contains some possibilities of extra-judicial legal protection. The citizen has in some cases the opportunity, or, in other cases, the obligation to challenge administrative acts and subordinate instruments which infringe his rights by referring the matter in the first place to the administrative authority immediately superior. The decision of the administration is then reviewed both as to its legality and as to its appropriateness in relation to the purpose it is intended to achieve (Zweckmässigkeit) and if necessary another decision is substituted therefor. If there is provision for appeal, the person affected may subsequently turn to the courts. For certain matters there are 'appellate committees', which review, to a certain extent independently of the other parts of the administration, the measures taken by the authority in question; the decisions of such committees may as a rule be challenged in court.<sup>9</sup>

In addition to those forms of appeal and appellate committees, the 'Ombudsman' is by far the most important of all the forms of extra-judicial protection of rights. The institution of the Ombudsman, who is appointed by Parliament and is completely independent, has its legal basis in Article 55 of the Constitution and in the statute of 1 December 1961. The creation of such an institution was intended on the one hand to give the citizen a quicker and cheaper form of legal protection against the administration, and on the other hand to render subject to review such

<sup>1</sup> *Castberg*, Verfassungsgerichtsbarkeit in Norwegen und Dänemark, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 36 (1962), p. 420.

<sup>2</sup> Thus the predominant view: e.g. *Andersen*, Dansk Statsforfatningsret, p. 460; *Sørensen*, op. cit., p. 302.

<sup>3</sup> Thus *Ross*, Dansk Statsforfatningsret, 2nd ed. 1966, p. 195 *et seq.*, with further references.

<sup>4</sup> *Ross*, op. cit., p. 194.

<sup>5</sup> *Sørensen*, op. cit., p. 298.

<sup>6</sup> Cf. *Bent Christensen*, Der gerichtliche Rechtsschutz des einzelnen gegenüber der vollziehenden Gewalt in Dänemark, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 5 (1) (1969), p. 122.

<sup>7</sup> *Castberg*, op. cit., p. 432; *Sørensen*, op. cit., p. 319; *Ross*, op. cit., p. 758.

<sup>8</sup> *Krarup and Mathiasen*, Forvaltningsret, 1967, p. 118 *et seq.*

<sup>9</sup> *Sørensen*, op. cit., p. 289; *Christensen*, op. cit., p. 124.

administrative action as would not normally be capable of challenge in court. Of his own motion, or on the application of an individual in that behalf, the Ombudsman investigates any administrative act—simple administrative measures, administrative action, or even activities having no legal significance whatsoever—as to its legality and reasonableness. There are doubts as to whether the institution of the Ombudsman—which was initially intended as an experiment—may be abolished by ordinary statute, or only by constitutional amendment.<sup>1</sup> Since the decisions of the Ombudsman are not legally binding—he may refer the matter for investigation and legal proceedings to the authorities competent to take such action in the case in question, but cannot alter or annul the decision—the administrative authority concerned is free to decide whether it will look afresh at what it has done, and thereafter adopt a different attitude in the actual case in question. It should however be said that the administration as a rule follows the recommendations of the Ombudsman.<sup>2</sup>

## Federal Republic of Germany

The Basic Law for the Federal Republic of Germany of 23 May 1949 has shaped the protection of the individual's fundamental rights in a manner which is without parallel in former German constitutions or in comparable foreign constitutional systems. This is not so as regards the guaranteed rights themselves, but rather as regards the way in which they are protected. The predominant guarantees are in respect of the traditional rights of the individual against undue intrusion by State authority. Among the most significant of the guaranteed fundamental rights are: the protection of the dignity of the individual human being (Article 1), the right of free personal development (Article 2), the principle of equality (Article 3), freedom of religion and conscience (Article 4), freedom of opinion and of the press, as well as freedom of artistic and scientific endeavour (Article 5), freedom of assembly (Article 8), freedom of association (Article 9), secrecy in relation to letters, mails and telephone communications (Article 10), freedom of movement (Article 11), freedom of choice of trade or profession (Article 12), and the guarantee of property (Article 14). In addition there are provisions as to the civil (*staatsbürgerlich*) equality of all German nationals (Article 33), the constitutional entrenchment of the principle of liability on the part of the State for breaches of administrative duties (Article 34), provisions on the principles relating to electoral law (Article 38), and on the protection of the individual during civil or criminal proceedings (abolition of the death penalty, Article 102; the right to be heard; no punishment without legal justification; *autrefois convict*, Article 103; and guarantees in relation to deprivation of freedom, Article 104).

Many of the fundamental rights are available to any person, regardless of nationality, others only to 'Germans'.

The Constitution contains a complicated system providing for possible derogations from these fundamental rights. Many fundamental rights are guaranteed without reservation (which does not however completely exclude any requisite delimitation and more specific elaboration by the courts and by learned writers),

while other fundamental rights have been subjected by the Constitution itself to a reservation permitting more detailed statutory provision; under no circumstances may the 'essential content' ('*Wesensgehalt*') of a fundamental right be altered (Article 19(2)).

Social fundamental rights are largely absent from the Basic Law. In this context we cannot go into greater detail in relation to certain recent tendencies, in some areas of learned writing, and also in decided cases, to declare social rights and democratic rights of participation (*Teilhaberechte*) to be parts of the Constitution pursuant to the general principle of the social State and the constitutional requirement of democracy (in some cases in conjunction with the principle of equality), and to interpret them afresh accordingly.

Apart from the guaranteed fundamental rights contained in the Basic Law there are a number of other provisions for the protection of the individual. Thus, some of the constitutions of the Länder of the Federation contain detailed catalogues of fundamental rights which subsist concurrently with the Basic Law (Article 142). The ECHR with its Additional Protocols has the force of law in the Federal Republic, ranking according to the prevailing view, on a par with an ordinary statute. In numerous other statutes, the social protection of the individual in particular is more specifically established, and judicial protection will as a rule be available to reinforce such social protection.

So far as the text of the Constitution is concerned (Articles 1(3), 20(3)) it is beyond doubt and undisputed that the legislature also is bound by the Basic Law. While, as has been mentioned above, the legislature has the power within certain limits to evolve more specific elaborations of fundamental rights or derogations therefrom, none the less there is no single fundamental right which is at the mercy of the legislature, and ultimately it is always for the courts to draw the line between those derogations from fundamental rights which are lawful and those which are not.

The manner in which the judicial protection of rights has been shaped by the Basic Law is the really outstanding and perhaps unique feature of West German constitutional law. From the outset, the Constitution itself provides that there are rights of action in the courts against any breach by public authority of the rights of the individual (Article 19(4)). Thus, independently of any enabling provision in the ordinary statute in question, every act of the executive constituting an interference in the sphere of the individual can be challenged in court. The courts have the right and the duty to review the manner in which public authority has observed the Constitution, including the fundamental rights. It follows that in judicial practice, especially that of the administrative courts, the fundamental rights and certain further constitutional maxims play an unusually important role. Individual fundamental rights, including the principle of equality, and 'unwritten' constitutional principles such as the requirements of the rule of law, the principle of proportionality, etc., frequently govern the manner in which the courts conduct their re-

<sup>1</sup> As to the latter: *Ross*, op. cit., p. 774.

<sup>2</sup> On this point in detail: *Ross*, op. cit., p. 771 *et seq.*; *Christensen*, op. cit., p. 125, and bibliography, p. 126.

view. Whenever the courts hold these rights and principles to have been breached they correct the executive act in question.

They do so on their own authority and alone are answerable therefor; they are only subject to restrictions in so far as they deny the constitutionality of a formal statute.

In principle, the compatibility of statutes with the Constitution, and thereby also with the fundamental rights guaranteed by the Constitution, can come before the Bundesverfassungsgericht in three separate ways. First, other organs of State and a one-third minority of the members of the Bundestag may demand a review of the constitutionality of a statute by the constitutional court (Article 93(1) (2)).

Secondly, any court of the Federal Republic can submit to the constitutional court for review any provision of law which it would have to apply but which it considers to be unconstitutional (Article 100(1)). Finally, any citizen can apply directly to the constitutional court by way of objection on constitutional grounds (normally after the exhaustion of other legal remedies) (Article 93(1) (4)(a)) in cases of alleged breaches of fundamental rights by any public authority including the legislature.

This system for guaranteeing fundamental rights and legal protection, which clearly bears the marks of previous experience of the inhumanity of a totalitarian regime, demonstrates the importance of fundamental rights within the West German legal system, and, at the same time, the problems for European Community law thereby arising. By virtue of their jurisdiction outlined above, the courts of the Federal Republic, led by the Bundesverfassungsgericht, have evolved a body of case law relating to all the important fundamental rights and fundamental constitutional principles, which imposes constraints on all other parts of State authority and which must be respected by them. In this way judgments on, for instance, the freedom of trade or occupation, the right of property, the principle of equality or the requirements of the rule of law, have led to extremely subtle distinctions and differentiations, intended to protect the sphere of the individual, without at the same time disregarding unduly the necessary interests of the community as a whole. The central importance of the fundamental rights within the West German constitutional system creates at the same time familiar problems for the European Communities. While the Basic Law enjoins (especially in Article 24) international cooperation and integration as well as comprehensive protection of fundamental rights, it does not deal in any explicit way with the possible tensions thereby created. This probably accounts for the fact that the problem of protection of fundamental rights within the framework of the European Communities is being, and will continue to be, canvassed in the Federal Republic with particular intensity, and that the legal view which found its authoritative expression in the judgment of the Bundesverfassungsgericht of 29 May 1974<sup>1</sup> and according to which national fundamental rights are to prevail, for the time being at least, over acts of the Community, is generally recognized as unsatisfactory.<sup>2</sup>

It must also be mentioned that a corpus of constitutional provisions embodying a core of human rights remains unalterable

even by means of the procedure for constitutional amendment (Article 79 (3)); the difficult question of where the line is to be drawn between constitutional amendments which are lawful and those which are not, cannot be gone into here.

## France

The Constitution of the Fifth Republic of 4 October 1958, like the Constitutions of 1875 and 1946<sup>3</sup> has no fixed catalogue of fundamental rights.<sup>4</sup> As far as human rights are concerned, the Preamble refers instead to the Declaration of 1789 as well as to the Preamble of the Constitution of 1946: 'Le peuple français proclame solennellement son attachement aux droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946'.

Beyond this, the text of the Constitution of 1958 mentions only a few of the classical fundamental rights, such as the equality of all citizens before the law without regard to origin, race or religion (Article 2 (1)), the freedom of belief (Article 2 (1)), the freedom of the person from arbitrary arrest and the right to judicial control of any deprivation of personal liberty (Article 66).

For the protection of fundamental rights the reference to the Preamble of 1946 is of special importance. This Preamble refers in turn to the human rights of the Declaration of 1789 and the 'principes fondamentaux reconnus par les lois de la république'. In addition the Constitution of 1946 acknowledges the 'principes politiques, économiques et sociaux particulièrement nécessaires à notre temps'. We can therefore distinguish the following

<sup>1</sup> BVerfGE 37, p. 271 *et seq.*

<sup>2</sup> There are already a large number of comments on this judgment, from the point of view of Community law as well as from that of German constitutional law; cf. *inter alia*, Feige, Bundesverfassungsgericht — Grundrechte — Europa, JZ 1975, p. 476 *et seq.*; Hallstein, Europapolitik durch Rechtsprechung, Wirtschaftsordnung und Staatsverfassung, Festschrift für Franz Böhm zum 80. Geburtstag, 1975, p. 205 *et seq.*; Hilf, Klein, Bleckmann, Sekundäres Gemeinschaftsrecht und deutsche Grundrechte, Zum Beschluß des Bundesverfassungsgerichts vom 29. Mai 1974, ZaöRV 35 (1975), p. 51 *et seq.*; Ipsen, BVerfG versus EuGH *re* 'Grundrechte', Europarecht, 10 (1975), p. 1 *et seq.*; Pestalozza, Sekundäres Gemeinschaftsrecht und nationale Grundrechte, DVBl. 1974, p. 716 *et seq.*; Scheuner, Der Grundrechtsschutz in der Europäischen Gemeinschaft und in der Verfassungsrechtsprechung, AöR 100 (1975), p. 30 *et seq.*; Zuleeg, Das Bundesverfassungsgericht als Hüter der Grundrechte gegenüber der Gemeinschaftsgewalt, DÖV 1975, p. 44 *et seq.*

<sup>3</sup> The draft Constitution of 1946, which set out in detail the traditional fundamental rights and social rights, was rejected by the French people in a referendum. A partial reason for this, as well as the excessive power conferred on the National Assembly, was the fear of a whittling down of the classic fundamental liberties of the Declaration of 1789 by legal implementing rules and 'interventionist' and 'socialist' conceptions of fundamental rights. On this, cf. Burdeau, Droit constitutionnel et institutions politiques, 1959, p. 330; Vedel, *Cour de droit constitutionnel*, 1950-51, p. 570 *et seq.*; Prétot, *Institutions politiques et droit constitutionnel*, 1961, p. 510 *et seq.*; Laferrrière, *Manuel de droit constitutionnel*, 1947, pp. 904, 910 *et seq.*

<sup>4</sup> Cf. on the fundamental position of basic rights within the French legal system esp. Rivero, *Les libertés publiques*, Vol. 1, *Les droits de l'homme*, 1973; Burdeau, *Les libertés publiques*, 4th ed. 1972; Colliard, *Libertés publiques*, 4th ed. 1972; Stahl, *Die Sicherung der Grundfreiheiten im öffentlichen Recht der Fünften Französischen Republik*, Veröffentlichungen des Instituts für Internationales Recht an der Universität Köln 61 (1970); Duverger-Sfex, *Die staatsbürgerlichen Freiheitsrechte in Frankreich und in der Union Française*, in: *Bettermann-Nipperdey-Scheuner, Die Grundrechte*, 1967, Vol. 1, Part 2, p. 543 *et seq.*

groups of constitutionally entrenched fundamental rights ('libertés publiques'):

(i) the classical freedoms contained in the Declaration of 1789 such as the freedom of the person, the principle of equality, of private property, and freedom of opinion and of the press;

(ii) the political, economic and social principles of 1946. The courts and legal writers are predominantly of the view that the reference in the Preamble of 1958 embraces these rights as well, although, strictly speaking, this does not amount to an extension of the 'droits de l'homme' listed in the Declaration of 1789.<sup>1</sup> Amongst these additional rights are the right to strike, to work, and to industrial participation, the principle of social security for all, as well as the guarantee of equal educational opportunity;

(iii) the 'principes fondamentaux reconnus par les lois de la république'. By virtue of the reference to these principles, the fundamental freedoms provided for by ordinary statute during the Third Republic are raised to the constitutional level.<sup>2</sup> Some of the fundamental rights which are the most important in practice come within the 'principes fondamentaux', as, for instance, the freedom of assembly (liberté de réunion—protected by statute of 30 June 1881), the freedom of commerce and industry (liberté de commerce et de l'industrie—statute of 21 March 1819).

It was for a long time disputed whether the Preamble had the status of a directly applicable legal rule or represented a mere guideline for construction.<sup>3</sup> The prevailing view, both in the decided cases and in learned writing, was that the Preamble, as part of the Constitution resolved upon by the French nation, had the same legal status as the text of the Constitution itself, in so far as directly binding provisions could be deduced therefrom. This was affirmed as regards the rights to freedom, but denied as regards the social rights laid down in the Preamble to the Constitution of 1946 which require the performance of a positive act on the part of the State.<sup>4</sup> The question of the legal status of the Preamble can today essentially be regarded as resolved, since the Conseil Constitutionnel in its judgment of 16 July 1971 declared unconstitutional a bill for the reform of the French law relating to association, in reliance on the Preamble.<sup>5</sup>

The 'libertés publiques' constitutionally entrenched in the Preamble cannot be assimilated to the individual fundamental rights of the German Basic Law, for instance. The constitutional securing of a precisely defined corpus of individual rights against the State is a concept alien to French legal thought.<sup>6</sup> The traditional rights of the citizen are defined in ordinary statutes and are, in the French view, thereby secured. The respect for the achievement of the French revolution renders it scarcely conceivable that a statute could be in breach of human rights. The possibility of a contradiction between the acknowledgement of fundamental rights in the Preamble and an ordinary statute has only been discussed since the said judgement of the Conseil Constitutionnel.<sup>7</sup> This understanding of the role of the legislature explains moreover why the attempt to set fundamental rights out in detail in the draft 1946 Constitution was rejected by the French nation in a referendum.

The French courts have furthermore never conceived of the 'libertés publiques' as subjective public rights in the sense of the

German doctrine. The established rights are to be understood rather as a guarantee of a general principle. This view is manifest externally in that the Conseil d'État does not as a rule speak of rights, but rather speaks for example of the 'principe de la liberté de réunion'.<sup>8</sup> This makes possible a more flexible approach by the courts in relation to fundamental freedoms.

According to Article 89 of the Constitution, Parliament, or on the recommendation of the Prime Minister, the President of the Republic may initiate the procedure for constitutional amendment. The proposed amendment requires the approval of the National Assembly and the Senate, and must be endorsed by referendum. A referendum may be dispensed with only if the President of the Republic decides to submit the amendment to the entire Parliament. In this case the amendment is accepted, if three-fifths of the votes cast are in favour of it. Only the principle of the republican form of government is excluded from constitutional amendment.

Since the decision of the Conseil d'État in *Aramu*<sup>9</sup> fundamental freedoms may, even if not covered by the twofold reference in the Preamble to the Constitution, none the less subsist as general principles of law inherent in the French legal system. Such fundamental freedoms will apply 'même en l'absence de textes' if they are in conformity with French legal tradition.<sup>10</sup> We are therefore concerned in essence with judge-made law. It covers, in addition to certain fundamental freedoms, such as the freedom of movement, the inviolability of the home, freedom of education and the right to be heard, also administrative principles, such as recourse to the administrative courts, the prohibition on retrospective administrative decisions, and many other principles of proper administration (impartiality of investigating commissions, legal force of administrative decisions).<sup>11</sup> The distinction between the general legal principles and the constitutionally entrenched principles is made more difficult by the fact that the Conseil d'État increasingly considers the fundamental freedoms as general principles 'résultant notamment du préambule de la Constitution'. The constitutional entrenchment is therefore only one of the possible sources of general legal principles.<sup>12</sup>

<sup>1</sup> *Stahl*, op. cit., p. 23 with further references; for a different opinion *Vedel*, *Cours de droit constitutionnel et des institutions politiques*, 1961, p. 790.

<sup>2</sup> *Rivero*, Les 'principes fondamentaux reconnus par les lois de la République': une nouvelle catégorie constitutionnelle? *D. Sir.* 1972, Chron. 265.

<sup>3</sup> *Pelloux*, Quelques réflexions sur le préambule de la Constitution française de 1958, *Hommage d'une génération de juristes au Président Basdevant*, 1960, p. 389 et seq.; *Morange*, Valeur juridique des principes contenus dans les déclarations des droits, RDP 1945, p. 229 et seq.; *Georgel*, Aspects du Préambule de la Constitution du 4 octobre 1958, RDP 1960, p. 85 et seq.

<sup>4</sup> *Georgel*, op. cit., p. 91; *Rivero-Vedel*, Les principes économiques et sociaux de la Constitution: Le préambule, *Collection Droit Social* 31 (1947), p. 20; *Stahl*, op. cit., p. 32 et seq.

<sup>5</sup> *JÖRF* 1971, p. 7114; see *Ress*, *Der Conseil Constitutionnel und der Schutz der Grundfreiheiten in Frankreich*, *JöRNF* 23 (1974), p. 123 et seq.

<sup>6</sup> See *Stahl*, op. cit., p. 53 et seq.

<sup>7</sup> *Ress*, op. cit., p. 125; *Rivero*, note to CC of 16.7.1971, *AJDA*, p. 537 et seq.

<sup>8</sup> References from judgments of the CE in *Stahl*, op. cit., p. 57 et seq.

<sup>9</sup> CE of 26.10.1945, *Aramu*, *D.* 1946, J., p. 158 with notes by *Morange*.

<sup>10</sup> *Morange*, Les principes généraux du droit sous la V<sup>e</sup> République, RDP 1960, p. 1188 et seq.; *Letourneur*, Les 'principes généraux du droit' dans la jurisprudence du Conseil d'État, *Étude s et Documents* (pub. by CE) 1951, p. 19 et seq.; *Krech*, Die Theorie der allgemeinen Rechtsgrundsätze im französischen öffentlichen Recht, *Studien zum internationalen Wirtschaftsrecht und Atomenergiericht* 49 (1973), p. 11 et seq.

<sup>11</sup> Review in *Krech*, op. cit., p. 179 et seq.

<sup>12</sup> Cf. CE of 26.6.1959, *Syndicat général des ingénieurs-conseils*, *Rec.* p. 394.



There is considerable controversy amongst learned writers as to the status of such of those general principles as are not embraced within the reference in the Preamble. From the decisions of the Conseil d'État the prevailing inference is that all general legal principles enjoy constitutional status.<sup>1</sup> There will be no need to answer this question so long as it is only executive acts which are being reviewed as to their compatibility with the 'liberté publiques'. The Conseil Constitutionnel has hitherto had no occasion to decide on the question whether these general legal principles are also binding on the legislature.

It has already been said that by virtue of the reference in the Preamble the fundamental human rights provided for in the statutes of the Third Republic are constitutionally safeguarded. The legislature is thus prohibited from proceeding to amend the law in such a way as to contravene the 'principes fondamentaux' therein contained. A question therefore arises as to whether this will lead to what can be termed the petrification of the content of these statutes, that is, which part of a statute partakes of the fundamental substance of the principle.<sup>2</sup> It would furthermore seem possible as a result of the decisions of the Conseil Constitutionnel since the judgment of 16 July 1971, to draw, to some extent, the conclusion that not only are the freedoms entrenched in the statutes of the Third Republic to be numbered amongst the 'principes fondamentaux', but also further basic freedoms which have been enacted in subsequent ordinary statutes.<sup>3</sup>

The reference to the 'principes fondamentaux' and the legal decisions in relation to the general legal principles greatly complicate the answer to the question whether any given right against the State on the part of a citizen is protected by ordinary statute only or by the Constitution itself. As in practice this problem has only recently become of importance, as a consequence of the recent decisions of the Conseil Constitutionnel, the discussion on this point is still very much in its early stages. The necessity to identify those fundamental rights which are protected by the Constitution against encroachment by the legislature could alter the entire scheme of things existing hitherto. It is now for the courts to give shape to the vague concept of 'principes fondamentaux', in order to evolve a secured corpus of fundamental freedoms.

France has in the meantime ratified the European Convention on Human Rights (ECHR), and four of the five Additional Protocols, by a decree of 3 May 1974.<sup>4</sup> The Second Additional Protocol was not ratified: it confers on the European Court of Human Rights the power to render opinions on legal questions relating to the construction of the Convention, upon the application of the Committee of Ministers. Moreover, France has only accepted the right of appeal on the part of the State, and not on the part of individuals under Article 25. As with any other international treaty gazetted in France in the appropriate manner, the ECHR applies directly as part of the French legal system. Under Article 55 of the Constitution properly ratified or approved treaties or conventions shall prevail, as from the date of their gazetting, over the statutes of the country, subject to the proviso that the treaty or convention in question is also applied by the other party thereto. The true meaning of precedence in this way is a

matter of controversy in learned writing and in decided cases.<sup>5</sup> The Conseil Constitutionnel, in its decision of 15 January 1975 in relation to the termination of pregnancy, made clear that, as far as the ECHR is concerned, the incompatibility of a statute with the treaty in question cannot be assimilated to unconstitutionality.<sup>6</sup> For this reason the Conseil Constitutionnel declined to incorporate the ECHR into the constitutional criteria for review for the purposes of the procedure under Article 61.

French legal tradition, moulded by Jean-Jacques Rousseau's doctrine of laws as the expression of the 'volonté générale', cannot conceive of the judicial review of legislative acts by reference to fundamental rights guaranteed by the Constitution.<sup>7</sup> It is only by establishing fundamental rights in statutory form that, in the French view, the acknowledgement of fundamental freedoms of the Declaration of 1789 and Preamble of 1946 can be secured. Accordingly, protection of freedoms against the executive is the focus of the protection of fundamental rights. Article 61 of the Constitution nevertheless confers upon the Conseil Constitutionnel a right to review statutes as to constitutionality. Statutes are subject to such review when they have been passed by Parliament but not yet gazetted. There is thus no constitutional review of statutes after their publication. The decisions of the Conseil Constitutionnel have legal force. A provision which has been declared unconstitutional may not be published or applied. The decisions of the Conseil Constitutionnel are binding upon public authority, and all authorities or courts (Article 62 (2)). This procedure has only become of practical importance since the Conseil Constitutionnel in its judgment of 16 July 1971 has declared the Preamble to be among the criteria for review.<sup>8</sup> In this case a Government bill was for the first time declared unconstitutional for breach of the fundamental freedoms guaranteed by the Preamble. Additional importance was acquired by this decision by the constitutional amendment of 29 October 1974.<sup>9</sup>

<sup>1</sup> Vedel, *Droit administratif*, 4th Ed. 1964, p. 252 *et seq.*; Auby-Drago, *Traité de contentieux administratif*, Vol. 3, 1962, p. 23; Batailler, *Le Conseil d'État, juge constitutionnel*, 1966, p. 132 *et seq.*

<sup>2</sup> See *Ress*, *op. cit.*, p. 156 *et seq.*

<sup>3</sup> Cf. *Rivero*, Les 'principes fondamentaux reconnus par les lois de la République', une nouvelle catégorie constitutionnelle? D. Sir. 1972, Chron. 265.

<sup>4</sup> JORF of 4.5.1974, p. 4750; see also *Madiot*, Du Conseil Constitutionnel à la Convention européenne: vers un renforcement des libertés publiques? D. Sir. 1975, Chron. I p. 3 *et seq.*

<sup>5</sup> See *Ress*, Der Rang völkerrechtlicher Verträge nach französischem Verfassungsrecht, Überlegungen zur Entscheidung des Conseil Constitutionnel vom 15. Januar 1975 über den Rang der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten nach Art. 55 der französischen Verfassung, *ZaöRV* 35 (1975), p. 445 *et seq.*

<sup>6</sup> JORF of 16.1.1975, 671; JCP 1975 II, 18030 note *Bey*; AJDA 1975 II, 134 note *Rivero*; *EuGRZ* 1975, p. 54 *et seq.*

<sup>7</sup> See in detail *Stahl*, *op. cit.*, p. 72 *et seq.* In general on the judicial protection of fundamental rights: *Dran*, Le contrôle juridictionnel et la garantie des libertés publiques, 1968; *Rivero*, Le système français de protection des droits de l'homme, Les droits de l'homme, *Revue de Droit International et Comparé* 1 (1968), p. 70 *et seq.*; *Franck*, Les fonctions juridictionnelles du Conseil Constitutionnel et du Conseil d'État dans l'ordre constitutionnel, 1974; *Goose*, Die Normenkontrolle durch den französischen Conseil Constitutionnel, *Schriften zum Öffentlichen Recht*, 212 (1973).

<sup>8</sup> Cf. for the most recent decisions of the CC: *Hamon*, Contrôle de constitutionnalité et protection des droits individuels: A propos de trois décisions récentes du Conseil Constitutionnel, D. Sir. 1974, Chron. 83; *Favoreu-Philip*, La jurisprudence du Conseil Constitutionnel, RDP 1975, p. 165 *et seq.*; see also *Favoreu-Philip*, Les grandes décisions du Conseil Constitutionnel, 1975.

<sup>9</sup> Loi constitutionnelle No 74-904 of 29.10.1974, JORF of 30.10.1974; see *Franck*, Le nouveau régime des saisines du Conseil Constitutionnel, JCP 1975 I, p. 2678; *Philip*, L'élargissement de la saisine du Conseil Constitutionnel, AJDA 1975, p. 15 *et seq.*

Whereas hitherto the jurisdiction of the Conseil Constitutionnel could only be invoked by the President of the Republic, the Prime Minister, or the Presidents of both Chambers, the right is now conferred upon 60 deputies for the time being of the National Assembly or the Senate to invoke the jurisdiction of the Conseil Constitutionnel by seeking a review of the constitutionality of a statute which has not yet been published. The extension of this right to apply to the Conseil Constitutionnel is of great importance, since now a parliamentary minority may also use the procedure under Article 61 as a political instrument against the Government. It has already been so used on three occasions, and on one of these occasions the Conseil Constitutionnel rendered its decision (on the question of termination of pregnancy, decision of 15 January 1975).<sup>1</sup>

Recent decisions of the Conseil Constitutionnel have provoked lively discussion in France as to whether parliamentary sovereignty was being replaced by government by the courts.<sup>2</sup> The problem of judicial review of legislative action is posed all the more acutely since the twofold reference in the Preamble to the Constitution of 1958 rarely permits of any precise and unequivocal definition of the substance and extent of protected fundamental rights.

Furthermore, recently decided cases have imposed on the legislature substantive limitations within the field of fundamental rights when enacting provisions in relation to matters reserved to it under Article 34.<sup>3</sup> Article 34 states: 'La loi fixe les règles concernant: — les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques...'. The development in France could lead to a weakening of the traditional aversion to any catalogue of fundamental rights. The development of a jurisdiction to review on the part of a constitutional court, which would be effective and at the same time acceptable to Parliament, would only be possible in the long term if the court can proceed on the basis of sufficiently concrete criteria for review.

The French administrative courts determine the legality of any act of an administrative authority.<sup>4</sup> They review the compatibility of executive measures with the law. The Conseil d'État reviews indirectly administrative decisions as to their compatibility with the Constitution, in so far as constitutional provisions are embodied or given concrete form in ordinary statutes. Moreover, since the judgment of the Conseil d'État of 28 June 1918,<sup>5</sup> the constraint has been removed whereby the Conseil d'État could neither apply nor interpret the Constitution. In this way, the Conseil d'État secured the means of taking into account, when construing statutes, the constitutional guarantees relating to the protection of fundamental rights in cases of undue encroachment by the executive. This will however not be possible where the wording of the statute is unequivocal. In such case, the statute in question must be applied, in spite of its being unconstitutional, and any administrative act founded thereon will be binding.<sup>6</sup>

The Conseil d'État however applies the Constitution as the direct criterion in cases of government regulations which are issued independently of any statute (gesetzesunabhängige Verord-

nungen). By Article 37 of the Constitution of 1958 the government is empowered to issue regulations independently of any statute, in so far as the matter is not reserved to the legislature under Article 34 of the Constitution. On 7 July 1950<sup>7</sup> in *Dehaene* the Conseil d'État had regard for the first time to the Preamble and deduced therefrom that, pursuant to paragraph 7 of the Preamble of 1946, the right to strike was recognized in law even for civil servants. In the following period, the principle of equality in the Preamble was used several times in the review of provisions governing the civil service (dienstrechtliche Vorschriften). In its judgment in *Société d'Eky* of 12 February 1960<sup>8</sup> the Conseil d'État conclusively settled that the Declaration of 1789 imposes, as directly applicable constitutional law, constraints on the authority of the Government to issue regulations. Nevertheless, the review of government regulations and administrative acts on the basis of the Preamble has not acquired any great importance within the case-law of the Conseil d'État. In fact, the application of the Preamble will in most cases be unnecessary since the fundamental freedoms are normally regarded as 'principes généraux du droit applicables même en l'absence des textes', quite independently of the fact that they may be statutorily or constitutionally secured. It is true that the Conseil d'État in its more recent judgments refers to the connection between the 'principes généraux' and the Preamble to the Constitution. The Preamble however plays only a supporting role. What is decisive is the creation of law by the administrative courts, which has brought into being an extensive catalogue of freedoms.<sup>9</sup> The general principles of law bind the 'autorité réglementaire', which means that they assert themselves directly in relation to regulations issued independently of statutes, and in relation to administrative acts. The bounds of this doctrine are reached where the administrative decision can be founded on a statutory provision. The unconstitutionality of the administrative act will in this case not lead to its being set aside. The fact that the act is in accordance with the statute will prevail. But since even within the field of administration independent of statutory provision the administration usually enjoys a broad measure of discretion, there are numerous cases in which the Conseil d'État

<sup>1</sup> JORF of 16.1.1975, p. 671; see *Ress*, *Der Rang völkerrechtlicher Verträge nach französischem Verfassungsrecht, Überlegungen zur Entscheidung des Conseil Constitutionnel vom 15. Januar 1975 über den Rang der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten nach Artikel 55 der französischen Verfassung*, ZaöRV 35 (1975), p. 445 *et seq.*; *Ruzié*, *La Constitution française et le droit international (à propos de la décision du Conseil Constitutionnel du 15 janvier 1975)*, Clunet 1975, p. 249 *et seq.*

<sup>2</sup> Cf. *Rivero*, *Les 'principes fondamentaux reconnus par les lois de la République': une nouvelle catégorie constitutionnelle?* D. Sir. 1972, Chron. 265; *Hamon*, *loc. cit.*; further references in *Ress*, *Der Conseil Constitutionnel und der Schutz der Grundfreiheiten in Frankreich*, JöRNF 23 (1974), p. 123 *et seq.*

<sup>3</sup> Cf. the decision of the CC of 28.11.1973, JORF of 6.12.1973, p. 12949; see also *de Soto*, *La décision du Conseil Constitutionnel en date du 28 novembre 1973*, RDP 1974, p. 889; *Rivero*, *Peines de prison et pouvoir réglementaire*, AJDA 1974, p. 229.

<sup>4</sup> See *Fromont*, *La protection juridictionnelle du particulier contre le pouvoir exécutif en France, Gerichtsschutz gegen die Exekutive, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 52(1) (1970), p. 221 *et seq.*; *Stahl*, *Die Sicherung der Grundfreiheiten im öffentlichen Recht der Fünften Französischen Republik*, Veröffentlichungen des Instituts für Internationales Recht an der Universität Köln 61 (1970), p. 133 *et seq.*

<sup>5</sup> *Heyriès*, Sir. 1922, 3, 49 note *Hauriou*.

<sup>6</sup> *Stahl*, *op. cit.*, p. 59 *et seq.*

<sup>7</sup> *Dehaene*, RDP 1950, p. 691 *et seq.*

<sup>8</sup> *Société d'Eky*, D. 1960, J., p. 263, note *Huillier*; JCP 1960, II, No 11629 bis with note by *Vedel*.

<sup>9</sup> *Stahl*, *op. cit.*, p. 72 *et seq.*

has reviewed administrative action directly as to its compatibility with the freedoms recognized as 'principes généraux'.

General statements as to the circumstances in which fundamental rights may be curtailed by the administration are more difficult to make than for example is the case with the judgments of the German courts. The fundamental considerations which have influenced the decision in the specific case are generally not disclosed. Learned writers in France appear to consider the setting-off of opposing interests according to the principle of proportionality as constituting something of a guideline in the case-law of the Conseil d'État.<sup>1</sup> The interest of the State in exercising its authority to intervene is weighed against the value of the freedom thereby affected and the extent of the damage inflicted. The severity of the intervention must bear some reasonable relation to the interest of the State which is thereby to be secured. No intervention may therefore affect the substance of the freedom in question. This covers 'absolute, general' prohibitions (e.g. the prohibition upon persons suffering from tuberculosis from entering areas of tourism).<sup>2</sup> Moreover, any interference with freedoms must be based on a careful weighing-up of the actual circumstances of the case. In this weighing-up an important consideration is the value of the freedom in question. The extension of powers of control will thus depend on the value of the freedom opposing such extension. The Conseil d'État in this respect is guided by the intentions of the legislature. The possible limitations will vary depending on whether the legislature has employed a greater or lesser degree of care in order to guarantee the various fundamental rights. Particularly stressed is the value of the 'liberté fondamentale', which chiefly comprises the rights attaching to the individual's personal sphere, such as the freedom of the person, the inviolability of the home, and property. In addition, the 'principes fondamentaux reconnus par les lois de la République' usually carry particular weight. These include, *inter alia*, the freedoms of the press, of assembly, of association, and of religion. It is true that no systematic approach in relation to the content of, and the limitations upon, the 'liberté fondamentale' has been evolved. Whether the protection of freedom or the interests of the State should prevail is decided by the Conseil d'État by weighing-up in each individual case the basic freedoms against the 'intérêts de l'ordre et de la sécurité'.

No formal appellate procedure within the administration is known to French law. There is the 'recours à gracieux', whereby a citizen may address himself to the authority which has taken the administrative action in question, or has declined to take such action when requested. In addition there is the possibility of the 'recours hiérarchique' whereby an appeal is made to superior authority. Both these forms of appeal are referred to as 'recours administratif', as opposed to 'recours contentieux', that is, actions brought in the courts.<sup>3</sup> These are not appeals having particular requirements as to form or to time-limits. The authority to which they are addressed is under no duty to take any decision thereon. The absence of any formal procedure for legal protection by the administration is to be explained in terms of the history of the development of the French administrative jurisdiction. This jurisdiction has evolved from the system for legal protection operated by the administration itself. Until 1953 it was for the Prefectoral Councils to determine complaints wherein adminis-

trative action was challenged, and against their decisions an appeal lay to the Conseil d'État. In the reforms of 1953 these Prefectoral Councils were replaced by 'tribunaux administratifs' which thenceforth had jurisdiction at first instance in all administrative disputes. Procedurally, the principles applying in the administrative courts are very much akin to those of the Conseil d'État. The prerequisite for any action is first of all that there be a decision of the administrative authority in question, dismissing an objection raised by a citizen. Against the decision containing such dismissal appeal can be made to the administrative court within two months. Silence on the part of the authority in question will, after four months, be construed as a refusal. The administrative courts deal with a wide variety of actions, each of which has its own peculiarities.<sup>4</sup> The most important form of action is the 'recours pour excès de pouvoir'. In this action the setting aside of administrative acts violating statutory law can be sought. For the citizen seeking redress there is also the 'recours de pleine juridiction', which is a species of action in the administrative courts for the fulfilment of an obligation. It is concerned with subjective rights against the administration arising under statute or contract. According to French legal opinion, the administration can only be adjudged liable for the payment of money, but not to perform an administrative act. For all practical purposes this action can therefore be regarded as an action for damages.

## Ireland

The Irish Constitution of 1937 contains a comprehensive inventory of fundamental rights. In the section on fundamental rights (Article 40 *et seq.*) there are guaranteed, in particular, general equality, the 'personal rights of the citizen' (a general freedom), the right to personal freedom, the inviolability of the home, freedom of opinion, freedom of assembly, freedom of association and combination, family rights, parental rights, private property, freedom of religion and conscience. There are moreover fundamental rights in relation to criminal procedure (Article 38) and a prohibition on giving retrospective effect to criminal statutes (Article 15 (5)), as well as the guarantee of judicial independence (Article 35 (2)). Any constitutional amendment is subject to a referendum (Article 46 (2)). Constitutional amendments are therefore extremely difficult.<sup>5</sup> The Constitution also contains certain social fundamental rights. In the provisions on 'fundamental rights' the right to free primary education should above all be mentioned (Article 42 (4)). Reference should further be made to Article 41 (2):<sup>6</sup>

<sup>1</sup> For this point and the following, see *Burdeau*, *Les libertés publiques*, p. 43 *et seq.*; *Colliard*, *Libertés publiques*, 1972, p. 158 *et seq.*; *Vedel*, *Droit administratif*, 5th ed. 1973, p. 794 *et seq.*

<sup>2</sup> References in *Burdeau*, *op. cit.*, p. 48.

<sup>3</sup> *De Laubadère*, *Traité de droit administratif*, 6th ed. 1973, p. 257 *et seq.*; *Lücking*, *Die Grundlagen der französischen Verwaltungsgerichtsbarkeit*, 1955, p. 56 *et seq.*

<sup>4</sup> Cf. *Debbasch*, *Droit administratif*, 2nd ed. 1971, p. 435 *et seq.*; *de Laubadère*, *op. cit.*, p. 478 *et seq.*; *Bourjol*, *Droit administratif*, Vol. 2, *Le contrôle de l'action administrative*, 1973, p. 163 *et seq.*

<sup>5</sup> *Kelly*, *Fundamental rights and the Irish Law and Constitution*, 2nd ed. 1967, p. 9 *et seq.*

<sup>6</sup> *Kelly*, *op. cit.*, p. 305 *et seq.*

'The State shall... endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'.

The Constitution also contains principles in relation to social policy ('directive principles of social policy') the observance of which cannot, unlike that of the fundamental rights, be reviewed by the courts (Article 45).

A whole series of fundamental rights, which are not contained in the Irish Constitution, are guaranteed elsewhere in the legal system, such as the right to be heard, the right to an early trial.<sup>1</sup> The ECHR is not however part of the domestic law.<sup>2</sup>

The fundamental rights of the Irish Constitution bind the administration and the legislature.<sup>3</sup> Various forms of judicial protection are available to ensure that they do so.

Article 26 of the Irish Constitution provides initially for a preliminary procedure for obtaining an opinion in relation to the constitutionality of any statute. The President may, before signing any statute, submit it to the Supreme Court for an opinion as to its constitutionality.

Apart from statutes which have already been the subject of a pronouncement by the Supreme Court pursuant to the abovementioned procedure, the High Court and the Supreme Court can also pronounce on the constitutionality of statutes in cases where constitutionality is not the substantive issue (Article 34 (3)(2)).<sup>4</sup> Moreover, in a judgment in 1970, the Irish Supreme Court has recognized the possibility of an objection on constitutional grounds to statutes in so far as the objectors are directly affected by the statutory provision in question.<sup>5</sup>

Though no general right to legal protection against illegal acts of public authority is formulated explicitly in the Constitution, the courts have deduced such a right from Article 34 (3)(1), and Article 40 (3).<sup>6</sup> There exists therefore comprehensive judicial protection against illegal executive action.<sup>7</sup> It should be noted, however, that under Article 37 of the Constitution 'limited functions and powers of a judicial nature' may be conferred on persons or bodies other than judges or courts. Even when this has been done by statute, the ordinary courts have still exercised a control over the constitutionality of the procedure.<sup>8</sup>

## Italy

The Italian Constitution of 1947 contains a very comprehensive catalogue of fundamental rights, consisting of the general principles prefacing the Constitution and the entire Part I thereof; there are in all 54 articles, which are subdivided as follows: Title I: civil liberties; Title II: socio-ethical relations; Title III: economic relations; Title IV: political relations. Provision for derogation by statute is reserved in the case of numerous fundamental rights.

The major part of the Constitution can be amended by the procedure for constitutional amendment. Only the principle of the republican form of government is expressly excluded from such amendment, pursuant to Article 139. However, according to the

prevailing view, in addition to the republican form of government, Article 2 of the Constitution contains a further limitation on constitutional amendment. Since Article 2 speaks of inviolable human rights, any setting aside of these rights is not lawful; what alone is lawful is to amend and adjust them to new situations, without affecting their essence.<sup>9</sup> None the less an amendment to the Constitution can only be achieved by a cumbersome procedure prescribed under Article 138 of the Constitution: any law to amend the Constitution must be accepted by both chambers in two separate readings at an interval of at least three months, and with an absolute majority. It is subjected to a referendum, if one-fifth of the members of one chamber or 500 000 voters or five regional councils so demand. A law which has been subjected to a referendum will not be published if it is not approved by a majority of the valid votes cast. A referendum will not however take place if the law has been approved during the second division by each chamber by a two-thirds majority of the members.<sup>10</sup>

A further guarantee of fundamental rights has been achieved by the ratification by Italy of the ECHR and the Additional Protocol of 20 March 1952, by statute No 848 of 4 August 1955.<sup>11</sup> The ECHR is Italian domestic law with the status of an ordinary statute.

The observance of the Constitution is ensured primarily by the Corte Costituzionale. The tasks of the Court are set out in Article 134 of the Constitution. The protection of fundamental rights is not secured by the direct appeal by way of objection on the grounds of constitutionality, as in Germany, but only incidentally, or by a procedure 'in via principale' whereby the State may request a review of the constitutionality of the legislation of a Region, or a Region may apply to the Corte Costituzionale for a review of the constitutionality of a national statute or the legislation of another Region.

The procedure whereby constitutionality is reviewed when it is not the substantive issue in the dispute in question is set out in greater detail by Article 1 of the Constitutional Act No 1 (*legge costituzionale*) of 9 February 1948 and Articles 23-30 of ordinary

<sup>1</sup> *Kelly*, op. cit., p. 305 *et seq.*

<sup>2</sup> *Süsterhenn*, La protection internationale des droits de l'homme dans le cadre européen, 1961, pp. 303 *et seq.*, 308, with further references.

<sup>3</sup> *Boldt*, Grundrechte und Normenkontrolle im Verfassungsrecht der Republik Irland, JOR, 19 (1970), p. 229 *et seq.*

<sup>4</sup> See *Boldt*, op. cit., p. 244 *et seq.*

<sup>5</sup> *East Donegal Cooperative v Attorney-General*, 1970, IR 335, esp. at p. 338 *et seq.*; cf. also *Boldt*, op. cit., p. 247.

<sup>6</sup> *Kelly*, op. cit., p. 291 *et seq.*; *Kelly*, Judicial Protection of the Individual against the Executive in the Republic of Ireland, *Gerichtsschutz gegen die Executive*, Vol. 1, 1969, pp. 426 *et seq.*, 435; cf. also *Barrington*, Private Property under the Irish Constitution, *The Irish Jurist* 8 (1973), p. 16 *et seq.*; *Kelly*, Judicial Review of Administrative Action: New Irish Trends, *The Irish Jurist* 6 (1971), p. 40 *et seq.*

<sup>7</sup> The opinion of *Boldt*, op. cit., p. 242, that the control of the executive by the courts is rarely effective, cannot be accepted. The references cited by *Boldt* rather indicate the contrary.

<sup>8</sup> *Foley v Irish Land Commission and Attorney-General*, *Irish Law Times* 86 (1952), p. 55 *et seq.*, (1952) IR 118. Cf. however *Fisher v Irish Land Commission* (1968) IR 3, and the criticism of this decision in *Barrington*, loc. cit. See also on these problems *Grogan*, *Administrative Tribunals*, in King (ed.), *Public Administration in Ireland*, Vol. 3 (1954), who, however, relies for his restrictive interpretation of the jurisdiction of the ordinary courts on decisions given before the Constitution of 1937, which thus have only a limited value as precedents on question of constitutional law.

<sup>9</sup> Cf. *Mortati*, *Istituzioni di diritto pubblico*, 8th ed. 1969, p. 1126.

<sup>10</sup> On the problem of constitutional amendment *Mortati*, op. cit., p. 1105, *et seq.*

<sup>11</sup> References to learned authors in *Mortati*, op. cit., p. 1128.

statute No 87 of 11 March 1953. Some details of importance for the protection of rights deserve special mention. Article 23 of the ordinary statute of 1953 provides that constitutionality may be reviewed incidentally in any 'giudizio dinanzi ad un'autorità giurisdizionale'. These words have always been broadly interpreted by the Corte Costituzionale,<sup>1</sup> thus bringing within their ambit not only the ordinary courts as 'giurisdizione volontaria' but also the various 'giurisdizioni speciali' (e.g. Commissari per la liquidazione degli usi civici, Commissione dei ricorsi in materia di brevetti, etc.). There is uncertainty as to arbitration tribunals and the Giunta per le elezioni nell'ambito delle Camere parlamentari. The Corte costituzionale has confirmed (Ordinanza 22/1960 and 57/1961) that it may in the course of proceedings, e.g. in conflitti di attribuzioni or in sede penale, itself raise the question of constitutionality, and refer it to itself. According to a judgment of the Corte costituzionale, no such right of referral is granted to the investigating judge in civil proceedings (sentenza 109/1962); and while the public prosecutor in criminal cases may raise the question of constitutionality, he has no power to refer the papers to the Corte Costituzionale (sentenza 40/1963). In sentenza 53/1968 the Corte Costituzionale recognizes the power to refer on the part of the giudice di sorveglianza in cases relating to the application of security measures, and with sentenza 72/1968 in cases relating to the execution of sentence.

There are special time-limits prescribed for the course of the proceedings, with the effect that they are completed relatively quickly.<sup>2</sup> What merits mention is that the proceedings before the Corte Costituzionale are independent of the proceedings in the course of which the referral has occurred. If the latter for any reason come to an end, the proceedings before the Corte Costituzionale will continue; moreover, the proceedings in the Corte Costituzionale are removed from the control of the parties thereto.

A judgment of the Corte Costituzionale has the following effect: any provision declared unconstitutional will cease to apply as from the day following the publication of the judgment. The question whether unconstitutionality has an *ex tunc* or *ex nunc* effect is thus avoided and a practical solution is what is contemplated (cf. Article 30 (2) of the Act of 1953). The dismissal of a referral will only be effective for the particular case in question, or for the actual proceedings between the parties in provision. The dismissal does not exclude a referral in a different case, even on the same grounds and by the same parties.

The legal protection for the citizen alleging undue encroachment by the executive is based on Articles 24 (1) and 113 of the Constitution. According to these provisions every person may, for the protection of his own rights or legitimate interests, seek the assistance of the courts. For the protection of rights and legitimate interests against acts of the public administration there is always the right to sue in the ordinary and in the administrative courts. This protection may not be excluded or restricted in favour of special forms of appeal or in respect of particular kinds of acts. The law defines which courts may set aside acts of the

public administration in the cases prescribed by statute and with the effects so prescribed. Title IV of the Constitution, which relates to courts (Article 101 *et seq.*), contains further important provision on the judicial protection of the rights of the individual. No exceptions are permitted from the absolute jurisdiction of the courts.<sup>3</sup>

## Luxembourg

The Luxembourg Constitution of 1868 with its significant subsequent amendments contains in its Chapter II ('Des Luxembourgeois et de leurs droits') a catalogue of fundamental rights. For the best part, these fundamental rights subsist in their original form, bearing the stamp of a bourgeois-liberal concept of the State. Only by the constitutional amendment of 12 May 1948 were some social fundamental rights brought into the catalogue, such as the right to work, but also the protection of freedom of economic activity.

Following a proclamatory basic statement in Article 11 (3) ('L'État garantit les droits naturels de la personne humaine et de la famille'), the Luxembourg catalogue of fundamental rights provides, *inter alia*, for the following fundamental rights: equality before the law (Article 11 (2)), general freedom of the person (Article 12 (1)), inviolability of the home (Article 15), guarantee of property (Article 16), freedom of opinion (Article 24 (1)), freedom of the press (also Article 24 (1)), postal secrecy (Article 28), right of petition (Article 27), freedom of religion (Article 19), freedom of assembly (Article 25), freedom of association (Article 26), the right to public primary education (Article 23) the right to work and to social security (Article 11 (4)), the guarantee of trade union rights (Article 11 (5)), freedom to carry on an independent trade or profession (Article 11 (6)), the right to trial by the lawful judge (Article 12). Some of these fundamental rights are subject to a reservation permitting statutory restriction, and others, such as the freedom of economic activity, can only be given shape by statute. But even where the legislature is entrusted with the task of giving shape to certain rights, the Constitution has in some cases attached a further reservation permitting statutory restriction.

According to prevailing legal opinion, fundamental rights take precedence over ordinary statutes by virtue of their embodiment in the Constitution. This precedence derives from Article 113 ('Aucune disposition de la Constitution peut être suspendue').<sup>4</sup> Although the Constitution entrusts the courts with the review

<sup>1</sup> *Biscaretti di Ruffia*, Diritto costituzionale, 10th ed. 1974, p. 567.

<sup>2</sup> *Biscaretti di Ruffia*, op. cit., p. 568 *et seq.*

<sup>3</sup> *Bachelet*, La protection juridictionnelle du particulier contre le pouvoir exécutif en Italie, Gerichtsschutz gegen die Exekutive, 1972, p. 469 *et seq.*; *Mortati*, op. cit., p. 1125 *et seq.*; *Landi-Potenza*, Manuale di diritto amministrativo, 4th ed. 1971, p. 57 *et seq.*, esp. pp. 585, 659, *et seq.*

<sup>4</sup> Cf. *re constitutional precedence Bonn*, Le contrôle de la constitutionnalité des lois, Pas. Lux., 1973, p. 5 *et seq.*; *Majerus*, L'État Luxembourgeois, 2nd ed. 1959, p. 42 *et seq.*; *Pescatore*, Introduction à la science du droit, 1960, No 92.

of the constitutionality of subordinate instruments,<sup>1</sup> it does not contain any provision for the review of the constitutionality of statutes. The courts have accordingly declined to review ordinary statutes.<sup>2</sup> This can be explained by the liberal concept of the Constitution of the previous century which considered the legislature to be the most appropriate guarantor of the protection of civil rights and freedoms. Further support was derived from the principle of the separation of powers.<sup>3</sup> However, this is not a necessary inference from the Constitution.<sup>4</sup> The aforementioned principle is however also applied by the courts to grand-ducal regulations issued in lieu of statutes.<sup>5</sup> Whether the courts can continue with this line of authority seems doubtful, given the influence of the Belgian courts, and in particular of a more recent judgment of the Belgian Cour de Cassation.<sup>6</sup> But the legislature in enacting ordinary statutes has followed the view of the courts, and has in section 237 of the Penal Code made it a punishable offence for a judge to fail to give effect to a statute.<sup>7</sup> These decisions of the courts have recently been criticized by learned authors, especially in comparison with the review of statutes on the basis of international treaties.<sup>8</sup>

The provisions on fundamental rights are, like all constitutional provisions, liable to constitutional amendment. The procedure for constitutional amendment has several stages. First, the legislature must satisfy itself of the necessity for a constitutional amendment, by reference to the provisions to be amended (Article 114). Thereafter, the Chamber is dissolved by operation of law. Only a re-elected Chamber may resolve to amend the constitution and in so doing it is bound by the decision of its predecessor as regards the subject-matter. With not less than three-quarters of its members present, the Chamber votes on the amendment by a two-thirds majority of all votes cast. The legislature is not bound as to the actual contents of the amendment. There is no limit to possible constitutional amendments. Only during a regency are constitutional amendments without exception inadmissible under Article 115.

Apart from the Constitution the ECHR is of importance. Previously the courts had, just as in relation to the constitutional guarantees, declined to review national law by reference to international treaties.<sup>9</sup> They have nevertheless developed a presumption of interpretation that until the contrary is proved the legislature is not to be taken to have intended to put itself in breach of an international obligation; and therefore the law of Luxembourg should as far as possible be interpreted in accordance with treaty provisions.<sup>10</sup> Since 1950 a change is discernible in the approach of the courts. Provisions of international treaties which are 'directly applicable' are now given precedence over national statutes, irrespective of the date of their coming into force;<sup>11</sup> the international treaty is a source of law of higher status.<sup>12</sup> The courts of Luxembourg have nevertheless declined to accord such precedence in relation to the application of the ECHR, on the footing that it is not directly applicable under national law but that it merely provides for obligations on the part of the States.<sup>13</sup> The approach of the courts of Luxembourg therefore contrasts with that of the other Benelux States, which give the ECHR direct applicability and precedence over national law.

There is no judicial control directed to compliance with the Constitution in Luxembourg.<sup>14</sup> The ordinary law (Article 237 of the Penal Code) denies the courts any powers in relation to review of legislation. The power of the Conseil d'État to advance constitutional objections under the legislative procedure (pursuant to Article 76) cannot be considered as a judicial procedure. No binding force attaches to the opinion of the Conseil d'État. The Conseil d'État can only withhold its assent to dispensing with a second reading of a statute in the Chamber. Since this could only take place, at the earliest, three months after the first reading, the Conseil d'État is in a position to exercise a temporary veto; it has no further means of blocking the statute in question (Article 59 of the Constitution).

For the legal protection of citizens alleging undue encroachment on the part of the executive, proceedings may be brought either in the ordinary courts or in the administrative courts, depending on the matter in issue.<sup>15</sup> Before the Conseil d'État, Comité Contentieux, two kinds of proceedings are possible: the 'contentieux de pleine juridiction' as proceedings at second instance against decisions of the administrative courts, or as appellate proceedings, but only in so far as provided by statute. In addition, the Conseil d'État has jurisdiction in the 'contentieux d'annulation', as a court of cassation, having power to determine all objections to administrative decisions where there are no other means of legal protection

<sup>1</sup> Article 95: 'Les cours et tribunaux n'appliquent les arrêtés et règlements généraux et locaux qu'autant qu'ils sont conformes aux lois'. The Conseil d'État considers this provision directly applicable to itself, though it is neither a 'cour' nor 'tribunal'. Cf. *Loesch*, *Le Conseil d'État du Grand-Duché de Luxembourg*, Livre Jubilaire, 1956, pp. 507, 515.

<sup>2</sup> Cour de Cassation, judgment of 14.8.1877, Pas. Lux. I, p. 370; judgment of 24.4.1879, Pas. Lux. I p. 534; Conseil d'État, Comité du Contentieux, judgment of 3.1.1883, Pas. Lux. II p. 174; Cour de Cassation, judgment of 21.11.1919, Pas. Lux. XI, p. 72; judgment of 26.5.1920, Pas. Lux. XI, p. 72.

<sup>3</sup> ... ils [les tribunaux] n'ont pas reçu la mission de contrôler les dispositions législatives et de les écarter pour cause d'inconstitutionnalité ... S'il en était autrement il y pourraient anéantir les actes du corps législatif... le juge doit se rappeler sans cesse que sa mission se borne à juger suivant la loi, et non à juger la loi' (Cour de Cassation, judgment of 14.8.1877, Pas. Lux. I, p. 370).

<sup>4</sup> Cf. *Bonn*, op. cit., p. 18.

<sup>5</sup> Cour de Cassation, judgment of 29.7.1948, Pas. Lux. XIV, p. 422; judgment of 13.5.1954, Pas. Lux. XVI, p. 99; Cour d'Appel, judgment of 25.1.1958, Pas. Lux. XVII, p. 248.

<sup>6</sup> *Journal des Tribunaux* 1974 p. 564, Cf. re the influence of Belgian cases, *Bonn*, op. cit., p. 12; see also latest developments in Belgium, above II 1.

<sup>7</sup> 'Seront punis ... les juges ... qui se seront immiscés dans l'exercice du pouvoir législatif, soit par des règlements contenant des dispositions législatives soit en arrêtant ou suspendant l'exécution d'une ou plusieurs lois, soit en délibérant sur le point de savoir, si ces lois seront exécutées ...'

<sup>8</sup> Cf. *Bonn*, loc. cit.

<sup>9</sup> Cour Supérieure de Justice, judgment of 21.11.1919, Pas. Lux. XI, p. 74.

<sup>10</sup> Cour Supérieure de Justice, judgment of 13.6.1890, Pas. Lux. II, p. 621. Cf. on this question *Pescatore*, Conclusion et effet des Traités internationaux selon le droit constitutionnel, les usages et la jurisprudence du Grand-Duché de Luxembourg, 1964.

<sup>11</sup> Cour Supérieure de Justice, judgment of 8.6.1950, Pas. Lux. XV, p. 41; more detailed judgment of 14.7.1954 Pas. Lux. XVI, p. 150; judgment of 21.7.1951, Pas. Lux. XV, p. 235.

<sup>12</sup> Cour Supérieure de Justice, judgment of 14.7.1954, loc. cit.; doubtful as to the reasoning, but in agreement with the outcome: *Pescatore*, op. cit., p. 106, *et seq.*

<sup>13</sup> Tribunal Correctionnel Luxembourg, judgment of 24.10.1960; unpublished, mentioned (with dissenting comment) by *Bonn*, op. cit., p. 16, and *Pescatore*, Pas. Lux. XVIII, pp. 97, 107.

<sup>14</sup> Cf. *Welter*, La protection du particulier contre le pouvoir exécutif au Luxembourg, Gerichtsschutz gegen die Exekutive, 1969, Vol. 2, pp. 679, *et seq.*

<sup>15</sup> *Welter*, loc. cit.

available.<sup>1</sup> What is exceptional is that no judicial protection is available against 'actes de Gouvernement'.<sup>2</sup>

## The Netherlands

The 'Statuut voor het Koninkrijk der Nederlanden', regulating the legal relationship between the European dominions, the former colonies, and the now autonomous dominion of the Netherlands Antilles contains in Articles 43 to 45 general provisions relating to fundamental rights. By virtue thereof, each domination is bound to give effect to fundamental human rights and liberties. Amendments to the provisions on fundamental rights in the Constitution of the European Netherlands or in the local legislation of the Antilles require the assent of the Imperial Government.<sup>3</sup>

The Constitution of the European Netherlands, the Grondwet (GW), of 1815 (with numerous amendments) contains a number of fundamental rights without, however, establishing a uniform and consistent catalogue of fundamental rights. Essentially the GW contains the classical fundamental rights. It is however thought there also exist further unwritten social fundamental rights, such as the right to be cared for by the State and the right to provision for ill-health and old age.<sup>4</sup> At present, the GW contains the following fundamental rights: the right to equal protection of person and property for all who are within the imperial dominions (which is the equivalent of the principle of equality of treatment, Article 4); equal opportunity for all Dutch citizens to enter the government service (Article 5); the prohibition of censorship and freedom of the press (Article 7); right of petition (Article 8); freedom of association and assembly (Article 9); expropriation only for the benefit of the public, and only subject to prior compensation, or compensation guaranteed prior to expropriation (Article 165); the right to trial by the lawful judge (Article 170); protection from arbitrary arrest (Article 171); protection of the home (Article 172); postal secrecy (Article 173); freedom of religious observance and the liberties relating to religious communities (Articles 181 to 187); freedom of education (Article 208(2)). It is worth observing that the right of property is not protected generally but only against certain forms of interference.<sup>5</sup> No fundamental right to choose one's own trade or occupation can be deduced from the Constitution. As part of the current moves to amend the Constitution of the Netherlands, it is intended to preface the GW with a catalogue of classical fundamental rights (as Chapter I). In Chapter IV some social fundamental rights are to be incorporated in the Constitution, including a right to work, which would also cover work on one's own account, the promotion of public welfare and the safeguarding of the nation's health, etc.<sup>6</sup>

The fundamental rights currently guaranteed in the Netherlands are considered as general principles requiring more specific elaboration by the legislature.<sup>7</sup> There are no real restric-

tions on the legislature enacting ordinary statutes; in elaborating further statutory provisions including provisions restricting fundamental rights, they may go a considerable way without infringement of the letter of the Constitution.<sup>8</sup> The extent of most fundamental rights therefore depends on this further elaboration, which is reserved to the legislature alone. The real protection of fundamental rights lies in the fact that any restrictions must be based on a formal statute.<sup>9</sup> It is consonant with this understanding of fundamental rights that they are not considered to be law having any higher status. They may be amended at will, like other provisions of the GW, by any legislature effecting constitutional amendments. Any form of constraint on such a legislature is alien to Dutch law.<sup>10</sup> There are no restrictions as to subject-matter in relation to constitutional amendments. A complicated procedure is however provided for in the case of constitutional amendment. First, Article 210 of the GW requires a statement as to the necessity for constitutional amendment, in the form of a statute providing for amending provisions. Thereupon both Chambers are dissolved (Article 211 of the GW). The new Chambers then resolve upon the constitutional amendment, which requires in both Chambers a two-thirds majority of the votes cast. Since constitutional amendments relating to fundamental human rights and liberties are, pursuant to Article 45(a) of the Statute of the Kingdom of the Netherlands, 'empire matters', the provisions relating to imperial legislation must also be applied (Articles 15 to 20 of that Statute). The extent of the participation of the other dominions in the amendment of the provisions relating to fundamental rights in the GW is however a disputed question.<sup>11</sup>

Of the extra-constitutional guarantees of fundamental rights the ECHR is of particular importance. The constitutional amendment of 1953 has provided, under Article 65 of the GW, for the direct application of international treaty law; pursuant to Article 66 of the GW the Dutch courts must dis-

<sup>1</sup> *Re administrative jurisdiction Bonn, Le contentieux administratif en droit luxembourgeois*, 1966; *Welter*, loc. cit.; *Majerus*, op. cit., p. 155 *et seq.*

<sup>2</sup> *Welter*, op. cit., p. 686.

<sup>3</sup> This consists of the Government of the European Netherlands, supplemented by a Minister from the Government of the Netherlands Antilles.

<sup>4</sup> *Belinfante*, *Beginselen van Nederlands Staatsrecht*, 1964, p. 162 *et seq.*

<sup>5</sup> *Belinfante*, op. cit., p. 178.

<sup>6</sup> Draft Constitution by the State Commission (Cals-Donner-Commission): Tweede rapport, Eindrapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet, 1969, p. 25 *et seq.*; 1971, p. 212 *et seq.*

<sup>7</sup> *Belinfante*, op. cit., p. 162.

<sup>8</sup> *Kranenburg*, *Het Nederlands Staatsrecht*, 1958, p. 501; *Van der Pot-Donner*, *Handboek van het Nederlandse Staatsrecht*, 9th ed. 1972, p. 462.

<sup>9</sup> *Oud*, *Het Constitutioneel Recht van het Koninkrijk der Nederlanden*, Vol. 2, 2nd ed. 1970, p. 698.

<sup>10</sup> *Oud*, loc. cit.

<sup>11</sup> Thus *Kranenburg*, *De Nieuwe Structuur van ons Koninkrijk*, 1955, p. 56; *Van Helsdingen*, *Het Statuut voor het Koninkrijk der Nederlanden*, 1957, Note to Article 45, p. 497, *et seq.*; *Oud*, *Het Constitutioneel Recht van het Koninkrijk der Nederlanden*, Vol. 1, 2nd ed. 1967, p. 57; *Van der Pot-Donner*, op. cit., p. 635 (somewhat hesitantly, wishing to emphasize the particular circumstances of individual cases).

regard any Dutch law to the contrary.<sup>1</sup> Directly applicable international treaty law therefore has acquired precedence over national law, including constitutional law. In contrast to the Luxembourg courts, which regard the ECHR merely as an obligation undertaken by the States without any direct applicability in national law, the Dutch Hoge Raad has acknowledged that the ECHR is so applicable.<sup>2</sup> Accordingly, the Dutch courts must review provisions of national law by reference to the ECHR.<sup>3</sup> This duty to review is of heightened importance, since review of ordinary statutes by reference to the Constitution is prohibited under Article 131 of the GW.<sup>4</sup> In order to overcome this inconsistency in the jurisdiction to review, the State Commission for Constitutional Reform has proposed the adoption into the Constitution of a jurisdiction to review by reference to the classical fundamental rights. Other constitutional provisions, including those relating to social fundamental rights, should not be available as a yardstick for such review.<sup>5</sup> At present, the introduction of this jurisdiction to review seems unlikely, since the Government is not considering the incorporation of such a provision into its draft constitutional amendment.<sup>6</sup> There has not yet been any parliamentary initiative in this matter.

In the Netherlands the courts do not have the power to review the constitutionality of legislation. The procedure before the Raad van State to obtain an opinion, which must be observed in any legislative process pursuant to Article 64 of the GW, cannot be regarded as judicial review. This procedure is merely an internal matter within the government; it is of no consequence if the opinion is disregarded.<sup>7</sup> The opinions are also not published. The vesting of any jurisdiction in the courts to enforce compliance with the Constitution seems unlikely. The Government has, during the discussion on a constitutional amendment, declared its opposition to any such jurisdiction in the courts,<sup>8</sup> as proposed by the State Commission.<sup>9</sup>

In the Netherlands there are a large number of forms of legal protection against excessive encroachment by the executive. That hitherto encountered most frequently is a quasi-judicial protection available within the administration itself, for instance, under the 'Wet Beroep administratieve Beschikkingen' which grants legal protection against measures taken by State authorities. The jurisdiction of the civil courts is also of some importance, as they may issue orders against administrative authorities in interlocutory proceedings, and these courts also give a wide interpretation to the concept of civil law.<sup>10</sup>

In the spring of 1975 the Estates General passed a statute relating to general administrative jurisdiction, although the date of its coming into force is not yet settled. Originally it was to have been 1 January 1976. This statute 'Wet administratieve rechtspraak overheidsbeschikkingen'<sup>11</sup> provides in principle for a general administrative jurisdiction in relation to acts of all administrative authorities, including those of the provinces and the districts. For this purpose a judicial section with judicial functions and guarantees is to be established within the Raad van State. Articles 5 and 6 of the statute pro-

vide for the setting-up a negative list of matters to be excluded from the administrative jurisdiction. Some parts of this negative list will remain in force for only a limited period; but there is at any rate the possibility of amendments or extension. The area of application of this general statute on administrative jurisdiction will furthermore be restricted for the time being because the jurisdiction it confers is only available in a subsidiary way. In so far as other means of protection of rights exist, including those existing purely within the administration, the jurisdiction of the administrative court (Raad van State, afdeling rechtspraak) will be excluded. The ambit of the statute can be broadened in two ways: by a curtailing of the 'negative list' of Articles 5 and 6 and by setting aside the provisions relating to special legal protection, since this would bring into force the subsidiary effect of the general statute on administrative jurisdiction.

## United Kingdom

As is well known, the United Kingdom has no written constitution, that is, no constitution in the formal sense. Accordingly there can be no question of fundamental rights being entrenched by means of any formal constitutional instrument. On the other hand, there is of course a constitution in the practical sense as the sum of all the rules which govern the conduct of the highest organs of State and the fundamental relationship between the individual and the State. It is in this context that fundamental rights, or fundamental liberties, or civil rights and freedoms, can be spoken of in the United Kingdom.

The guarantee of fundamental rights in the British Constitution amounts in the final analysis to freedom generally, subject to general reservations permitting statutory restrictions. What is guaranteed—this is one of the most important aspects of the 'rule of law'—is the freedom of each individual to do, and not to do, whatever he wishes, so long as what he does is not contrary to the rights of third parties or the

<sup>1</sup> Article 65: 'Bepalingen van overeenkomsten, welke naar inhoud een ieder kunnen verbinden, hebben deze verbindende kracht nadat zij zijn bekend gemacht'. Article 66: 'Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing wanneer deze toepassing niet verenigbaar zou zijn met een ieder verbindende bepalingen van overeenkomsten, die hetzij voor, hetzij na de totstandkoming der voorschriften zijn aangegaan'.

<sup>2</sup> Hoge Raad, judgment of 13.3.1960, NJ 1960, No 436.

<sup>3</sup> Hoge Raad, judgment of 24.2.1960, NJ 1960, No 483; judgment of 18.4.1961, NJ 1961, No 273; judgment of 19.1.1962, NJ 1962, No 107; judgment of 25.6.1963, NJ 1964, No 239.

<sup>4</sup> Article 131(2): 'De wetten zijn onschendbaar'.

<sup>5</sup> Tweede rapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet, 1969, p. 34 *et seq.* (Cals-Donner-Commission).

<sup>6</sup> Nota inzake het Grondwetherzieningsbeleid, 2. Kamer, Zitting 1973-1974, Kamerstuk No 12 944 No 2, p. 12.

<sup>7</sup> Cf. *Oud*, op. cit., Vol. 1, p. 455 *et seq.*; *Van der Pot-Donner*, op. cit., p. 286 *et seq.*

<sup>8</sup> Staatscommissie, op. cit., 1969, p. 34, *re* the classical fundamental rights.

<sup>9</sup> Nota inzake het Grondwetherzieningsbeleid, op. cit., p. 12.

<sup>10</sup> *Re* this still valid legal position cf.: *Langemeijer*, Der gerichtliche Rechtsschutz des einzelnen gegenüber der vollziehenden Gewalt in den Niederlanden, in *Rechtsschutz gegen die Exekutive*, 1969, p. 793 *et seq.*

<sup>11</sup> For the text of the statute: *Eerste Kamer der Staten-Generaal*, Zitting 1974-1975, Kamerstuk No 47.



law. From this starting point, certain fundamental rights have, in legislation, case law and learned writing, been shaped in particular ways, such as the right of personal freedom, the freedom of speech, the freedom of assembly, and the freedom of property.<sup>1</sup> In recent years there have however been occasional demands for a formal constitution to be made for the United Kingdom, which could in certain circumstances even include a catalogue of fundamental rights. It cannot however be said that demand for this in the United Kingdom is so widespread that such a project would have any prospect of success in the near future.<sup>2</sup>

In view of what has been said above, the guaranteeing and the circumscribing of the rights of individuals are primarily the task of the legislature and also of the courts. There is however no comprehensive catalogue of fundamental rights prescribed by legislation, in the manner, for instance, of the Canadian Bill of Rights. Also the ECHR is not binding under the domestic law of the United Kingdom. It can nevertheless be said that, taken as a whole, the English legal system is fashioned in such a way that the rights contained for instance in the United Nations Treaty on Civil and Political Rights or in the ECHR, are generally speaking, secured within the territory of the United Kingdom. However, any rights so secured are entirely at the mercy of the legislature. The only guarantee that the legislature will not unduly restrict these rights lies in the mechanisms of political control which characterize British constitutional life, and in the libertarian traditions of Britain.<sup>3</sup>

Since fundamental rights are entirely at the mercy of the legislature, there can be no question of any judicial review of statutes for their compatibility with these fundamental rights. In dealing with legislation, the courts can of course effect certain marginal emendations (Randkorrekturen) for the protection of fundamental rights. For this purpose judicial practice has evolved a number of presumptions.<sup>4</sup> Thus, statutes are construed so that, for instance, the levying of taxes requires clear and explicit words. Criminal statutes are strictly construed. In the absence of clear and unequivocal provisions to the contrary, the legislature is not taken to have intended to oust the jurisdiction of the courts, or to give statutes retrospective effect. Similarly, the Court of Appeal has recently held that the ECHR must be taken into account in interpreting statutes: There is a presumption that the legislature did not intend to infringe the ECHR, and statutes are to be interpreted in such a way that they are compatible with that Convention.<sup>5</sup> The legislature is thus obliged to enact in clear and unequivocal terms any intervention in the sphere of the individual, but is not prevented from intervening in this way by any constitutional constraint.

Against this legal background, what in other legal systems might be considered under the heading of 'protection against infringement of fundamental rights by the executive' amounts in the United Kingdom to a control of the legality of executive action. To this extent, legal protection in the United Kingdom is comprehensive. But the legislature in turn is free to exclude the protection of the courts. This has occurred in

a number of cases,<sup>6</sup> though it is usual for quasi-judicial review bodies to be created for the legal protection of the individual. The ordinary courts have (although not invariably) interpreted such ousters of jurisdiction restrictively, and have thus preserved a certain power of review.<sup>7</sup> Some statutes, moreover, provide for limited rights of appeal to the ordinary courts.<sup>8</sup> Moreover, the executive has no immunity from judicial proceedings, with the exception of actions against the sovereign in person.<sup>9</sup>

Recently there have been reports of various suggestions and proposals for the enactment of a 'Bill of Rights' for the United Kingdom (or even for Northern Ireland alone) without the introduction of a formal constitution.<sup>10</sup> It remains to be seen how far such projects will succeed and lead to clear results, and this cannot be judged by an outsider. What merits comment is that the proposals clearly are intended to limit only partially the sovereignty of Parliament, in that the legislature, if it wishes to derogate from the Bill of Rights, will have to make this clear in the statute in question. Such a provision comes very close to the abovementioned presumption evolved by the courts, that, in a case of doubt, the legislature is not to be taken to have intended to infringe particular rights of the individual.

All in all, the position of fundamental rights in the United Kingdom presents unique features which in some degree are alien to continental constitutional thought. With the Magna Carta of 1215 and in the constitutional struggles of the 17th century England produced statements of fundamental importance for the development of fundamental rights. Even today, it cannot be said that the protection of fundamental rights in the United Kingdom does in fact lag behind that in continental European States. However, the formal position is that fundamental rights are at the mercy of the legislature to a far greater extent than in most other Members States of the European Community.

<sup>1</sup> Cf. *Street*, Freedom, the Individual and the Law, 1963, p. 9 *et seq.*; *Daintith*, The Protection of Human Rights in the United Kingdom, Human Rights 1 (1968), p. 275 *et seq.*; *Mitchell*, Constitutional Law 2nd ed. 1968, p. 323 *et seq.*; *Wade-Phillips-Bradley*, Constitutional Law, 7th ed. 1965, p. 488 *et seq.*; *Padfield* British Constitutional Law Made Simple, 1972, p. 222 *et seq.*; *Crombach*, Civil Liberties in England, DVBl. 1973, p. 561 *et seq.*; *Dicke*, Englisches Verfassungsverständnis und die Schwierigkeiten einer Verfassungskodifikation, DÖV 1971, p. 409 *et seq.*; *Raschauer*, Die Gesetzeskontrolle im britischen Recht, Der Staat 13 (1974), p. 245 *et seq.*

<sup>2</sup> Cf. *Dicke*, loc. cit.; *de Smith*, Constitutional and Administrative Law, 2nd ed. 1973, p. 27 *et seq.*

<sup>3</sup> Cf. *de Smith*, op. cit., p. 92 *et seq.*

<sup>4</sup> Cf. *Daintith*, op. cit., p. 299 *et seq.*; *de Smith*, Statutory Restriction of Judicial Review, Modern Law Review, 18 (1955), p. 575 *et seq.*

<sup>5</sup> *Reg v Home Secretary, ex parte Bhajan Singh*, (1975) 3 WRL 231 (Lord Denning).

<sup>6</sup> Cf. *de Smith*, Statutory Restriction of Judicial Review, Modern Law Review 18 (1955), p. 577 *et seq.*

<sup>7</sup> *De Smith*, op. cit.; *Bentil*, Disregarding the Finality of a Determination by Statutory Authorities and the Order of Certiorari, Public Law 1973, p. 80 *et seq.*; *Marshall-Yardley*, Constitutional Jurisdiction in the United Kingdom, ZaöRV 22 (1962), pp. 542 *et seq.*, 554 *et seq.*; *Lord Salmon*, The Law and Individual Liberty (The Thirty-Fourth Haldane Memorial Lecture Delivered at Birkbeck College, London, 3rd December 1970), p. 5 *et seq.*

<sup>8</sup> *Bradley*, Judicial Protection of the Individual against the Executive in Great Britain, Gerichtsschutz gegen die Exekutive, Vol. 1 (1968), p. 345.

<sup>9</sup> See in detail *Bradley*, op. cit., p. 327 *et seq.*

<sup>10</sup> Cf. e.g. Council of Europe, Newsletter on legislative activities, No 19, June 1975, and *The Times* of 18.3.1975. See also *Lord Salmon*, op. cit., p. 9.

## Assessment

This cursory survey of the protection of fundamental rights within the Member States of the European Communities permits certain initial inferences to be drawn, and findings made. By way of simplification it can be said that many common features of principle contrast with deep-rooted differences in the manner in which these fundamental rights have been elaborated amongst the Member States.

The thinking on fundamental rights in all Member States has been largely shaped by the historical development of fundamental rights and by an understanding of them as rights protecting the individual against undue encroachment by the State, and notably by the executive. In the unwritten law of the British constitution, the experience of centuries of British constitutional struggles has a continuing effect in the field of fundamental rights. The present-day guarantee of fundamental rights in French constitutional law is formally linked with the French Revolution, by the references in the current Constitution to the Constitution of 1946 and the Declaration of human and Civil Rights of 1789. The constitutional provisions of other European States, such as the Belgian Constitution, also date back to a considerable extent to the first half of the last century. Constitutional re-formulations of fundamental rights, as in the Federal Republic of Germany, in Italy and Luxembourg, as a rule contain, in so far as protected fundamental rights are concerned, no fundamental changes in relation to the past. Overall, it could be said that in terms of constitutional history and of the history of thought the protection of fundamental rights within the Member States of the European Community manifests similar concepts and basic structures. They continue to have effect with undiminished vigour, and are at the same time reinforced by the international declarations and conventions relating to human rights. It is also worth mentioning that various currents of thought and movements can be discerned at national level, which tend further to develop the protection of fundamental rights. In the United Kingdom a formal Bill of Rights is being discussed. In France there are some signs that, contrary to traditional views, the activity of the legislature itself may be subject to some control as to its compatibility with fundamental rights, although only to a limited extent.

In the States under consideration, the protection of fundamental rights has been judicially secured to varying degrees. All the States of the European Community seem to be at one on the principle of judicial control as to the legality of executive action. While some States favour the principle of enumeration, that is the proposition that administrative acts can only be challenged in court in the cases provided for by law, other States make possible the judicial review of all executive action by means of a general provision. The need for judicial control of the executive, taken with the requirement of legality in all administrative action, is undisputed in principle and a common element in legal thinking in the States of the European Community.

The same cannot be said in relation to control over the legislature as regards respect for fundamental rights. The theoretically comprehensive and absolute power to review legislation vested in the Bundesverfassungsgericht of the Federal Republic of Germany is in contrast to the approach in other States, where the courts are always bound by the law and have no right to test its constitutionality. This view is axiomatic under British constitutional law, and it also prevails to some extent in France and the Benelux States, even though certain moves to restrict this principle can be detected. Italy, on the other hand, possesses in its Corte Costituzionale a tribunal of final instance which also controls in effective manner what the parliament does.

Closer consideration and assessment of the substance of guarantees in relation to fundamental rights and catalogues thereof reveal considerable differences between the States, and thereby disclose appreciable difficulties. In the United Kingdom, apart from the ECHR, there is no catalogue of fundamental rights whatsoever; guarantees of particular rights must be drawn from various instruments, from numerous statutes and recognized principles of law. In France, alongside rudimentary constitutional provisions, the Declaration of Fundamental Human and Civil Rights, the fundamental laws and the general principles of law evolved mainly by the Conseil d'État must be considered for the purposes of any survey. The other European States herein considered have more or less comprehensive catalogues of fundamental rights in their constitutions. The task of a complete survey of the fundamental rights in all these catalogues and of those of such rights which are only guaranteed by express provision in the constitution of certain of the States is no doubt an attractive one but cannot be undertaken here. Two guarantees are to be studied below, by way of example. More detailed consideration could be shown that certain rights which have a particular bearing on the personal responsibility and dignity of the human being—as for instance the freedom from arbitrary arrest, the freedom of belief and conscience, postal secrecy—are as a rule guaranteed. The more the rights of the individual are likely to conflict with the interests of the community, without any unequivocal provision for the former to prevail, the greater the discretion to elaborate entrusted to the legislature, whether on the basis of express reservation provided for in the catalogue of fundamental rights or under a general power of the legislature to draw the line in a manner exempt from judicial control between the personal sphere of the individual and the interests of the community. This is for instance true of the protection of property, where no legal system can dispense with some provision for expropriation, and the freedom of trade or occupation, which cannot have the same purport for every occupation, and which is closely linked to the economy in the State in question.

## 2. Protection of human rights in international law, in particular in the ECHR

For our purposes the ECHR is of particular significance in two ways; first, since the accession thereto of France in 1974, all Member States of the European Communities have been bound by the ECHR, so that its content reflects the common 'minimum standard' which the States with which we are concerned have undertaken to respect. To this extent the ECHR permits of definite conclusions as to what all Member States are unquestionably willing to grant by way of protection for fundamental rights. Secondly, there is the question whether, and, if so, to what extent, the European Community is bound directly by the ECHR.

No more than is the case with most of the national catalogues of fundamental rights can the guarantees of the ECHR be regarded as a system complete in itself and comprehending all the important rights of the individual organized convincingly and coherently. The position is rather that any catalogue of fundamental rights is as a rule, as in this case, simply a consolidation of various rights which historical experience and common belief have caused to be considered as particularly deserving of protection, and which are secured by means of differing formulations, limitations and reservations. Thus, in the ECHR are found predominantly the classical protective rights against particularly grave encroachments by State authority. The ECHR catalogue begins with the right to life in Article 2, followed by the prohibition on torture, slavery and forced labour, and the right to freedom from unjustified arrest and incarceration. These deal primarily with protection from the totalitarian and arbitrary measures of a police State; much the same is true of the rights protected by Article 6 of the ECHR in respect of legal proceedings, and of Article 7 (*nulla poena sine lege*). Then there is the guarantee of the right to respect for the privacy of the individual, including postal secrecy (Article 8), freedom of thought, conscience, and religion (Article 9), the right to free expression of opinion (Article 10), freedom of assembly and association (Article 11), the right to marry and found a family (Article 12). Article 14 contains prohibitions on discrimination. The First Additional Protocol has added to these rights of the Convention the protection of property, a right to education, and the guarantee of free and secret elections. The Fourth Additional Protocol guarantees, *inter alia*, the freedom of establishment and the freedom of movement. Most guarantees of fundamental rights in the ECHR and the additional Protocols are accompanied by possible and more narrowly circumscribed derogations therefrom; in this regard the respective paragraph (2) of Articles 8 to 10 of the ECHR are of special importance.

At this stage it is appropriate to make some remarks on the substantive importance of the ECHR guarantees for the European Communities. Some of the fundamental rights of the ECHR clearly predicate the existence of governmental machine having all-embracing and potentially boundless pow-

er, and would therefore have little bearing on the law of the European Communities, given their legal and actual limitations. The right to life, the prohibition of torture and slavery, the rights of the defendant or the accused in criminal proceedings, are, at the current stage of development, matters for the State alone, and not the Community. Most of the other rights of the ECHR could only come into conflict with Community measures in exceptional and borderline cases, as for instance the freedom of conscience and the freedom of opinion; the fact that in this respect conflicts cannot be entirely ruled out will be gone into below; but here one can scarcely speak of far-reaching threats to the individual from acts of Community authority. For the Community the following rights of the ECHR are more likely to be of importance: the right to form trade unions (Article 11), the protection of property (Article 1 of the First Additional Protocol), and the freedom of movement and freedom of establishment (Fourth Additional Protocol). On these points the protection of fundamental rights by the ECHR can acquire relevance in relation to the acts of Community organs in circumstances and situations likely to occur more frequently.

We shall consider below to what extent Community law and the judgments of the Court of Justice of the European Communities impose upon the Community institutions the obligation of compliance with the ECHR. For the time being we shall continue with this conspectus of the position of human rights in international law.

The proposition that State authority is in principle subject to no constraint under international law in relation to its domestic acts and its exercise of power in relation to its own nationals is now a thing of the past, and not only by reason of the ECHR. The protection of the individual against pressures and undue encroachment on the part of the State has found expression in a large number of provisions of international law.

It is not entirely free from doubt to what extent international customary law and the fundamental principles of the international legal system protect fundamental rights and the human rights of the individual. It does however seem to be increasingly accepted that unwritten international law guarantees a modicum of human rights and places upon States an obligation to respect them. The Declaration of Human Rights of the United Nations of 1948, even though lacking any binding character, is, at least to some extent and in conjunction with a large number of other international instruments, evidence that the exercise of State authority is subject to constraints of international law for the benefit of the individual. In any case this can be deduced from the United Nations Charter.

Although the Conventions on Human Rights of the United Nations of 1966 are not yet in force, it is probable that they will come into force in the near future.<sup>1</sup> A number of other

<sup>1</sup> The International Agreement on Economic, Social and Cultural Rights came into force on 3 January 1976; the International Agreement on Civil and Political Rights came into force on 23 March 1976. [Editor's Note]

worldwide conventions, such as the UN Convention on the prohibition of racial discrimination, has become binding in certain of the Member States of the European Communities as international treaty law. Then there are the Agreements of the International Labour Organization, the European Social Charter and other bilateral and multilateral agreements which cannot be individually listed and evaluated here. It should however be borne in mind that, apart from the ECHR, a considerable number of obligations arising under international law bind States to respect fundamental rights and place upon them a duty to uphold the rights of the individual.

### 3. Recognition of fundamental rights in the Treaties of the Communities and by the Court of Justice of the European Communities

The Treaties relating to the European Communities contain no catalogue of fundamental rights. It would however be wrong to infer that the Treaties ascribe no importance to fundamental rights and the rights of the individual, or even take no cognisance of them. The text of the Treaty certainly affords considerable scope for the rights of the individual and objective rules relating to his protection, notably, having regard to the chief objects of the Treaties, in relation to economic endeavour. Thus, the prohibition on discrimination between citizens of the Common Market for reasons of nationality forms part of the basis principles of the Treaties; it is emphasized as a principle in Article 7 of the EEC Treaty and thereafter explicitly in Articles 40, 45, 79 or 95 thereof; the provisions of Articles 85 *et seq.* on competition are concerned, *inter alia*, with prohibitions on discrimination and thus bear upon certain aspects of the principle of equality. The Treaty provisions on freedom of movement for workers (Article 48 *et seq.*) and the freedom of establishment (Article 52 *et seq.*) or even on the free provision of services within the Community (Article 59 *et seq.*) are closely related to the freedom to practise a trade or occupation and thereby to a fundamental right embodied in many national constitutions. The part of the EEC Treaty which relates to social policy (Article 117 *et seq.*) contains provisions on social aims, which can be considered together with the problem of social rights; Article 119 enjoins equal pay for men and women and thus deals with an aspect of the principle of equality which is extremely important in practice and which moreover touches upon the problem of the relevance of fundamental rights in relations between individuals (Drittwirkung). In this context it is neither possible nor necessary to consider the abovementioned provisions in greater detail. The fact is that the Treaties do contain scope and rules for fundamental rights of economic relevance, and in my opinion it is an important task for legal science and for practitioners to consolidate all the

rights and entitlements of the individual which are guaranteed explicitly or implicitly by the Treaties, and to examine in greater detail their ambit as well as the existing deficiencies. Apart from the provisions already mentioned, regard would need to be had to Article 220, which provides for negotiations to secure for Community citizens equality of treatment in further areas, but also to Article 222, whereby the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

On the question of how far fundamental rights are already protected under the law of the European Communities, the judgments of the Court of Justice of the Communities naturally play a prominent part. The Court has the obligation to ensure that in the interpretation and application of the Treaty, the law is observed (Article 164); in so doing, it reviews, *inter alia*, the legality of the acts of the Council and the Commission (Article 173). Accordingly it is primarily from the judgments of the Court that we can establish how far fundamental rights and the protection of the rights and interests of the individual are currently available under Community law. The Court has on several occasions during recent years explicitly dealt with this question and the judgments in question have rightly attracted great attention. It should however not be overlooked that general legal principles play a major role in the practice of the Court even where fundamental rights are not specifically relied upon, and these general legal principles are seen, on closer examination, to contain much that corresponds or approximates to fundamental rights under national law.

In the meantime there are a number of publications in the field of legal science which deal with the importance of general legal principles in the law of the European Communities, and which find ample material in the judgments of the Court at Luxembourg. To name but a few from German learned writing: Feige has dealt in a monograph<sup>1</sup> with the principle of equality in EEC law. Lecheler has made a special study of general legal principles in the judgments of the European Court,<sup>2</sup> dealing, *inter alia*, with the principle of the legality of administrative action, with its implications for the revocability of administrative acts which are illegal but which have conferred a benefit, in the judgments of the Court of Justice, and has made full use of the impressive dicta on the principles of legal certainty, of good faith, the prohibition of discrimination and the duty to grant a fair hearing. Finally, Gottfried Zieger has also thoroughly analysed the judgments of the Court of Justice in relation to general legal principles.<sup>3</sup> He considers the case-law under the following headings:

‘The principle of equality  
in legislation relating to pricing  
prohibition of special charges

<sup>1</sup> Feige, *Der Gleichheitssatz im Recht der EWG*, 1973.

<sup>2</sup> Lecheler, *Der Europäische Gerichtshof und die allgemeinen Rechtsgrundsätze*, 1971.

<sup>3</sup> Zieger, *Die Rechtsprechung des Europäischen Gerichtshofs, eine Untersuchung der Allgemeinen Rechtsgrundsätze*, JöRNF 22, p. 299 *et seq.*

- equality in the levying of public imposts
- equality in the European law governing officials
- The right to a hearing
- Ne bis in idem*
- Economic freedom
- The principle of proportionality
- Other fundamental rights
- Other principles based on the rule of law
  - Principle of legal certainty
  - Principle of administrative legality.<sup>1</sup>

This is not the place to discuss in detail the various components of this list. What is important is simply that it gives a picture of the general legal principles which play a part in the judgments of the Court of the European Communities, without encountering fundamental objections and difficulties. According to these judgments, which in this respect are unchallenged, the law of the European Communities which the Court of Justice has to apply includes not only the provisions expressly contained in the Treaty but also the unwritten principles widely acknowledged in systems based on the rule of law. In evolving general principles of law the Court has followed the example of national courts. The case-law of the French Conseil d'État mentioned above has, over the course of its long development, fashioned the most important principles to be observed by an administration which is subject to statutes and the law. In a similar way, although in a different context and in relation to a Community authority holding considerably lesser powers than a State, the European Court of Justice has developed appropriate legal principles; it can be assumed that the experience of the individual judges, derived from their own legal systems, has played an important part in this. The proximity of these decided cases to the problem of fundamental rights is brought out by another comparison. The Bundesverfassungsgericht of the Federal Republic of Germany, relying loosely on a small number of references in the text of the Constitution, has developed a whole series of constitutional requirements—such as the requirement of legal certainty, the principles of the protection of legitimate expectation (*Vertrauensschutz*) and of proportionality—and has brought them within the protection of the constitutional court under the procedure for objections on grounds of constitutionality. The relevant judgments of the Court of the European Communities do not refer expressly, or only do so very occasionally, to the requirement, imposed by the rule of law, of upholding the rights of the individual or fundamental rights; but in fact these are limitations laid upon Community authority primarily in the interests of the citizens of the Common Market.

Amongst the decided cases of the Court of the European Communities, there are four principal judgments which contain important fundamental statements as to the protection and the position of fundamental rights within the Community.<sup>1</sup> They have attracted a corresponding measure of attention. We must once again indicate their most salient features.

In *Stauder v Sozialamt der Stadt Ulm*<sup>2</sup> the Court, in a preliminary

ruling under Article 177 of the EEC Treaty, had to make its decision upon a relatively simple set of facts. They were that a person in receipt of war victim welfare benefits thought it wrong that, in order to receive butter at a reduced price as provided under Community law, he was obliged to state his name to third parties. The German administrative court to which appeal was made itself had doubts as to the legality of the provision in question. The very short judgment of the Court of Justice appears to acknowledge fundamental rights as part of the general principles of Community law, but holds that in that particular case, on a certain construction of the provision in question, no illegality was disclosed. The essential part of the judgment reads:

'The provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community Law and protected by the Court'.

This was the earliest indication that fundamental rights are entrenched in Community law by means of the general principles of law. It must also be mentioned that in *Stauder* various fundamental rights and legal principles were canvassed as having possibly been infringed, namely the requirement of respect for human dignity as well as the principle of equality and the requirement to observe the principle of proportionality between the gravity of the interference in question and the needs of the Community. The Court did not elaborate on these points.

In a further fundamental judgment of 17 December 1970 in *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle*<sup>3</sup> the European Court of Justice, again in a preliminary ruling under Article 177 of the EEC Treaty, made some statements of principle on the position of fundamental rights in Community law. The case concerned a Community regulation which provided for the forfeiture of deposits where export licences were not used, and which the exporter thereby affected, and the national court considered to be contrary to fundamental rights. The Court of Justice of the Communities stated:

'Recourse to legal rules or concepts of national law to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Community law. The validity of such instruments can only be judged in the light of Community law. In fact, the law born from the Treaty, the issue of an autonomous source, could not, by its very nature, have the courts opposing to it rules of national law of any nature whatever without losing its Community character and without the legal basis of the Community itself being put in question. Therefore the validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in

<sup>1</sup> See especially the report of *Pescatore* for the Seventh Congress of the International Federation for European Law, Brussels, 2 to 4n October 1975.

<sup>2</sup> [1969] ECR 419 *et seq.*

<sup>3</sup> [1970] ECR 1125 *et seq.* (but English text of quotation from the judgment taken from (1972) CMLR 283, the official English version not yet being published).

that State's constitution or the principles of a national constitutional structure.

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

The Court of Justice finally decided that there had been no violation by the provision in question. What is of interest here, apart from the basic position taken by the Court of Justice as quoted above, are the fundamental rights alleged to have been infringed. These were primarily the principle of proportionality, then the right of the individual freely to carry on economic activity, and finally the fundamental rights of property and respect therefor. Even if we concur with the Court that on the facts of this particular case, these rights were not infringed, we must nevertheless appreciate that these rights by their very nature are particularly apt to be affected by Community authority.

The next judgment of the Court of Justice of particular importance, namely that of 14 May 1974, in *Nold v Commission*,<sup>1</sup> concerned the legality of regulations which precluded the applicant because of his modest turnover from receiving deliveries as a wholesale coal merchant. The Court once again laid down principles relating to the protection of basic rights.

'As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from 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. 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. The submissions of the applicant must be examined in the light of these principles.

If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of the right freely to choose and practise their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance

with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity. The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested Decision.'

The regulations under challenge were finally upheld in this case also. However, it is important in this context that the Court once again, and more strongly, emphasized the fact that the Community organs are in principle bound to respect fundamental rights; these are a component part of Community law, the substance of which can be deduced from the guarantees relating to fundamental rights available in the Member States, and also—and this is novel—from the ECHR. What was in question here were, again, the protection of property, the prohibition of discrimination, the right freely to practise a trade or occupation and to carry on economic activity, and the principle of proportionality.

Meanwhile, a new decision of the Court dated 28 October 1975—Case 36/75, *Roland Rutili v The Minister for the Interior*<sup>2</sup>—has developed the previous case-law and evaluated and restricted the limitations on the freedom of movement for workers guaranteed by Article 48 of the EEC Treaty in the light of the European Convention on Human Rights.

#### **4. General legal principles and the fundamental rights common to all Member States as necessary components of the law of the European Communities**

As already pointed out, the basic Treaties of the European Communities do contain certain reference points for the protection of the rights and interests of the individual, but no catalogue of fundamental rights. The Court of Justice has in its judgments, despite this absence of explicit rules in the text of the Treaties, gradually developed and accepted a considerable number of general legal principles; and has, in the judgments cited above, expressed its attitude in a fundamental way on the significance of fundamental rights in Community law. Its position can be summarized thus: although in no case can national law, including fundamental rights arising under national constitutional law, claim priority over Community

<sup>1</sup> [1974] ECR 491, 507.

<sup>2</sup> [1975] ECR 1219.

law as an independent legal order, none the less as general legal principles the fundamental rights generally recognized in the Member States do form part of Community law, and, according to the Nold judgment in 1974, in establishing such rights the ECHR must also be considered. If despite these statements of the Court of Justice, the present state of affairs is regarded in various quarters as unsatisfactory, this may be attributable to more than one reason. For one thing, there is the apprehension, expressed by the constitutional court of the Federal Republic of Germany, that fundamental rights underlying national constitutional law are unprotected under Community law. Moreover, there is a danger that, given the increasing activity of the Community and its organs and the inadequate provision for fundamental rights in the Treaties, important interests of the individual will remain without protection. This in turn is bound up with doubts as to whether the Court of Justice has the jurisdiction and the capacity to develop its own appropriate form of protection of fundamental rights. These questions must be considered briefly at this stage.

There can be no doubt that from the point of view of Community law, there can be no question of national fundamental rights having validity and applicability. Even less would it be possible merely to add together the corpus of fundamental rights of the nine Member States and to have the entire scheme of provisions thus assembled made binding on the Community and its organs. Such an approach must contend with the fact that virtually all the catalogues of fundamental rights contain unique features and are subject to limitations formulated in different ways by reason of national and historical phenomena, and that these cannot be transferred *in toto* and cumulatively into Community law, if the Community is not thereby to become paralysed. The independent character of Community law precludes any direct recourse to national fundamental rights.

Furthermore, every international and supranational legal system (just like any national legal system) will require its written law to be supplemented by general legal principles and legal concepts shared by the Member States. In international law this necessity has found expression in Article 38(1)(c) of the Statute of the International Court of Justice. I have, in another context, already pointed out that international administrative courts, particularly the administrative courts of the United Nations and the International Labour Organization, have of necessity evolved and applied appropriate general legal principles.<sup>1</sup> 'The judgments of the international administrative courts contain ample support for the view that the general legal principles of national legal systems must be observed in the elaboration and application of the internal law of the organization in question. General principles of national administrative procedure and of judicial control of State acts are correctly considered by the courts as also being necessary parts of the international legal system. The requirement of 'due process of law', the duty to grant a hearing, the maxim *audi et alteram partem*, the inherent constraints upon administrative discretion and the judicial review thereof, the principle of pro-

portionality, and further basic legal principles are also applicable to the internal law of international organizations; and the administrative courts rightly assume it to be their duty to ensure that these principles are respected.'<sup>2</sup>

If the matter is looked at in this way, it is not only not unusual but is perfectly natural that the Court of Justice of the European Communities also derives general legal principles, including the underlying guarantees of fundamental rights, from the legal systems of the Member States, and applies them, and that all Community organs are bound to respect these legal principles.

In order to serve any practical purpose this fundamental statement needs more specific elaboration, and in this considerable difficulties will have to be overcome. Whenever there is the possibility that any fundamental rights have been affected, careful scrutiny is requisite to establish how far a fundamental right is directly recognized within the treaty law of the Communities, to what extent and in what form it is to be encountered in the legal systems of the Member States, and how far it is possible to speak of any fundamental significance of the right in question and its implications. Such investigation, however, can hardly be avoided if a correct idea of legal concepts in the Member States is to be conveyed. In this context the ECHR ought also to be considered, since it contains a minimum of rights recognized by all Member States. At the same time, we agree with the judgment of the Court of Justice in Nold, in that the mention of the ECHR is only a supplementary one, since the contents of the ECHR are not identical with the legal principles recognized by Member States of the EEC.

Finally, we shall briefly discuss the question of the direct applicability of the ECHR to Community organs. The Court of Justice of the European Communities in its judgment of 12 December 1972 *re* International Fruit Company<sup>3</sup> has, as is known, declared that the Community is bound directly by the provisions of GATT; and it has been discussed on various occasions whether and to what extent the view of the Court of Justice as expressed in that judgment can be applied to the ECHR. In my opinion, there are strong arguments against the ECHR having direct effect against Community organs. The ECHR contemplates only States as parties thereto, and the organizational structure (Commission, Court of Justice and Committee of Ministers) provided for therein is designed for States as parties to the Convention. Even under the law of the EEC itself (cf. particularly Article 234 of the EEC Treaty) there is no requirement that the Community need be assumed to be bound directly by the Convention. The appropriate solution, and that conforming to international law, can be achieved by other means. The ECHR, as treaty law recognized as binding upon them by all Member States of the EEC, contains

<sup>1</sup> Cf. Bernhardt (-Mehsler), *Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen*, Heft 12 der Berichte der Deutschen Gesellschaft für Völkerrecht, 1973, pp. 7 *et seq.*, 29 *et seq.*

<sup>2</sup> *Ibid.*, with further references.

<sup>3</sup> [1972] ECR 1219 *et seq.*

underlying legal concepts common to them all, relating to the necessary protection of the individual; and by virtue of this the prerequisites for the existence of general legal principles under EEC law are met. This does not, however, preclude the possibility that more extensive fundamental rights are present in the law of the nine Member States, which are to be considered as general legal principles of these States, and in such case the protection of fundamental rights under Community law goes beyond that of the ECHR. There are further reasons in favour of the proposition that the ECHR is relevant to the EEC only in an indirect manner; for instance, only in this way will the individuality in actual and in organizational terms of both legal orders be preserved. We cannot go into this more deeply here, and a few observations will suffice. As already mentioned, the human rights guaranteed by the ECHR, by reason of their substantive nature, primarily affect the signatory States. An infringement by the Community organs of most of the fundamental rights of the individual as contained in the ECHR is improbable or impossible. In so far as the rights under the ECHR can have relevance in Community law, the Court of Justice of the European Communities can cite them as principles common to the Member States, and in this connection it can and should take into account the decisions and the practice of the ECHR organs. If the Community were, however, to be bound directly, this would be incompatible with the organizational provisions of the ECHR, and provoke conflicts of jurisdiction. On the other hand, any divergencies between the judgments of the Court of Justice of the European Communities on the one hand and the decisions of the ECHR organs on the other would then become less important.

Considerations similar to those in relation to the ECHR will obtain in relation to other rules and agreements of international law. Treaties to which Member States of the EEC are parties, for instance the agreements of the International Labour Organization, or—after its coming into force—the Human Rights Charter of the United Nations, have to be taken into account when considering whether individual fundamental rights are part of general legal principles. Here, it is not always necessary that all the EEC Member States should be bound by the individual conventions. In so far as national law accords with the convention in question without the State in question being bound thereby, then there can be deduced from the combination of treaty and national law a general principle which will have to be respected in Community law. A certain flexibility is inevitable here, and is in any case appropriate, since in any individual case it will have to be established from a large number of relevant aspects how far a rule can be regarded as a general legal principle.

In such an assessment of written Community law, of the principles of the national law of the Member States, and of the binding provisions of international law, it seems likely that all the fundamental rights which are deemed inalienable will be considered as part of Community law to be respected and applied by the Community organs. It is hard to believe that any grave deficiencies continue to subsist in the protec-

tion of fundamental right. In any event, contrary to the view of the German Bundesverfassungsgericht, any lack of protection of fundamental rights within Community law is not apparent, or is, to say the least, unlikely, in the light of our understanding of the current position.



### III — Comparative legal study of certain fundamental rights

#### *Preliminary*

We shall now explore in greater depth the question whether an assessment from the point of view of comparative law of national provisions on fundamental rights can furnish assistance or advice for evolving 'European' fundamental rights, and we shall proceed by considering individual fundamental rights. For this purpose we can discuss only two fundamental rights, or, as the case may be, legally protected rights of the individual. It would be wrong to select such rights on the basis of ease of comparison between States, and it seems more appropriate to select fundamental rights which would be likely to play a greater role in the context of the European Communities. Some of the classical fundamental rights, such as protection from arbitrary arrest or even the freedom of religion, are more readily comparable, but largely unimportant in the EEC context. Those fundamental rights which are of special importance for the European Communities are on the other hand harder to identify and compare; but an attempt to review them must be made.

The freedom to exercise one's trade or occupation is of prime importance in a Community whose object is economic integration transcending national frontiers. In what follows we shall therefore explore a major aspect of the general freedom to exercise a trade or occupation, namely the freedom of economic activity (*Gewerbefreiheit*), and the manner in which it is regulated by law within the Member States of the EEC. This right is, however, inseparably linked to the whole economic system of the State in question; and this creates additional difficulties in a comparative survey. Once again it must be stressed that the time at our disposal permits only of a very cursory glance at the relevant legal provisions of the nine Member States of the EEC, and no doubt experts from the relevant countries could suggest improvements in many respects.

In addition to the fundamental rights expressly formulated and reasonably clearly defined, general precepts or legal principles play an important part in most legal systems. This has already been demonstrated more than once in the course of this study, notably in connection with the discussion of the development of fundamental rights in France, as well as in the reference to the judgments of the Bundesverfassungsgericht on the requirements of the rule of law, and finally in the survey of the legal principles which have been evolved in the judgments of the Court of Justice of the European Communities for the purposes of these Communities. It seems appropriate to bring into the following survey a legal principle which can be of special importance for the position and protection of the individual and which has on various occasions

had a part to play in the judgments of the Court of Justice at Luxembourg. It is the problem of how far public authority may interfere with the rights of the individual which are already established. This question is extremely important, and just as hard to answer unequivocally. On this subject too, it should be said that in what follows allowance will need to be made for shortcomings and deficiencies.

#### 1. Freedom of economic activity

In the wide variety of possible activities by way of trade or occupation, freedom of economic activity occupies an important position. By this right we mean the freedom to pursue on one's own account the business of manufacturing, supplying services, or of buying and selling with the object of participating in economic life and achieving profits. The essential features of the relevant legal rules of the Member States of the European Communities can be described as follows.

#### Belgium

Freedom to carry on economic activity as part of the freedom to practise a trade or occupation is not expressly provided for in the Belgian Constitution. Earlier writers sometimes sought to deduce it from Article 7 of the Constitution ('La liberté individuelle est garantie').<sup>1</sup> This view has now been abandoned. Prevailing opinion sees in Article 7 a guarantee merely of the 'liberté d'aller et venir', corresponding to the English *habeas corpus*.<sup>2</sup> This restrictive interpretation of Article 7 of the Constitution is confirmed by the various attempts to amend the Constitution as regards fundamental economic rights. As late as 1954 Parliament saw no necessity for a constitutional amendment to this end. Within the relevant Committee of the Chamber it had been pointed out that the then current text of the Constitution contained no guarantee of freedom of economic activity, but that had been no bar to appropriate legislative development. To incorporate economic fundamental rights into the Constitution was deemed to be superfluous<sup>3</sup> and ineffectual, since provision for such economic fundamental rights would still have to leave to the legislature extensive powers of regulation.<sup>4</sup> Although a Declaration of 1968 acknowledged the necessity of amending the Constitution 'par l'insertion de dispositions relative aux droits économiques et sociaux', no such constitutional amendment

<sup>1</sup> References in *Dor and Braas*, *Les nouvelles*, corpus iuris belgici, Vol. 2, 1935, paragraph 143; further *Perin*, *Cours de Droit Public*, Vol. 3, 1967, pp. 59, 73.

<sup>2</sup> References in *Buchmann and Buttgenbach*, *Revue de droit international et de droit comparé*, 27 (1950), p. 154; *De Visscher*, *Annales de droit et des sciences politiques*, 12 (1952), pp. 310 *et seq.* 315; *Wigny*, *Droit constitutionnel*, p. 389 *et seq.*; *id.*, *Cour de Droit Constitutionnel*, p. 177; *Vlaeminck*, *Le Droit constitutionnel belge*, 5th ed. 1966, p. 70.

<sup>3</sup> Cf. the *de Schryver* Committee Report, *Chambre 1952-1953*, Doc. 693, p. 33.

<sup>4</sup> Chiefly *De Visscher*, *Annales de droit et des sciences politiques*, 12 (1952), p. 315 *et seq.*

has so far been effected because of heavy pressure of other business on the legislature in its constitution-amending capacity.<sup>1</sup>

In the absence of such a constitutional basis, the courts found the right to freedom of economic activity upon Article 7 of the French Decree of 2 March 1791 and Article 2 of the Law of 21 March 1819.<sup>2</sup> Article 7 of the Decree of 2 March 1791 reads, 'Il sera libre a toute personne de faire tel négoce ou d'exercer telle profession, art ou métier qu'elle trouvera bon; mais elle sera tenue de se conformer aux règlements de police qui pourront être fait'.

Règlements de police in the implementation of this provision are therefore capable of restricting freedom of economic activity, but could not abolish it completely, as they would thereby go beyond mere implementation. This could, however, be achieved by statute, as the legislature is not subject to any restriction if it wishes to disregard some other ordinary statute (here that of 1791). Belgian learned writing contains no comprehensive portrayal of the current exceptions from the right to freedom of economic activity. None the less a brief glance at Belgian ordinary statute law makes it clear that there are, for instance, State monopolies, as in the field of broadcasting and telephone communications (Law of 14 May 1930). The Constitution furthermore contains no restrictions as to the establishment of State economic enterprises, so that here also, as a pure matter of fact, freedom of economic activity could be undermined.<sup>3</sup> Finally, entry to certain occupations is in many cases regulated, whether to ensure professional qualification (as for instance with doctors and pharmacists), or to preserve economic balance (as with trade and crafts), or to protect third parties (as with banks, insurance undertakings).<sup>4</sup> The lengths to which statutory regulation can go here is perhaps shown by a law of 22 April 1948,<sup>5</sup> which prescribed a set-off of profits and losses amongst the different coalmining enterprises and provided at the same time that any coalmine which was closing down would continue to be worked by the State on its own account.

Judicial protection to ensure the legality of administrative action within the field of freedom of economic activity is guaranteed in principle. We can refer to what is said above. There is, in addition, legal protection available within the administration: first the informal application for legal redress in the shape of the submission of grievances (*Gegenvorstellung*) or appeals to higher authority (*Dienstaufsichtsbeschwerde*); then there are the formal appeals also to be brought within the administration. These are individually prescribed by statute. An appeal to the courts, in particular to the Conseil d'État, is possible only in cases where the prescribed formal appeals within the administration have been made without success.<sup>6</sup>

## Denmark

Denmark has no fundamental right to freedom of economic activity entrenched in the Constitution. Neither from the con-

stitutional duty upon the legislature to abrogate any discriminatory statute governing occupations (Article 74), nor from the right to work entrenched in Article 75 (1), can such a fundamental right be inferred. Only indirectly is a person exercising economic activity protected by Article 73 of the Basic Law (right of property). Thus the withdrawal from such a person of his trade licence can amount in certain circumstances to an interference with his rights of property.

Each individual has a right to obtain a trade licence, if he fulfills all criteria prescribed in the statute relating to trading. If he is refused such a licence in spite of his fulfilling all the criteria, he may sue in court for the issue thereof. This will not be the case, if—as is provided in specific cases—the authorities in question have been given a measure of discretion in the issue of a licence.

There are in principle no general restrictions on commencing and carrying on economic activity. The specific criteria for the issue of a trade licence are set out in the Trade Law of 8 June 1966. There are particular areas (private *Bereiche*) which are almost completely under State control and supervision.<sup>7</sup> The State also participates to a modest degree in economic life directly; chiefly, however, in the field of public services, such as railway and local transport undertakings, and postal and telegraph services. The organizations in question are either directly incorporated into the administration or the undertakings are carried on as joint stock companies under private law in which the State holds a majority of the shares and to which it has granted the appropriate concessions. Finally there are various statutes relating to unfair competition and monopolies which curtail to some extent the autonomy of the private sector. Actual nationalizations have not yet taken place.

## Federal Republic of Germany

The Basic Law of the Federal Republic of Germany contains, in the part dealing with fundamental rights, various provisions which are of importance for the individual's economic activity. Thus the freedom for personal development guaranteed in Article 2 extends, according to prevailing learned opinion, also to certain areas of economic activity, *inter alia*, to freedom of contract. Article 9 protects the formation of economic associations. Article 14 contains a guarantee of property; Article 15 allows, under certain circumstances, nationalization (*Überfüh-*

<sup>1</sup> On the so far unsuccessful attempt to amend the Constitution as regards fundamental economic rights, see especially—with further references in each case—*de Stexhe*, *La révision de la constitution belge, 1968-1971*, 1972, p. 349 *et seq.*; *Wigny*, *La troisième révision de la constitution*, 1972, p. 406 *et seq.*

<sup>2</sup> *Cour de Cassation*, 18 June 1906, *Pasicrisie belge* 1906, I, 311; cf. *Wigny*, *Cours de Droit Constitutionnel*, p. 177; *Vlaeminck*, *op. cit.*, p. 70.

<sup>3</sup> See *Buchmann*, *Buttgenbach*, *Revue de droit international et de droit comparé*, 27 (1950), p. 160 *et seq.*

<sup>4</sup> Cf. *Wigny*, *Cours de Droit Constitutionnel*, p. 177; *id.*, *Droit Constitutionnel*, p. 389 *et seq.*; *Buchmann* and *Buttgenbach*, *op. cit.*, p. 161 *et seq.*

<sup>5</sup> *Pasimonie* I 1948, *Collection complète des lois, Arrêts et règlements généraux*.

<sup>6</sup> Cf. the report of *Velu*, *loc. cit.* and *Mast*, *Précis de droit administratif belge*, 1966, p. 306 *et seq.*

<sup>7</sup> Cf. *Andersen*, *Dansk Forvaltningsret*, 5th ed. 1966, p. 79.

rungen in Gemeineigentum). Of cardinal importance for our purposes is Article 12(1) of the Basic Law:

‘Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder aufgrund eines Gesetzes geregelt werden.’

This constitutional provision has led to copious case-law from the Bundesverfassungsgericht. Of particular importance was and still is a judgment of 11 June 1958,<sup>1</sup> in which the constitutional court described in greater detail the extent to which freedom of trade or occupation could lawfully be regulated by statute. Since then, the Bundesverfassungsgericht has continued to follow the views evolved in this judgment, while at the same time it has in a large number of further judgments defined more closely where the line is to be drawn between lawful and unlawful interference with the freedom to choose one's trade or occupation.<sup>2</sup> The ‘philosophy’ of the constitutional court can be described as follows: interference with the freedom of trade or occupation is lawful for the purpose of safeguarding important public interests, but only by a process of weighing up the public interests at stake against the individual's freedom of personal development. Here, the court has evolved a ‘graduated levels approach’ (‘Stufentheorie’), which distinguishes between three main levels where interference is permissible under conditions which become increasingly stringent from one level to the next. The first level relates to the *exercise* of occupations, that is, to the specific circumstances under which any activity, which is lawful in principle and open to any person, may be regulated by statute. Here we have the provisions relating to industrial safety, working conditions, requirements of hygiene or measure for the protection of the environment. In the case of such provisions the individual may therefore carry on a specific activity, but must, so far as the practical aspects are concerned, comply with certain requirements. Here the legislature is given a considerable measure of discretion. The second level relates to what are termed the subjective qualifying conditions (sogenannte subjektive Zulassungsbedingungen). These are conditions which the individual must personally satisfy in order to take up and practice a trade or occupation. Examples of this are passing the requisite examinations for the practice of medicine or pharmacy and the personal requirements imposed on a driver or a hotel-keeper. At the level of the subjective qualifying conditions interference is only permissible in so far as important public interests are at stake and in need of protection. The third level relates to what are termed the objective qualifying conditions. Here, decisions as to whether any person may embark on any particular activity are made by reference to objective criteria which the individual cannot influence. For example, only a limited number of persons are permitted to become chimney-sweeps, taxi-drivers or surveyors. Such interventions restrict the individual's right to free development in a particularly serious way and in the judgments of the Bundesverfassungsgericht they are only permitted in terms of constitutional law for the purposes of safeguarding pre-eminent community interests.

The constitutional court has applied these principles to numerous occupations in a manner which has attracted not only approval but also considerable opposition. We cannot here go into detail; and the exceptions in the case of certain professions linked in a particular way to the State (such as notaries) cannot be considered here. The State organs must however take into consideration a large number of points of view and criteria when regulating professional activity, and in the final analysis the Bundesverfassungsgericht will determine in binding manner the intervention which the legislature may undertake. It follows from what is said above that each individual case is subject to judicial control.

These comments on the law of the Federal Republic must suffice. The constitutional formulations of the Basic Law are particularly apt to demonstrate the possibilities and the limitations of incorporating the right to freedom of trade or occupation in a catalogue of fundamental rights. The fundamental right itself can be relatively easily and clearly defined. Given that economic life can take so many different shapes and that society makes a variety of demands, the freedom of trade or occupation can hardly be constitutionally guaranteed without allowing to the legislature by means of explicit or implicit reservations a measure of discretion in the elaboration by statute of these rights—going as far as the power to prohibit individual activities or to set up State monopolies and to nationalize parts of the economy. The conditions for lawful intervention can hardly be particularized in the catalogue of fundamental rights, and certain generalized provisions would be unavoidable. It seems all the more important therefore that some judicial authority should have the power to review the acts of the legislature, and of the executive, and, if necessary, to correct them, if the fundamental right is not to be left entirely at the mercy of the legislature.

## France

Although the Preamble to the Constitution of 1946 does not list the right to free economic activity among the ‘*principes sociaux*’, the judgments of the Conseil d'État proceed on the footing that the ‘*liberté de commerce et de l'industrie*’ and the ‘*liberté de l'activité professionnelle*’ are fundamental principles.<sup>3</sup> The Council d'État relies on the one hand on the constitutional assurance in the Constitution of 1848 and on the other hand on a decree of 1791 on freedom of economic activity: ‘Il sera libre à toute personne de faire tel négoce ou

<sup>1</sup> BVerfGE 7, 377.

<sup>2</sup> Cf. BVerfGE 39, 210 (225 *et seq.*).

<sup>3</sup> Cf. Schmid, *Die Handels- und Gewerbefreiheit in der französischen Rechtsprechung*, Diss. Tübingen 1965; Burdeau, *Libertés publiques*, p. 425 *et seq.*; Morange, *Réflexions sur la protection accordée par le juge administratif à la liberté du commerce et de l'industrie*, D. 1956, Chron. 117 *et seq.*; Mallen, *La liberté du commerce et de l'industrie, en droit français*, in: *La liberté du commerce et de l'industrie en droit public suisse et comparé*, 1954, p. 199 *et seq.*; Stahl, *Die Sicherung der Grundfreiheiten im öffentlichen Recht der Fünften Französischen Republik*, Veröffentlichungen des Instituts für International Recht an der Universität Köln 61 (1970) p. 268 *et seq.*

d'exercer telle profession, art ou métier qu'elle trouvera bon; mais elle sera tenue de se conformer aux règlements de police qui pourront être faits'.<sup>1</sup> The freedom of economic activity is nevertheless subject to extensive restriction. In the case of many undertakings there is no longer any freedom of economic activity, and they are carried on exclusively by State monopolies (for instance, PTT, tobacco, matches, gunpowder). Against the establishment of monopolies by the legislature no appeal will lie on the principle of the right to freedom of economic activity. The power of the legislature to establish such monopolies for police or fiscal reasons has never been doubted by French learned writers.<sup>2</sup> The Preamble to the Constitution of 1946 does only envisage nationalization for 'services publics nationaux'; these are predominantly banks, insurance undertakings, motor car manufacturers and the industries concerned with raw materials. Some of these nationalized public undertakings compete with the private sector (for instance Gaz et Electricité de France, Radiotélévision, Renault), and others have the character of a monopoly.

If however industrial or commercial activities are carried on by a public undertaking, only the legislature can confer monopoly status upon such activities.<sup>3</sup> A *de facto* monopoly can come into being where the State acquires interests in private commercial undertakings and assists them by special measures. Moreover, where the private sector competes with public undertakings in the 'domaine public' the executive has the power to promulgate rules for the carrying-on of these activities, in order to secure optimal use of the 'service public'. This can go so far as to withhold any requisite permit from competing private undertakings, if competition could harm the public undertaking.<sup>4</sup> Also, the right to freedom of economic activity does not in practice impose any constraints on the setting-up of public undertakings in competition with the private sector. Originally, this was only permissible if 'special circumstances, such as the ensuring of appropriate supply' justified such measures.<sup>5</sup> To an increasing extent, however, the Conseil d'État has deemed it sufficient if any public purpose could be achieved by a public undertaking.<sup>6</sup> The right to freedom of economic activity could only place constraints upon public authority to the extent that it acted exclusively for gain.

Pursuant to Article 37 of the Constitution of 1958, the executive is directly authorized to issue directives for the purpose of regulating the economy. In its judgment the Conseil d'État has however set certain limits to this law-making power of the executive in that it has numbered the 'liberté de commerce et de l'industrie' amongst the fundamental guarantees under Article 34 of the Constitution, which can only be regulated by Parliament.<sup>7</sup> In this way it has for instance, declared illegal the issue of a permit to a film company subject to the condition that a State official held the right to take part in all meetings and to suspend the implementation of all decisions of company organs.<sup>8</sup> Although a statute of 1946 empowered the authorities to make the grant of licences subject to conditions, the Conseil d'État nevertheless held that conditions of this kind could only be imposed on the basis of

explicit statutory provision. Accordingly, any fundamental intervention in this sphere of free economic activity will amount to regulating a fundamental principle within the meaning of Article 34; examples of such intervention are the introduction of marketing organizations for certain products; price restrictions, quota arrangements. This has been established explicitly in the judgment of the Conseil d'État of 28.5.1965 in relation to the quantitative limitation of petroleum imports.<sup>9</sup> The executive will therefore retain the power to make provision, within the framework of the law, for the more detailed implementation of measures for the purpose of regulating the economy.

It is still an open question how far the 'liberté de commerce' sets limits to the power of the legislature to enact provisions for regulating the economy. In view of the necessity, widely recognized in France, of extending state intervention in the economy, the hypothesis is scarcely conceivable in which the Conseil Constitutionnel could declare unconstitutional a statute for regulating the economy.

The taking-up of a trade or profession, and the practice thereof, and economic activity, generally, are subject to the reservation of 'ordre public'<sup>10</sup>. There are thus numerous restrictions based on statutes and regulations and designed to ensure the oversight of the way in which businesses are conducted, as for instance the Law of 19 December 1917 on the setting-up of undertakings which are dangerous, dirty, and cause disturbance. Restrictions can be made for moral, sanitary, economic or even general reasons relating to public safety. They range from the absolute prohibition on the carrying-on of certain kinds of trade (for instance no person may carry on the business of banking if he has a previous conviction for an offence relating to money) to the requirement for certain licences or particular evidence of competence to be given and finally to detailed rules for particular trades (pharmacists).

The courts distinguish between the freedom to exercise a trade or occupation ('liberté de l'activité professionnelle')<sup>11</sup> and the freedom to be admitted to a trade or occupation ('principes du libre accès à l'exercice par les citoyens de toute activité professionnelle').<sup>12</sup> In regulating the freedom to be admitted to a trade or occupation the executive is subject to appreciably more stringent constraints than in regulating the

<sup>1</sup> Dalloz, Code administratif, 1951, p. 771.

<sup>2</sup> Cf. Schmid, op. cit., p. 14, Burdeau, op. cit., 37, p. 437 *et seq.*

<sup>3</sup> CE of 16.11.1956, Société des grandes huileries Perusson, RDP 1957, p. 351.

<sup>4</sup> CE of 16.11.1956, Société Desaveine, Rec. p. 440.

<sup>5</sup> Stahl, op. cit., p. 271; Burdeau op. cit., p. 437.

<sup>6</sup> Loschak, Les problèmes juridiques posés par la concurrence des services publics et des activités privés AJDA 1971, p. 261 *et seq.*; Burdeau, op. cit., p. 440; Stahl, op. cit., p. 273; Colliard, Libertés publiques, p. 718 *et seq.*

<sup>7</sup> CE of 28.10.1960, de Laboulaye, Rec. p. 570, further references in Stahl, p. 275 *et seq.*

<sup>8</sup> CE of 29.7.1953, Société générale des travaux cinématographiques, Rec. p. 430.

<sup>9</sup> CE of 28.5.1965, Société Mobil Oil française, Rec. p. 310.

<sup>10</sup> Cf. for police restrictions in detail: Burdeau, op. cit., p. 425; Morange, op. cit., p. 117 *et seq.*; *seq.*; Colliard, Libertés publiques; Waline, Traité élémentaire de droit administratif, 9th ed. 1963.

<sup>11</sup> CE of 28.10.1960, de Laboulaye, Rec. p. 570.

<sup>12</sup> CE of 29.6.1963, Syndicat du personnel soignant de la Guadeloupe, RDP 1963, p. 1210; in general Stahl, op. cit., p. 268 *et seq.*

manner in which a trade or occupation is carried on. Thus, the Conseil d'État has stated in several judgments that the administration may not prohibit the exercise of a trade or occupation or make it subject to conditions or to administrative licences having no statutory basis.<sup>1</sup> In regulating the exercise of a trade or occupation, the administration may however have full regard to 'ordre public'. It is therefore lawful to stipulate the opening hours for pharmacies for reasons of public health, to prohibit certain activities in slaughterhouses for the prevention of disease, or to place dairies under a duty to supply milk to large families at the preferential State price.<sup>2</sup>

It has been widely assumed from these judgments that the change in economic and social thought allows extensive restrictions to be imposed on the exercise of a trade or occupation. There can be therefore not only the traditional restrictions in the sense of supervision for the avoidance of dangers but also restrictions on grounds of social justice. The overall impression from French learned writing is that the 'liberté de commerce et de l'industrie' is a freedom which is controlled and guided to a considerable extent.<sup>3</sup> It is epitomized by *Roche* as follows: 'Pur produit du libéralisme, la liberté du commerce et de l'industrie sans être abandonnée comme principe général de notre droit n'a cessé de dépérir en même temps que l'État étendait son contrôle sur l'économie'.<sup>4</sup>

## Ireland

The Irish Constitution contains no provision explicitly guaranteeing the freedom of trade and occupation. The freedom of property guaranteed under Article 43(1)(2), which comprises 'the general right to transfer, bequeath and inherit property', may have some relevance to freedom of economic activity, but the question cannot be considered to have been elucidated by the courts.<sup>5</sup> Freedom of trade and occupation could perhaps be protected as a 'personal right of the citizen' within the meaning of Article 40(3)(1).<sup>6</sup> This also has still to be elucidated by the courts. Two cases dealing with the exercise of a profession are only concerned with the power of professional bodies to exclude members, and thereby to make it impossible for them to practice their profession. In the case of barristers a statutory provision ousting the jurisdiction of the ordinary courts has been held unconstitutional, though only by reference to the fundamental rights of justice (Justizgrundrechte) in the Constitution.<sup>7</sup> In another case, the question whether Article 40(3) contained 'a right to earn a living' was expressly left open since in the case in question there was in any case no infringement of such right.<sup>8</sup> If it be assumed that there is a guarantee of freedom of economic activity in Article 40(3) of the Irish Constitution, there is no doubt that statutory restrictions are possible to a considerable extent. What 'personal rights' are protected against interference by the legislature and the extent to which powers are available to restrict such rights cannot be regarded as settled, having regard

to the judgment of the Supreme Court in *Ryan v Attorney-General*, which was considered to be *avant-garde* by Irish learned authors.<sup>9</sup> In this case, the Court allowed little discretion to the legislature to pass a statute which could affect the bodily integrity of the individual. On the other hand, in reviewing by reference to the guarantee of property (Article 43) legislation for the purpose of regulating the economy, the Court has in some decisions accorded the legislature considerable freedom. The Court's decisions are not, however, entirely consistent on this subject.<sup>10</sup> All in all, we can speak of a constitutional guarantee in Ireland of freedom of economic activity, but one in relation to which the statutory powers to regulate have not been clarified. There are in fact numerous statutes regulating the freedom to take up a trade or profession.<sup>11</sup>

In Ireland there also exist several State monopolies which preclude any activity on the part of the private individual, such as the production, distribution and sale of electricity.<sup>12</sup> In other areas, the State carries on economic activity but does not exclude parallel private sector activity. In large areas there is competition between public and private sectors, though it would be wrong to speak of any appreciable restriction of freedom of economic activity because of the existence of the State-run economic undertakings.<sup>13</sup>

In accordance with what has been said above on legal protection generally, any restriction on commercial activity which cannot be justified by statutory provision can be challenged in court. In many cases, particular statutes also make express provision for appeals within the administration and also to the courts.<sup>14</sup>

## Italy

Trade or occupational freedom is not expressly mentioned in the Italian catalogue of fundamental rights, but can be deduced indirectly from numerous provisions of the Constitution, particularly from the text of Article 4(2):

<sup>1</sup> CE of 22.6.1951, *Daudignac*, Rec. p. 362; CE of 26.2.1960, *Ville de Rouen*, Rec. p. 154; CE of 15.10.1965, *Alcaraz*, Rec. p. 516.

<sup>2</sup> Examples and references in *Stahl*, op. cit. p. 270; *Burdeau*, op. cit., p. 429.

<sup>3</sup> Cf. for instance, *Burdeau*, op. cit., p. 437; *Morange*, loc. cit., Chron. p. 117.

<sup>4</sup> *Roche*, *Libertés Publiques*, 3rd. ed. 1974, p. 85.

<sup>5</sup> Cf. *Kelly*, *Fundamental Rights and the Irish Law and Constitution*, 2 ed. 1967, p. 54 *et seq.*; *Barrington*, *Private Property under the Irish Constitution*, *The Irish Jurist* 8 (1973), p. 1 *et seq.*; *Temple Lang*, *The Common Market and Common Law* (1966), pp. 359-264.

<sup>6</sup> *Boldt*, *Die Grundrechte in der Verfassung Irlands vom 29.12.1937*, Diss. Bonn 1968, p. 116.

<sup>7</sup> *Boldt*, op. cit., p. 114 *et seq.*

<sup>8</sup> *McDonald v. Bord na gCon*, 100 ILTR89 (1966), Supreme Court.

<sup>9</sup> 1965, IR 294, Cf. *Kelly*, *Fundamental Rights and the Irish Law and Constitution*, 2 ed. 1967, p. 36 *et seq.*; also *Temple Lang*, *Private Law Aspects of the Irish Constitution*, *The Irish Jurist* 6 (1971), p. 237, 252.

<sup>10</sup> For a detailed account see *Barrington*, *Private Property under the Irish Constitution*, *The Irish Jurist* 8 (1973), p. 3 *et seq.*

<sup>11</sup> See references in *Boldt*, op. cit., p. 114.

<sup>12</sup> *Hegarty*, *The Control of Government and Business*, in *King* (ed.), *Public Administration in Ireland*, Vol. 3 (1954), p. 191.

<sup>13</sup> Cf. on such competition *FitzGerald*, *State sponsored Bodies*, 2nd ed. 1963, p. 30 *et seq.*

<sup>14</sup> Cf. from more recent legislation s. 5 of the *Employment Agency Act* 1971, No 27, and s. 10 & 11 of the *Pawnbroker's Act* 1964, No 31.

'Ogni cittadino ha il dovere di svolgere, secondo le proprie possibilità e la propria scelta, un'attività o una funzione che concorra al progresso materiale e spirituale della società'.<sup>1</sup>

Along with Article 4, Articles 41 (freedom of economic enterprise) and 33 (freedom of artistic and scientific endeavour, and the establishment of schools) must be considered.

The right to freedom of economic activity as a part of the freedom of trade or occupation is also not expressly guaranteed by the Italian Constitution, but Article 41(1) does provide for the freedom of private enterprise, a provision which embraces the right to freedom of economic activity.<sup>2</sup> This paragraph 1 may however be misconstrued, if it is not taken with the two following paragraphs of that Article, and with Articles 42 and 43 of the Constitution. The combination of these provisions allows a very considerable limitation to be placed on the freedom of private enterprise, which cannot be set forth here in greater detail.<sup>3</sup> As examples of the very extensive economic activities of the State which create limitations on free enterprise we refer only to some of the industries which are operated in a semi-public way: ENI (petrol), ENEL (electricity), IRI (banks, radio, television, Alitalia, motorways, etc.).

Article 43 seems to be of special significance in relation to freedom of economic activity:

'43. A fini di utilità generale la legge può riservare originariamente o trasferire, mediante espropriazione e salvo indennizzo, allo Stato, ed enti pubblici o a comunità di lavoratori o di utenti determinate imprese o categorie di imprese, che si riferiscano a servizi pubblici essenziali o a fonti di energia o a situazioni di monopolio ed abbiano carattere di preminente interesse generale.'

As has been shown above, there is comprehensive judicial protection against unconstitutional statutes and unlawful administrative measures, which will accordingly also be available in cases of infringements of freedom of economic activity. But as the legislature has given a considerable measure of discretion to regulate this freedom, the constitutional protection of the individual is as a result correspondingly slight.

## Luxembourg

By a constitutional amendment of 21 May 1948, there was incorporated into the Constitution, *inter alia*, a guarantee of economic activity (*gewerbliche Tätigkeit*) as Article 11(6). This took place as a result of recommendations by the Conseil d'État, which expressed doubts as to whether the right to work, the incorporation of which had alone been envisaged prior thereto, would be apt to cover independent activity. The new provision reads:

'La loi garantit la liberté du commerce et de l'industrie, l'exercice de la profession libérale et du travail agricole sauf restrictions à établir par le pouvoir législatif'.

Despite the twofold reservation this constitutional provision is of some importance. The legislature is entrusted with the task itself of defining the freedom of economic activity and of providing for the limits thereto and for possible derogations therefrom.<sup>4</sup> State intervention in the economy is thus precluded in so far as the executive can no longer itself define the substance of the freedom of economic activity. Existing statutes will however remain in force until new legislation has been passed, in accordance with Article 11(6) of the Constitution.<sup>5</sup> Directives having the force of statute, which were issued before the constitutional amendment, also may continue to limit freedom of economic activity.<sup>6</sup>

Since the Constitution guarantees the right to freedom of economic activity without elaborating on what its substance is, those enacting ordinary statutes enjoy considerable discretion to define and restrict such right. They are however prevented from abolishing it altogether.<sup>7</sup> On the other hand, the courts themselves further limit any limitations on a fundamental right by means of the principle that restrictive provisions must be narrowly construed.<sup>8</sup> The statutes elaborating and restricting freedom of economic activity can empower the administration to issue implementing regulations. These must however be within the ambit of the limitations which are possible by statute. Administrative regulations cannot be founded directly upon the power in the Constitution to impose limitations.<sup>9</sup>

Certain areas may be excluded from the freedom of economic activity. This follows from Article 11(6) of the Constitution. The learned authors in Luxembourg have not yet discussed how far such exclusion may go.

## The Netherlands

There is no constitutional guarantee of trade or occupational freedom in the Netherlands. Nor do writers on constitutional law assume the existence of any unwritten constitutional principle to that effect.<sup>10</sup> The State Commission for Constitutional Reform (Cals-Donner-Commission) has incorporated in its draft constitution a right to free choice of occupation:

<sup>1</sup> Cf. on Article 4 Corte Costituzionale, sentenga. 45/1965

<sup>2</sup> Cf. Corte Costituzionale, sentenga 16 December 1958 No 78 on the concept of the iniziativa economica.

<sup>3</sup> Cf. in this respect *Mortati*, op. cit., p. 1013 *et seq.*; *Biscaretti di Ruffia*, op. cit., p. 721 *et seq.*; both with extensive references to other authors; and also *Lavagna*, *La Costituzione italiana, commentata con le decisioni della Corte Costituzionale*, Article 41, paragraph D (p. 555 *et seq.*).

<sup>4</sup> Thus *Majerus*, op. cit., p. 82.

<sup>5</sup> Thus, with reference to Article 120 of the Constitution, Conseil d'État, judgment of 29.5.1965, Pas. Lux. XIX, p. 528.

<sup>6</sup> Cour supérieure de justice, judgment of 26.10.1955, Pas. Lux. XVI, p. 397.

<sup>7</sup> Cf. the judgments on the right to strike defined by similar legal method (Article 11 (5) of the Constitution) Cour de Cassation, judgment of 24.7.1952, Pas. Lux. XV, p. 355; judgment of 15.12.1959, Pas. Lux. XVIII, p. 90.

<sup>8</sup> Conseil d'État, Comité du contentieux, judgment of 2.7.1958, Pas. Lux. XVII, p. 319.

<sup>9</sup> Conseil d'État, Comité du contentieux, judgment of 12.7.1957, Pas. Lux. XVII, p. 158.

<sup>10</sup> Cf. the works cited above by *Belinfante*, *Kranenburg*, *Oud*, *Van der Pot-Donner*, and *Stellinga*, *Grondtrekken van het Nederlands Staatsrecht* 1953.

'Article 80(3): Het recht van iedere Nederlander op vrije keuze van arbeid wordt erkend, behoudens de beperkingen bij of krachtens de wet gesteld'.

In the view of the Commission, this provision covers work either as an employee or on one's own account. This article contains an extensive reservation, which lacks substantive definition: the right is recognized subject to reservations to be effected by statute or powers derived thereunder. Accordingly, choice of occupation will no longer be subject to restrictions based on general powers. It will however remain possible for, say, a local authority to regulate, by virtue of its powers of administrative autonomy, the actual carrying-on of trades or occupations.<sup>1</sup> The delegation of the power to impose restrictions is considered to be lawful also for the future.<sup>2</sup> It is worth noting that this proposed provision for fundamental rights is placed amongst the social fundamental rights, with the consequence that even according to the draft of the State Commission, judicial review of ordinary statutes by reference to this constitutional provision will not be permitted.

Until the new constitutional provision is promulgated, the regulating of the freedom of economic activity in the Netherlands is completely in the hands of those enacting ordinary statutes. We cannot set forth in detail here the extent to which in this way interference occurs in practice. What is certain however is that in the current state of the law most areas of economic activity are open to the individual, but greater and increasing interference cannot be ruled out.

## United Kingdom

Freedom of economic activity is guaranteed under the British constitutional system as part of the freedom of conduct generally, as described above. The right to do whatever is not prohibited also applies to the economic activity of the individual. It is true however that freedom of economic activity is not one of those fundamental rights which have acquired particular features in constitutional practice. Thus only occasionally in learned writing is there mention of 'economic liberty'.<sup>3</sup> Street in his fundamental study of fundamental rights in the United Kingdom<sup>4</sup> deals with these questions under the heading of 'freedom to work'.

The fact that freedom of economic activity is guaranteed as part of the freedom of conduct generally does of course not imply that any person may take up and carry on any trade, since the legislature now increasingly regulates economic activity. The extent to which this should and may occur is, having regard to the legal situation as described, not a question of constitutional law but a political question. The two major parties have held and continue to hold different views on it.<sup>5</sup> There is however a long tradition of regulating trade for reasons of public order. Thus, a licence is required for the taking-up of many occupations.<sup>6</sup> The right to authorize the taking-up of a trade or profession may also be transferred to professional or trade bodies.

Where there are no statutory rules relating to the issue of licences the general right to freedom of economic activity can develop to the fullest extent. An example of this is the appearance of what are referred to as radio-cabs in British cities, in addition to the duly licensed taxis. A licence is only necessary for a driver who plies for hire on the streets, but not for one who is summoned by radio. Thus the radio-cabs have become established as a flourishing trade.

In the United Kingdom, major parts of the economy have been nationalized, especially after the Second World War.<sup>7</sup> This nationalization extends in particular to the coal and steel industry, the supply of electricity and gas, and to major parts of the transport industry. Coal, electricity and gas are public sector monopolies and accordingly no trade can be carried on in these areas. In the transport industry, the area available to the private sector has been altered by statute on several occasions, and has been a subject of political controversy.<sup>8</sup>

Judicial protection is in principle available if the administration interferes without lawful cause with freedom of economic activity. Various statutes provide for particular appellate procedures. Even where such a procedure is not explicitly provided for, the courts can still review the administrative act in question. This will always be the case unless judicial control has been expressly excluded. From time to time however, there is criticism that in this regard legal protection is deficient in certain respects.<sup>9</sup>

In view of the fact that it is not possible to speak of a constitutionally secured freedom of economic activity in the United Kingdom and that everything depends on numerous and varied provisions, both statutory and extra-statutory, this short survey is sufficient for our purposes.

## Assessment

Freedom of economic activity of the individual has, as the preceding conspectus shows, been expressly regulated under the Constitutions of the Federal Republic of Germany and of Luxembourg. Rudimentary or at least obscure points of reference for the protection of freedom of economic activity are

<sup>1</sup> This is deduced from Article 168 of the Gemeentewet: 'Aan hem (= de Raad) behoort het maken van de verordeningen, die in het belang der openbare orde, zedelijkheid en gezondheid worden vereischf.'

<sup>2</sup> Staatscommissie, Eindrapport, op. cit., p. 220 *et seq.*

<sup>3</sup> Mitchell, op. cit., p. 343 *et seq.*

<sup>4</sup> Cf. Street, Freedom, the Individual and the Law, 1963, p. 9 *et seq.*

<sup>5</sup> Cf. on the one side Utley, *The Principles of State Intervention, A Conservative View, Public Law, 1957*, p. 203, and on the other side Shore, *The Principles of State Intervention, A Socialist View, idem*, p. 218. On the problem of statutes conferring on the executive a discretion in questions of management of the economy, cf. Ganz, *The Control of Industry by Administrative Process, Public Law 1967*, p. 93 *et seq.*

<sup>6</sup> Cf. the survey in Williams, *Control by Licensing, Current Legal Problems 20 (1967)*, p. 81 *et seq.*; Street, op. cit., p. 238 *et seq.*

<sup>7</sup> Cf. the survey in Tivey, *Nationalization in British Industry, 1966*, especially p. 38 *et seq.*; Kelf-Cohen, *British Nationalization 1945-1973, 1973*, especially p. 19 *et seq.*

<sup>8</sup> Cf. Tivey, op. cit., p. 46 *et seq.*

<sup>9</sup> Cf. Williams, op. cit., p. 102 *et seq.*

to be found in the Constitutions of France, Ireland and Italy. No relevant constitutional provisions appear in the Constitutions of Belgium, Denmark, the United Kingdom and the Netherlands; but for the Netherlands there is at least a proposal for the enlargement of the Constitution. In the case of all countries of the European Communities it is thus established that within the framework of an economic system oriented towards a market economy important areas of commercial venture and activity are privately owned and open to entry by the individual. It is also beyond doubt that the extent of State intervention and regulation varies from State to State, but that no State refrains from intervening in many different ways in the economic process and in the freedom of economic and commercial activity.

The right to choose freely and exercise a trade or occupation, especially in the commercial field, can be considered a common feature of the legal systems of the Member States of the European Communities. The EEC Treaty also proceeds on the assumption, *inter alia*, in its provisions relating to freedom of movement and establishment, that the individual is free to choose and determine his occupation largely on his own responsibility. Any comprehensive regulation of commercial or professional life would moreover be incompatible with any legal system based on liberties, and would go to the heart of the principle of personal development. For these reasons, any catalogue of fundamental rights for the European Community could hardly dispense with the fundamental right of freedom to carry on a trade or occupation (whether as an employee or on one's own account). Formulating such a right should not present any fundamental difficulty; existing fundamental rights at the national level, the rules contained in ordinary statutes, and the views arrived at by the courts, such as the French Conseil d'État, could be of assistance.

It is at the same time inevitable that the national legislature as well as Community authority will, to the extent of their competence in that behalf, intervene in the freedom of trade or occupation for regulatory purposes. This is happening continuously, as a glance at the national official gazettes and the Official Journal of the European Communities will show. These interventions occur at different levels and with varying degrees of intensity. In many States, State monopolies and nationalizations remove important areas from the ambit of the individual's right to choose freely an economic activity. In all States, there are certain occupations and activities which are reserved to persons in the service of the State. Many activities may only be taken up by government authority or permission. In the exercise of most trades or occupations various aspects of the public interest must be kept in mind.

The many forms of State intervention in the freedom of trade or occupation are governed by different motives and aims. Sometimes the intervention is prompted—as is the case with nationalization—by general ideas of a just and democratic economic system. On other occasions the factors governing the extent and purport of the restrictions placed on the free-

dom of trade or occupation are public safety and order, the protection of particular occupational groups, the protection of the immediate environment and of the environment generally. These are different concerns which can take various forms, but whose basic justification or reasonableness can hardly be disputed, and they cannot, in my view, be set out in any catalogue of fundamental rights as limitations on the freedom of trade or occupation in a manner which is comprehensive and at the same time sufficiently precise. There is therefore hardly any alternative to making any incorporation of a fundamental right relating to freedom of trade or occupation within a European catalogue subject to a reservation which would permit Member States and Community organs alike to make rules, to the extent of their competence at any given time, as to the limitation on the freedom of trade or occupation requisite for the life of the Community.

## 2. Protection of the legal right to rely on an established legal position

As mentioned above, it is sensible, in this discussion of certain fundamental rights taken by way of example, to select also an unwritten right or a legal principle serving to protect the individual. As is shown by the judgments for instance of the French Conseil d'État or the German Bundesverfassungsgericht or even the Court of Justice of the European Communities, it is by no means the clearly defined traditional fundamental rights which always play the most important part within the daily work of the administration and the courts; in practice it is rather the expression of general principles, such as legal certainty and constitutionality of administrative action that can be more important to the individual than for instance the freedom of belief and conscience. The importance of general constitutional principles will increase as sovereign authority intervenes more and more at national and supranational level for the purpose of regulating the economic process.

One of the most important questions in any constitutional system is that of the legality of State interference with rights of the individual which are already established. Part of the question has been clearly answered in the field of criminal law: most States accord protection as a fundamental right to the maxim *nullum crimen, nulla poena sine lege*; it even appears in the ECHR (Article 7). Here we are not concerned with this prohibition on retrospective criminal liability, but other problems are of importance for European Community law. For one thing, it is of great importance to know how far the legislature (including the law-making authority at European level) may impose on citizens liability of a retrospective nature; this is of special importance in fiscal legislation. Equally important is the question of the extent to which the rights of the individual once acquired or established may be set aside *ab initio* or in the future, whether by the legislature or by the executive; in relation to concessions, licences, etc. this may be



of cardinal importance for the economic existence of the individual. This question of the protection of the legal right to rely on the continuance of the legal position, and of established rights of the individual, will be explored below by means of comparative legal studies. This problem also is too complex to be treated here without over-simplification and certainly also incidental inaccuracy. However, a brief review should convey the possibilities and the limitations of what could be secured by an explicit fundamental right.

## Belgium

There appears to be no prohibition in Belgium on alterations to the legal status quo to the detriment of the individual. The restrictions of Article 11 of the Constitution ('Nul ne peut être privé de sa propriété que pour cause d'utilité publique, dans les cas et de la manière établis par la loi, et moyennant une juste et préalable indemnité') are not capable of generalization. The right of property itself is subject to restrictive regulation in accordance with the concept of the individual's commitment to society (*Sozialbindung*): and as to the right to compensation under constitutional law, the protection it affords seems only to extend to immovable property, since those who enacted the Constitution clearly took *propriété* to mean only *propriété immobilière*.<sup>1</sup> There are, however, ordinary laws which provide for compensation for deprivation of moveable property.<sup>2</sup> Moreover, the Conseil d'État may recommend that compensation be paid for damage suffered by reason of lawful acts on the part of the State. At any rate we can find no general prohibition or substantive restriction on the power of the State to interfere with the rights of the individual.

There seems to be no bar to the retrospective application of statutes. Even in the case of retrospective fiscal legislation, its constitutionality is not questioned. At worst, it is considered bad politics.<sup>3</sup>

As to the power of the administration to revoke, or to modify to the detriment of the individual, licences lawfully issued, there is little in relevant Belgian learned writing to permit of precise conclusions. It seems however to be recognized that the administration may modify or revoke concessions on the basis of a statutory provision, if they relate to the 'gestion privée de service public', that is, the discharging of a task of the administration by private persons. This covers, for instance, the operation of railway or bus services.<sup>4</sup> Moreover, it would appear that the withdrawal or modification of licences is lawful, at least on the basis of statutory provision, in cases where in principle there is freedom of economic activity. But this question is not the subject of any coherent exposé in Belgian learned writing, with the result that it is difficult to make unequivocal statements thereon.

## Denmark

A general prohibition on the alteration of the legal position to the detriment of the individual exists neither as part of the Constitution nor in other statutes. Only in individual statutes are there provisions prescribing to any extent whether and in what circumstances an administrative act can, or must, be revoked and when not. Similarly, it is only in certain statutes that provision is made as to the extent to which an administrative act may be accompanied by a power of revocation.<sup>5</sup> For the rest, the general principles established by writers and by the courts will apply. In this respect the following distinctions are to be drawn: Constitutive administrative acts (*konstitutive Verwaltungsakte*) governed by statute may be altered or revoked only to the benefit of the citizen. The reservation of a power of revocation is unlawful in the absence of any enabling statutory provision. Constitutive administrative acts which are in the discretion of the administrative authority may, if they impose a liability on the individual, be revoked at will; but they may also be altered to his detriment if the statute provides for the imposition of liabilities which exceed those imposed by the act in question. Discretionary administrative acts which benefit the individual may be revoked, unless, exceptionally, the reliance placed by the citizen on the continuance of the *status quo* must prevail. When acting within scope of any discretion conferred upon it, the administration may reserve a power of revocation. Declaratory (*feststellende*) administrative acts may only be altered to the benefit of the person concerned. The revocation of an administrative act cannot be justified by an error of fact—this is a risk which the administration must bear—nor by an error of law, if the administration mistakenly considered itself to be under an obligation, or by changes in the law brought about by the passing of a new statute. If however a substantial change in the external circumstances has occurred, or if the public interest so requires, revocation is possible, provided regard is had to the interests of the individual.

In the case of what are termed police licences, whereby a statutory fetter placed on the general freedom of conduct is removed in the individual case in question, the interests of the individual and the public interest in security and order oppose each other. If there is a threat to public security and order, the licence can as a rule be revoked or modified. But in cases where the legal position has changed appreciably, where there have been errors of fact or of law on the part of the administration, and where new statutes have been passed, the public

<sup>1</sup> Cf. *Dor and Brass, Les nouvelles*, Vol. 2, p. 83 *et seq.*; *Wigny, Cours de droit constitutionnel*, p. 186; *id. Droit constitutionnel*, p. 288; *Cour de Cassation*, 6 April 1960, *Revue critique de jurisprudence belge*, 14 (1960), p. 257-308 with note by *Dabin*.

<sup>2</sup> Cf. *Mast, Précis de droit administratif belge*, 1966, p. 144.

<sup>3</sup> Cf. *Wigny, Droit constitutionnel*, pp. 127, 833 *et seq.*, 835 *et seq.*

<sup>4</sup> Cf. *Buttgenbach, Manuel de droit administratif*, 1954, pp. 191, 201 *et seq.*

<sup>5</sup> Cf. the list in *Andersen, Dansk Forvaltningsret*, 5th ed. 1966, pp. 494, 498.

interest will as a rule prevail, and then a licence granted unconditionally may be withdrawn. This principle will however apply only to a limited extent if the citizen concerned has already incurred particular expense in connection with the licence, e.g. as with construction and trading licences.<sup>1</sup>

With the exception of Article 3 of the Penal Code, which states that any provision increasing penalties shall not have retrospective force, the Danish legal system contains no general prohibition on the retrospective application of statutes. Where the legislature deems it necessary, it may give statutes such retrospective effect. There is however a presumption that a statute is only to have effect for the future.<sup>2</sup> Regulations and administrative provisions can, as a rule, only have retrospective effect if the statute in question makes provision for this.<sup>3</sup>

## Federal Republic of Germany

The comprehensive judicial protection of the individual against State interference in the Federal Republic of Germany has led to a large number of decisions on the question whether and to what extent legislature and administration may interfere with rights of the individual which are already established, and may modify the legal position, and also to a process of ever-increasing differentiation, which makes it difficult to draw the line correctly between those interferences which are lawful and those which are not. In this regard the text of the Constitution provides no help for the organs of State and for legal science; and it has been left to the courts, in particular the Bundesverfassungsgericht, to deduce the appropriate rules from the constitutional principle of the rule of law. At the level of ordinary statutes, there are a variety of different rules for the various areas, such as for the revocation of licences under the law relating to trade, for the withdrawal of approval in the case of a doctor or a pharmacist, etc. The courts have furthermore evolved general unwritten principles of administrative action in accordance with the rule of law which must also be observed. The most important distinctions in the current law of the Federal Republic of Germany will be described below.

The retrospective amendment of statutes to the detriment of the individual is, according to the judgments of the Bundesverfassungsgericht, fundamentally incompatible with the principle of the rule of law in the Constitution, and is therefore unlawful. This seemingly simple principle presents many difficulties in practice. Thus one speaks of a true and a false retrospective effect, and distinguishes between the respective categories; and in relation to amendments of statutes the matter does not always depend on the date upon which the statute is published, but a limited measure of retrospective effect is permitted in cases where the individual must have been able to foresee his position being adversely affected and could make arrangements accordingly. A recent decision<sup>4</sup> summarizes the relevant principles as follows:

'Onerous statutes which interfere with transactions already completed in the past, and thus have a true retrospective effect, are generally contrary to the Constitution since they offend against the requirements of legal certainty and protection of legitimate expectation which form part of the principle of the rule of law.<sup>5</sup> A statute is said to have false retrospectivity when it does not affect past transactions and legal relationships, but affects not merely future ones, but also, for the future, those not yet completed, thereby devaluing after the event the legal position as a whole.<sup>6</sup> Such statutes are in principle permissible. The concept of protection of legitimate expectation may, however, in this case set limits, depending on the facts of the particular situation, to the power of the legislator.<sup>6</sup>

The citizen cannot invoke the protection of legitimate expectation as an expression of the principle of the rule of law if his expectation of the continuance of a legal situation cannot fairly claim to be respected by the legislator. The relevant considerations here are, on the one hand, the extent to which his legitimate expectations have been disappointed, and, on the other hand, the importance of the public good which the legislator is seeking to secure. They must be balanced against each other.<sup>7</sup>

In German constitutional law, seen as a whole, there is thus in principle a prohibition on giving retrospective effect to statutes which impose a liability, but this prohibition is somewhat mitigated by the consideration afforded to the protection of legitimate expectation and to overriding community interests. The principle of the rule of law is not opposed to statutory amendment *pro futuro*; but other constitutional provisions and principles, particularly the protection of property, can prevent statutory interference with the established rights of the individual.

Even more complicated is the legal position in relation to the power of the administration to interfere with the established rights of the individual, or to disappoint his expectations when they are well founded in law. Here, various overlapping legal considerations have a part to play: the lawfulness or otherwise of the existing situation, the protection of the legitimate expectations of the individual, and the weight of the community interests at stake. In the case of rights acquired contrary to law, the following distinctions are drawn: benefits contrary to law which are acquired by fraud, or by the fault of the individual in question, may be revoked retrospectively; payments made or services rendered by the State contrary to law without any fault can however only be withheld for the

<sup>1</sup> Cf. on all the above the comprehensive comments in *Andersen*, op. cit., p. 485 *et seq.*

<sup>2</sup> *Andersen*, op. cit., p. 27.

<sup>3</sup> *Ross*, op. cit., p. 499.

<sup>4</sup> BVerfGE 39, 128 (143 *et seq.*, 145 *et seq.*); cf. also BVerfGE 39, 156 (166 s) and, among earlier cases, e.g. BVerfGE 30, 272 (285 *et seq.*).

<sup>5</sup> BVerfGE 30, 392 (401); consistent case law.

<sup>6</sup> BVerfGE 30, 392 (402); consistent case law.

<sup>7</sup> BVerfGE 14, 288 (301); 22, 241 (249); 24, 220 (230); 25, 142 (154); 25, 269 (291); 31, 222 (228 *et seq.*).

future, and no recovery claimed in respect of the past; finally, in exceptional cases the administration must, in accordance with decided cases, even allow a situation contrary to law to continue, if in the case in question the protection of legitimate expectation so requires. These rules have chiefly been evolved in relation to the payment of pensions. When the administration has acted lawfully, the power to revoke concessions, licences etc. is not without limitation, but such revocation is usually lawful where preponderant interests of the community so require, and the legal provisions in question so permit. The pre-conditions and the consequences of revocation of benefits or licences by the authorities will vary as to the area of human activity affected. It is easily perceived that for the protection of the community, a driving licence for a motor vehicle may be withdrawn from a person whose health is such that he is no longer fit to drive, the approval may be withdrawn from a doctor who is a danger to the public, and a pharmacist's licence may be revoked if he is addicted to drugs. An important provision is contained in Article 51 (1) of the Trade Act (*Gewerbeordnung*):

'Wegen überwiegenden Nachteile und Gefahren für das Gemeinwohl kann die fernere Benützung einer jeden gewerblichen Anlage durch die zuständige Behörde zu jede Zeit untersagt werden. Doch muß dem Besitzer alsdann für den erneuerlichen Schaden Ersatz geleistet werden.'

The first sentence of this provision can perhaps be regarded as a general principle of law, even though the principle of the rule of law has caused it to be formulated explicitly in a statute. In a case of serious conflict between the interests of the community and rights hitherto enjoyed by an individual, the latter must bow to the former, although compensation is to be granted if necessary.

It should be clear that neither the principle of the rule of law whereby the rights of the individual are to be respected by public authority, nor the exceptions therefrom for the benefit of the community can be precisely formulated in any succinct fundamental rights provision; but general clauses are a possibility. According to the law of the Federal Republic of Germany the courts, and not only the *Bundesverfassungsgericht* but particularly the administrative courts, have the duty to be vigilant to ensure both respect for the constraints of constitutional law by the legislature and compliance by the administration with the unwritten and written norms and principles of the rule of law. This duty is discharged effectively, with the result that a body of case-law based on fine distinctions is becoming increasingly difficult to relate back to uniform principles.

## France

As to the prohibition on the retrospective effect of the acts of sovereign authority:<sup>1</sup> in the judgments of the Council d'État it has been repeatedly stated that no administrative act may have retrospective effect prior to the date of its publica-

tion or gazetting.<sup>2</sup> The reason for this prohibition on retrospective effect lies in the principle of legal certainty. The citizen may not have imposed upon him any liability of which he could not have known at the time when he entered upon the activity in question. This prohibition, however does not apply where a statute contains an express provision to the contrary.<sup>3</sup> The problem of retrospective effect must be distinguished from the application of an administrative measure to a situation which in legal terms had come into being prior to the adoption of that measure.<sup>4</sup>

As to the retrospective effect of statutes: under Article 2 of the 'Code Civil', there is a statutory prohibition on retrospective effect: 'La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif'. However, from this specific prohibition on retrospective effect for the purposes of the Code Civil, no general prohibition on retrospective amendment of statutes to the detriment of the individual may be deduced. The problem itself so far as we can see has not been more widely discussed in learned writing. This is due to the fact that until recently statutes could only under very restrictive conditions be reviewed as to their compatibility with the Constitution. From the principles relating to the retrospective effect of administrative acts it can however be inferred that there exists no statutory prohibition on retrospective effect. The Conseil d'État has allowed exceptions from the prohibition on retrospective effect of acts of sovereign authority, whenever the law expressly empowered the administration in that behalf.<sup>5</sup> It may be inferred from this that a statute itself could be amended retrospectively to the detriment of the individual. A prohibition on retrospective effect for statutes would not in any case be in keeping with French legal tradition.

As to revocation of licences:<sup>6</sup> French law proceeds from the principle that the administration can in the public interest always adapt its position to accord with new situations.<sup>7</sup> Thus, regulatory administrative acts ('actes réglementaires') may always be revoked. The persons affected have no protection in respect of any reliance they have placed on the continuance of a regulatory provision. An individual act may however only be revoked at will by the administration, if it has not created a right (*nicht rechtserzeugend*). Acts not creating a right in this sense are deemed to include authorizations ('autorisations') and revocable measures ('actes précaires et révoquables').<sup>8</sup> There is for instance no right to the continuance of a permit for the carrying-on of an activity within the 'domaine public'. Furthermore, any act the object of which is of a provisional nature may be revoked. Even an act creating a

<sup>1</sup> *Debbasch*, op. cit., p. 332 et seq.; *de Laubadère*, *Traité de Droit Administratif*, 6th ed. 1973, Vol. 1, p. 300 et seq.; *Dupeyroux*, *La règle de la non-rétroactivité des actes administratifs*, 1954; *Letourneur*, *Le principe de la non-rétroactivité des actes administratifs*, *Études et documents* 1955, p. 37 et seq.

<sup>2</sup> CE of 25.6.1948, *Société l'Aurore*, D. 1948, p. 437, Note *Waline*.

<sup>3</sup> CE of 14.11.1962, *Dupré de Pomarède*, Rec. 871.

<sup>4</sup> Cf. *Debbasch*, op. cit., p. 333 with references from decided cases.

<sup>5</sup> CE of 14.11.1962 *Dupré de Pomarède*, Rec. 871.

<sup>6</sup> Cf. *de Laubadère*, op. cit., p. 322 et seq.; *Debbasch*, op. cit., p. 333 et seq.

<sup>7</sup> CE of 25.5.1954, *Syndicat national de la meunerie à seigle*, D.1955, p. 49; CE of 27.1.1961, *Vaumier*, Rec. p. 6'.

<sup>8</sup> *Debbasch*, op. cit., p. 334.

right may be revoked if the law so provides. Similarly, revocation is possible if important changes have occurred in the factual or legal setting which militate against the continuance of the act.

The retrospective revocation of an act which has created a right is impossible. This is not so in respect of an act which has created no right. The revocation of an act contrary to law is possible, if it has not resulted in the creation of a right. In such case, revocation may be effected within the time prescribed for objection, or in the course of administrative court proceedings. The principle will apply that wherever a court may quash an act, the administration must likewise be entitled to do so.

## Ireland

On the protection of rights which are already established under Irish law, no more detailed statement can be derived from Irish learned writing or case-law. It can probably be assumed however that the Irish legal system, in so far as it has not been amended by statutes passed after independence, continues to follow the principles of English law, admittedly with the important additional feature that a series of rights, which in the United Kingdom merely form part of the constitutional tradition and are at the mercy of the legislature, are constitutionally secured in Ireland. A general prohibition on the alteration of the legal position to the detriment of the individual, or individual particular prohibitions of this kind, cannot really be deduced from the Irish Constitution. Even the prohibition on statutes with retrospective effect exists, as has been said, only in relation to criminal law. As to the possibility of the revocation of lawfully issued licences, what is said in relation to the United Kingdom holds good here.

## Italy

The question as to the lawfulness of alterations of the legal position to the detriment of the individual, as well as of the revocation or modification of lawfully issued licences to the detriment of the individual, as well as of the revocation of modification of lawfully issued licences to the detriment of the individual, arises in a special way in the Italian legal system, in that the character of the right concerned has a major part to play. The Italian legal system differentiates between four kinds of rights or legally protected interests, which attract differing measures of protection. The most strongly protected are the 'diritti soggettivi (privati e pubblici)' that is, subjective rights; they are defined as interests accorded by law to the individual exclusively, and thus enjoying direct protection.<sup>1</sup> These subjective legal rights cannot be affected or amended by the State.

The second group of rights and legally protected interests comprises the 'diritti affievoliti' or 'diritti esposti ad affievolimento',<sup>2</sup> that is, rights from which derogations have been or

can be made. These are subjective rights which could come into conflict with the interests of public administration. As long as this conflict does not arise, these rights have the same protection as subjective rights. If however such conflict does arise, the interests of the individual are subordinated to the public interest.<sup>3</sup> This correlation of the right of the individual and the public interest can arise from the moment the right comes into being or only subsequently; in the first case the rights are called 'diritti affievoliti', and in the second 'diritti esposti ad affievolimento'. An example of typical 'diritti affievoliti' are the rights arising under concessions; and an example of the 'diritti esposti ad affievolimento' is the right of property, the 'affievolimento' of which may, in an extreme case, be expropriation. All fundamental rights to which a reservation attaches can generally be taken as examples of 'diritti esposti ad affievolimento'. The protection of the 'diritti affievoliti' is equivalent to that of the 'interessi legittimi', the third kind of right now to be described in detail.

The 'interesse legittimo' is an interest of the individual which is closely bound up with the public interest.<sup>4</sup> If the public interest is a preponderant one the right of the individual must be subordinated thereto. This means that the administration may always revoke or modify at will any alteration in an individual's right where it is a 'diritto affievolito' or an 'interesse legittimo', if this is in the public interest.<sup>5</sup> The fourth group of rights is what are called the 'interessi semplici'<sup>6</sup> which are not recognized by law. The protection of these interests is normally effected by the administrative authorities but rarely by the administrative courts.<sup>7</sup>

The position is therefore that the rights of individuals may not be altered, if such rights are subjective rights, but that all other forms of rights may be altered at any time, if there is an over-riding public interest. Whether any right is a subjective right will be determined by the court whose jurisdiction is invoked; moreover, this can as a rule be elicited from the provision of law regulating the right in question. Thus, for instance, all fundamental rights to which a reservation attaches are to be regarded as 'diritti esposti ad affievolimento'; whether in any given case the limitation of the right is justified is for the courts to decide. In the case of concessions, approvals, etc. any alteration in the rights granted to the individual is always lawful, if the public interest demands it. If the public interest, for instance, requires the revocation of a concession, this is not, according to Italian legal thought, an instance of the revocation of an unimpeachable administrative act to the detriment of the individual, but is rather the revocation of an administrative act which was originally unimpeachable but which has become defective by reason of

<sup>1</sup> Zanolini, *Corso di diritto amministrativo*, I, p. 187.

<sup>2</sup> Sandulli, *Manuale di diritto amministrativo*, p. 74 *et seq.*

<sup>3</sup> Zanolini, *op. cit.*, p. 189.

<sup>4</sup> Landi/Potenza, *op. cit.*, p. 149, Consiglio di Stato, 24.11.1962 No 13 and 8.1.1966 No 1 in *Il Consiglio di Stato* 1962, I, p. 1734 and 1966, I, p. 1.

<sup>5</sup> Cf. Consiglio di Stato, IV, 30.3.1966 No 182, in *Il Consiglio di Stato* 1966, I, p. 478.

<sup>6</sup> Zanolini, *op. cit.*, p. 192.

<sup>7</sup> Landi/Potenza, *op. cit.*, p. 153.

the subsequent disappearance of the proper relationship between the act and the requirements of good administration. The legal basis for any such revocation is the principle that the action of the public administration must at all times accord to the greatest possible extent with the public interest.

The question whether statutes may be retrospectively amended to the detriment of the individual is dealt with in Article 11 of the Disposizioni sulla legge generale (also called *preleggi*), which states that the provisions of statutes may only affect the future and may not have any retrospective effect. (La legge non dispone che per l'avvenire: essa non ha effetto retroattivo). Plainly however this rule does not apply in an absolute way.<sup>1</sup> An amendment may however only be effected by a statute, that is, a source of law of equal status, whereby repeal will take place either implicitly, by virtue of the *lex posterior* rule, or expressly under the provisions of the new statute. A legislative amendment is also possible by means of a referendum (Article 75 of the Constitution, Article 27 of the Law of 25 May 1970, No 352). Criminal statutes are completely excluded from any retrospective effect (Article 25 (2) of the Constitution) and this must be extended by way of analogy to disciplinary measures.<sup>2</sup>

It is difficult to answer the question as to the possible effect of a statute, if the law hitherto in force has led to the creation of what is termed a 'diritto quesito' (acquired right) which in principle should not be affected by the new provision. No such *diritto quesito* will arise if the previous law had only conferred on the individual in question an expectation, or a legitimate interest. There is no answer of general validity to the question when a *diritto quesito* arises; opinion is divided and each case will require particular scrutiny.<sup>3</sup> All we can really say is that only criminal statutes and disciplinary provisions are subject to a strict prohibition of retrospective effect; in all other cases such effect must as a rule be affirmed where there is a preponderant public interest; however, where there are rights lawfully acquired (*diritti quesiti*), the individual case must be examined. There are however moves to extend the absolute prohibition on retrospective effect to fiscal legislation,<sup>4</sup> although the constitutional court has repeatedly declared retrospective fiscal legislation to be constitutional.<sup>5</sup>

## Luxembourg

The law of Luxembourg does not contain any evident prohibition on altering the legal position to the detriment of the individual. Whether Article 16 of the Constitution<sup>6</sup> belies this appears doubtful, since hitherto the judgments of the courts in relation to Article 16 have dealt essentially with expropriation of immovable property and compensation therefor.<sup>7</sup> Here we must refer to the legal position in Belgium, which frequently influences the Luxembourg legal system.

Similarly there is no express prohibition on the retrospective effect of statutes. Such effect has from time to time been denied by the courts in cases of individual statutes on the foot-

ing that such effect was not therein contemplated, but not for reasons of principle.<sup>8</sup> From this we can deduce that apart from criminal law the legal system of Luxembourg contains no general prohibition on such retrospective effect.

In terms of constitutional law it is also lawful to revoke or modify duly issued licences to the detriment of the individual. The courts do however require express statutory authority on the part of the administration. According to the decided cases, the administration is not entitled to revoke a licence at will; this may only be done in the cases contemplated by statute, and on the basis of circumstances which have arisen after the licence has been issued.<sup>9</sup>

## The Netherlands

Save in the more recent decided cases referred to below, there is in the Netherlands no prohibition on alterations of the legal position to the detriment of the individual. Retrospective amendment or retrospective enactment of statutes is precluded by Article 4 of the Law containing General Provisions in relation to Legislation;<sup>10</sup> but that Article is a provision having no more than the force of an ordinary statute, and is not formulated as a general constitutional principle.<sup>11</sup> The said provision is not directed to the legislature but to the courts, who have thereby placed at their disposal the presumption of construction that statutes are not enacted with retrospective effect unless there is specific provision.<sup>12</sup> Statutes having retrospective effect, though infrequent in the Netherlands, are none the less not unlawful.<sup>13</sup> In the context of law reform, however, the adoption into the Constitution of the principle of the prohibition on retrospective effect is being urged.<sup>14</sup>

The extent to which the administration is free to revoke licences depends on the extent to which it was under a duty

<sup>1</sup> Cf. Consiglio di Stato IV, 30.4.1955, No 297 and VI, 11.7.1956, No 508 in II Consiglio di Stato, 1955, I, p. 440 and 1956, I, p. 1002.

<sup>2</sup> *Zanobini*, op. cit., p. 108.

<sup>3</sup> Cf. *Romano*, Corso di diritto amministrativo, p. 72 *et seq.*; *Cammeo*, Corso di diritto amministrativo ristampa 1960), p. 252 *et seq.*; *Landi/Potenza*, op. cit., pp. 23 *et seq.*, 25; *Mortati*, op. cit., p. 345 with references to other works.

<sup>4</sup> Cf. the references in *Mortati*, op. cit., p. 346, Note 3.

<sup>5</sup> Cf. Corte Costituzionale, 9.3.1959, No 9, 16.6.1964, No 46, and many other decided cases.

<sup>6</sup> 'Nul ne peut être privé de sa propriété que pour cause d'utilité publique dans le cas et de la manière établis par la loi et moyennant une juste et préalable indemnité'.

<sup>7</sup> Cf. Cour de Cassation, judgment of 4.6.1953, Pas. Lux. XV, p. 493 on the substance of ownership. In connection with expropriation: judgment of 26.11.1915, Pas. Lux. IX, p. 487; Tribunal de Luxembourg, judgment of 15.6.1908, Pas. Lux. VIII, p. 14; judgment of 13.7.1955, Pas. Lux. XVI, p. 455; judgment of 28.10.1953, Pas. Lux. XVI, p. 29; judgment of 6.1.1960, Pas. Lux. XVIII, p. 175. In respect of the guarantee of ownership: *Majerus*, op. cit., p. 62 *et seq.*

<sup>8</sup> Cour supérieure de justice, judgment of 9.7.1959, Pas. Lux. XVIII, p. 5; Conseil supérieur des assurances sociales, judgment of 12.2.1953, Pas. Lux. XV, p. 467; Conseil arbitral des assurances sociales, decision of 30.6.1959, Pas. Lux. XVIII, p. 46.

<sup>9</sup> Conseil d'État, Comité du contentieux, judgment of 30.4.1952, Pas. Lux. XV, p. 441.

<sup>10</sup> Wet van 15 mei 1829, houdende algemeene bepalingen der wetgeving van het Koninkrijk (AB).

<sup>11</sup> *Oud*, op. cit., Vol. II, p. 171.

<sup>12</sup> *Duk*, Terugwerkende Kracht, Geschriften van de Vereniging voor Administratief Recht, 54 (1965) pp. 5 *et seq.*, 51.

<sup>13</sup> Cf. the list in *Oud*, op. cit., p. 174.

<sup>14</sup> Thus *Jeukens*, Terugwerkende Kracht, Geschriften, loc. cit., pp. 53 *et seq.*, 94.

to grant such licences. A revocation may not be founded on reasons which would not justify a refusal of the licence. A licence the granting of which is not regulated by statute may be revoked, if the public interest requires such revocation and is not disproportionate to the interests of the person benefiting by the licence.<sup>1</sup> Modifications of a licence are subject to restrictions in so far as they represent a substantial alteration in the licence originally issued.<sup>2</sup>

Certain statutes themselves contain provisions relating to the revocation of licences, such as the Law relating to the Carriage of Persons, the Cinema Law, the Law relating to Places of Refreshment and Closing Hours.<sup>3</sup> In these cases the fact that the issue of a licence is provided for by statute means that the administration is similarly bound as to revocation. On the other hand a licence the issue of which is in the discretion of the administration may be revoked at will. Originally the courts accepted such revocation at will.<sup>4</sup> More recent judgments however reveal a change. In these judgments there have been developed general principles of administrative law which run contrary to revocation at will. This revocation now requires the presence of real grounds,<sup>5</sup> or the principle of legal certainty and of protection of legitimate expectation is invoked.<sup>6</sup> In social security matters the importance of the rights lawfully acquired by the insured ('verkrigen rechten') has been held to preclude revocation at will.<sup>7</sup>

For the rest, the opinion seems to be gaining ground that in cases of revocation of licences there has to be a weighing-up of the respective public and private interests.<sup>8</sup> This may sometimes mean that while the revocation is lawful the person affected must be compensated.<sup>9</sup>

## United Kingdom

Under the constitution of the United Kingdom there can be no general prohibition flowing directly from the constitution on the alteration of the legal *status quo* to the detriment of the individual. None the less there is a kind of constitutional tradition whereby rights lawfully acquired are to be respected. This is shown in the basic inclination of the legislature not to expropriate without compensation, and in the inclination of the courts not to construe statutes in such a way as to allow expropriation without compensation.<sup>10</sup>

Nor can there be any rigorous prohibition on retrospective statutes under the British constitutional system. British constitutional tradition is however reluctant to give statutes retrospective effect. In particular the reluctance to enact retrospective criminal statutes is a well-established part of this tradition. The question of the lawfulness of retrospective statutes has recently played a part in the controversy surrounding the *Burmah Oil* case. The House of Lords had in this case found in favour of an award of compensation for loss of certain facilities in Rangoon as a result of hostilities. The British Government thereupon introduced a bill in the House of Commons which prohibited the payment of such compensation and which had retrospective force, that is, it disentitled the

plaintiffs in *Burmah Oil* from the compensation already awarded to them. During the debates on the bill in the House of Lords grave reservations were voiced against the bill on account of the prohibition on retrospective legislation. The House of Lords finally passed the bill, but it was clear that this was only because of the particular circumstances of the case, because ultimately the victims of the hostilities in Burma would have been placed in a considerably better position than those in the United Kingdom, who had no entitlement to compensation. The prohibition on retrospective legislation as a constitutional principle was heavily emphasized throughout the debate.<sup>11</sup>

Decisions made by the administration within the ambit of its powers are in principle binding on the administration.<sup>12</sup> On the other hand, the administration cannot bind itself by an act which is *ultra vires*. Accordingly, such an act may always be revoked. A difficult question is whether acts which at the time they were promulgated were *intra vires* can be revoked by reason of changes in the factual and legal setting. Learned authors assume this to be so.<sup>13</sup> These general principles are however only applicable in so far as there are no specific statutory rules.

## Assessment

The preceding conspectus has demonstrated some basic underlying features but leaves a bewildering variety of individual questions. Apart from the prohibition on retrospective criminal statutes, only in the case of the Federal Republic of Germany can we speak of a prohibition on retrospective legislation that is reasonably clear and firm and also subject to judicial review. In all other Member States of the European Community the legislature is considered to have the power to enact formal statutes having retrospective effect even to the detriment of the individual. It is true that in various legal sys-

<sup>1</sup> Rapport van de commissie inzake algemeene bepalingen van administratief recht, 4th ed., p. 108.

<sup>2</sup> Rapport, op. cit., p. 109.

<sup>3</sup> Rapport, op. cit., p. 102.

<sup>4</sup> Centrale Raad van Beroep, judgment of 30.9.1924, AB 1924, No 4, 380; 20.12.1957, Gem. St. 1957, 5469; judgment of 30.5.1961, RSV 1961, No 135; Hoge Raad, judgment of 19.10.1936, NJ 1937, No 154; Gerechtshof Amsterdam, judgment of 30.6.1961, NJ 1962, No 486.

<sup>5</sup> Centrale Raad van Beroep, judgment of 22.12.1955, AB 1956, No 402 *et seq.*

<sup>6</sup> Centrale Raad van Beroep, judgment of 13.1.1959, AB 1959, 222; judgment of 12.12.1969, AB 1971, No 130; Gerechtshof te 's Gravenhage, order of 23.6.1971, NJ 1971, No 308. In this case the President of the Court in interlocutory proceedings ordered the Government to continue to pay subsidies.

<sup>7</sup> Centrale Raad van Beroep, judgment of 7.11.1963, AB 1965, No 180; judgment of 23.1.1964, AB 1965, No 594.

<sup>8</sup> Rapport, op. cit., p. 107.

<sup>9</sup> Koninklijk Besluit of 19.12.1969, AB 1970, No 318; Koninklijk Besluit 8.4.1970, AB 1970, No 577.

<sup>10</sup> Cf. *Daintith*, op. cit., p. 300, and the example in *Wade*, op. cit., p. 180 *et seq.*; cf. further *Street/Wortley*, State and Private Property in English Law, Staat und Privateigentum, 1960, p. 131.

<sup>11</sup> *Daintith*, op. cit., p. 292; *Goodhart*, The *Burmah Oil* Case and the War Damage Act of 1965, Law Quarterly Review 82 (1966), p. 97 *et seq.*

<sup>12</sup> Cf. *Fazal*, Reliability of Official Acts and Advice, Public Law, 1972, p. 43 *et seq.*; *Ganz*, Estoppel and res judicata in Administrative Law, Public Law 1965, p. 237 *et seq.*

<sup>13</sup> *Ganz*, op. cit., p. 253 *et seq.*

tems there are presumptions as to the substance of such statutes, namely that in cases of doubt they are not to be given retrospective effect, and that other doubts have been expressed against the retrospective divesting of rights (compare for instance the doubts expressed in the British House of Lords), and that to some extent there is a demand, as in Italy, that retrospective fiscal legislation be prohibited. Such presumptions, doubts and demands can be seen as evidence for the fact that the giving of retrospective effect to statutes which impose a liability is constitutionally doubtful or repugnant; however, in most countries it is, in the final analysis, left to the legislature to decide whether for reasons of public interest there should be any retrospective effect.

Even less than a general prohibition on retrospective effect is it possible to demonstrate and justify any prohibition on the withdrawal even by statute of rights of the individual which have already been granted, and of vested individual rights. On the contrary, the legislature is in principle, and subject always to specific provisions such as those protecting property, not precluded in terms of constitutional law from interfering with rights lawfully vested, and in this the question as to whether compensation shall be granted is very much left to the sovereign decision of parliament.

As regards the interference with vested or subsisting rights of individuals by administrative measures, we find in the various legal systems discussed a bewildering variety of statutory provisions, of general legal principles developed by the courts and by learned authors, and of particular aspects of detail. As a general principle it may well be accepted that the rights and interests of the individual must as a rule give way to preponderant community interests, that is, that the administration (usually on the basis of statutory provision), may interfere with rights, revoke or modify licences, if this is urgently required for reasons of public interest, in which case liability to pay compensation is probably more the exception than the rule. The prerequisites for, and the extent of, any interference with the rights of individual differ according to the sphere of activity in question and the interests at stake and cannot be regulated uniformly.

The fact that public authority is enjoined to respect the reliance placed by the individual on the existing legal position and on the continuance of vested rights can, on the whole, probably be seen as a general legal principle within the law of the Member States as well as in the law of the European Community; but it can scarcely be regarded as a constitutionally secured fundamental right. The adoption into a European catalogue of fundamental rights of any provision in this regard would certainly encounter considerable difficulties and require reservations expressed in general terms. This comparative legal study has shown that national law cannot provide any convincingly formulated precedents.

## IV — Summary and outlook

### 1. Protection of fundamental rights under existing Community law

The Treaties relating to the European Communities contain individual provisions and reference points for the protection of the rights of the individual, but they contain no concluded catalogue of fundamental rights, nor do the various rules of Community law scattered throughout the Treaties together amount to a complete protection of all fundamental rights which might be infringed by Community authority.

The absence of written provisions relating to fundamental rights on the part of the Community does not, however, mean that the Community and its organs are not bound by fundamental rights. The position is rather that Community law, like the law of other international organizations and the written law of the individual States, requires to be supplemented by unwritten legal principles, which include, predominantly, fundamental rights and human rights. These legal principles, which supplement written Community law and are of equal status with primary Community law, can by means of comparative legal studies be identified out of the law of the Member States and from the rules of international law, including the ECHR, by which these States are bound. In its judgments the Court of Justice of the European Communities has with increasing precision acknowledged that Community law bears the imprint of fundamental rights which belong to the legal principles common to all Member States and which are embedded in their understanding of law; with this we would agree. The progressive development and deployment of general principles within the field of fundamental rights is part of the legitimate duties of the judicial arm, and of the jurisdiction of the Court of justice, as defined in the Community Treaties, to maintain Community law. In the nature of things it is only gradually and by the surmounting of uncertainties that judicial acknowledgment and implementation of unwritten legal principles can lead to a secured canonical corpus of protected fundamental rights.

In spite of the uncertainties and deficiencies in the safeguarding in practice of fundamental rights under Community law, it cannot be assumed that without the incorporation into written Community law of a formal catalogue of fundamental rights, the essential rights of the individual will remain unprotected. Written Community law, the common legal principles of the Member States and the rules of international law relating to the protection of fundamental rights, seen as a whole, do provide, so far as can be foreseen, an adequate and reasonable measure of protection of fundamental rights against the action of Community organs.

## 2. Basic questions in relation to a catalogue of fundamental rights in the European Communities

Despite the fact that the lack of written provisions of Community law within the field of fundamental rights can be made good by evolving general principles of law—which in my opinion would be adequate—a written catalogue of fundamental rights in the European Communities would undoubtedly have many advantages. Such a catalogue would increase the certainty of law, reduce the difficulties of law-making judicial labour, and lend weight to the democratic entrenching of fundamental rights in Community law. Such a catalogue of fundamental rights could only become legally binding by means of a formal supplement to the Community Treaties, in the form of an international treaty to be ratified according to the law of the Member States.

If it is desired, by means of a comparison of the guarantees of fundamental rights in the nine Member States, to determine their common elements and to draw up on this basis a catalogue of fundamental rights under Community law, there are in principle two ways of doing this. It would be possible to concentrate on examining what fundamental rights, irrespective of all questions of their detailed implementation, really are in principle recognized in the various States; an attempt could then be made, having regard to the requirement of the Community legal order, to find appropriate independent formulations of 'European fundamental rights'. Alternatively, the comparative method might attempt to examine, in respect of each fundamental right individually, how far it is, both in law and in fact, protected in the States concerned. On this basis an attempt could then be made to draft a catalogue of fundamental rights embracing the whole Community. Any investigation of this kind would require extremely extensive and time-consuming preparatory work, and its value from the point of view of development of the law might well be doubted.

The fundamental rights to be incorporated into such an inventory cannot easily be defined. The priority would be to secure those fundamental rights which could be particularly vulnerable to attack by Community authority. Of the classical fundamental rights, few seem greatly to be threatened by Community organs. Protection is primarily needed for those fundamental rights which secure the individual's freedom of economic development; in addition to the principle of equality, there is for instance the protection of property, the freedom of trade or occupation and the freedom of movement; moreover requirements of the rule of law such as that of legal certainty, or the principles of proportionality and of protection of legitimate expectation, need to be safeguarded, although it is extremely difficult to frame these principles in the form of clear-cut fundamental rights.

The fact that some fundamental rights are particularly apt to be infringed by Community authority and are therefore to be

protected as a matter of priority, should not, however, obscure the fact that numerous other fundamental rights can, if only in exceptional cases, acquire significance under Community law; any catalogue of fundamental rights purporting to be comprehensive would therefore require to be more widely drawn.

Even certain rights of the individual which *a priori* seem safe from interference by the Community may in particular cases require protection. For instance, the criminal law principle of *ne bis in idem* may be of significance in connection with the imposition of sanctions in cartel law or in the law relating to the discipline of those in the service of the Community. Press freedom may be affected by measures taken for economic purposes. The freedom of conscience, of opinion, and of scientific and artistic endeavour may require protection, at least for a limited class of persons, namely those in the service of the Community. Any consideration of the establishment of a catalogue of fundamental rights for the European Communities must therefore deal with the question whether only the most important and the most threatened of the fundamental rights are to be expressly guaranteed, or whether all fundamental rights which could possibly be breached by Community authority should be included. In the latter case, a comprehensive catalogue would have to be drawn up, whereas in the case of a catalogue restricted merely to a few fundamental rights there would be a need to avoid giving the impression that all fundamental rights not expressly mentioned were left unprotected, even if the general principles of law of the Member States require their protection.

A further question requiring an answer is whether and, if so, to what extent, social and democratic fundamental rights should be included in a catalogue of fundamental rights. What is the position of the right to work or the right of participation in the realizing of Community interests? In view of the widespread demand for extension of the powers of the European Parliament, the question of the establishment under the Treaty of a right of petition for the individual must be considered. Recently there has been discussion of the question whether the nationals of a Member State should be entitled to vote in elections at local level in other States of the Community. Should a provision to this effect be included in any European catalogue of fundamental rights? In answering this question, regard would need to be had to whether the national law of individual Member States at present grants voting rights to foreigners, or whether in this respect constitutional amendment would be necessary. Finally it must be considered whether the system of legal protection of the EEC Treaty is in need of amendment intended to bring about increased protection of the individual's fundamental rights.

Comparative legal studies may certainly be of help in evolving a catalogue of fundamental rights, but such help appears to be of limited value. The fundamental rights discussed above, incompletely and by way of example, show that while the legal systems of the Member States have much in common at the level of principle, there do however remain considerable differences in detail. It is, above all, impossible to dispense



with more detailed examination and definition of lawful restrictions on fundamental rights. There will, in the majority of cases, be no alternative to providing for possible restrictions, since conflicts between individual interests and demands of the community are unavoidable and in many cases have to be resolved in favour of the general good. In view of the heterogeneity of the activities that require to be regulated, definitions of fundamental rights can rarely be drawn clearly and conclusively; accordingly, provisions in general terms will be essential. This in turn will involve the risk that the fundamental rights will be left turning in the void.

### 3. Outlook for future legal development

It is the duty of those having political authority to weigh up the reasons in favour of a formal catalogue of fundamental rights in the law of the European Communities against the difficulties and disadvantages of such a catalogue, and to arrive at their decision on the basis of such an appraisal. In concluding this study, it only remains to set out some points which will have to be taken into account in that appraisal.

I do not believe that the protection of the individual's fundamental rights can be appreciably improved by a catalogue of fundamental rights as part of the law of the Community, in relation to the protection currently available. As has been shown, the general legal principles of the Member States and of international law are capable of making good any absence of express provisions in the Treaties of the Communities. The Court of Justice of the European Communities has recognized and has assumed this duty. It can be expected the Court of Justice will follow the path it has already taken and will set to right breaches of fundamental rights by other Community organs. It is hardly conceivable that rights of the individual which are important and deserving of protection will remain unprotected because of the lack of a catalogue of fundamental rights, since the general legal principles of the Member States will probably contain all those guarantees which are also inalienably part of Community law. If the protection of fundamental rights is entrusted to the Court of Justice by way of general legal principles, Community law can progressively be developed by judgments rendered in accordance with practical needs.

A catalogue of fundamental rights in the European Community would on the other hand strongly emphasize the importance attaching to fundamental rights, and dispel any lingering doubts as to their relevance to Community law. It would moreover, be possible to go beyond the present position, as determined by general legal principles, and to extend the protection of fundamental rights by a political decision. When evolving a catalogue of fundamental rights it should however be kept in mind that recourse to general legal principles should not be excluded, since even the most elaborate list

cannot contemplate all possible threats to the individual's rights, and make provision for them.

This illustrates, moreover, that a European catalogue of fundamental rights may involve not only advantages, but also dangers and even a retreat from the legal position already attained. After the recent decisions of the Court of Justice of the European Communities<sup>1</sup> it is scarcely conceivable that situations involving fundamental rights, which would in one of the Member States be regarded as substantial and inviolable, are unprotected in Community law. In these decisions, regard is had to the state of the law in all nine Member States so as to arrive at the maximum guarantees for fundamental rights. If a European catalogue were to lay behind this—and in view of the difficulties of drawing up a comprehensive catalogue, this is certainly not unlikely—the protection of fundamental rights might in the end be weakened rather than strengthened by codification.

If any binding catalogue of fundamental rights is to be evolved, this would in any event require extensive preparatory work and discussion at Community level as well as in the Member States. If the catalogue is to be founded on a broad basis of comparative law, considerable difficulties will have to be overcome and detailed examination will be necessary. Initially the question to be asked would presumably be: which fundamental rights appear necessary or important, in view of the structure and the tasks of the Community? With this, one would also have to consider whether the catalogue should be restricted to protective rights, or should also contain social fundamental rights and rights of democratic participation. This should be followed by detailed studies—perhaps on the basis of a questionnaire—on the way in which these fundamental rights are guaranteed under the current law of the different States and to what extent they are subject to reservation. From the comparative material thereby assembled it would then be necessary to distil the various common features and differences. In any event, the outcome must be a matter for political decision. It seems to me doubtful whether comparative legal studies going beyond mere review of principles into more detailed scrutiny could facilitate any such decision to any degree, since no catalogue of fundamental rights can, in the final analysis, do without reservations couched in general terms.

In my opinion a different means of strengthening fundamental rights in Community law should be considered. The gradual development of fundamental rights by the Court of Justice alone without any formal basis in Community legislation, as opposed to a formal and binding catalogue of fundamental rights, is open to criticism chiefly on the grounds that the judicial authority lacks any direct democratic mandate (Legitimation) and that it ought to be entrusted with an independent law-making function only within certain limits. This argument could be countered by the other Community or-

<sup>1</sup> See above II, 3.

gans—Parliament, Council, Commission—acknowledging by express declaration the validity of fundamental rights in the European Communities and their protection by the Court of Justice, without any formal treaty in this respect. It could in this way, even without formal binding force, be emphasized that the protection of fundamental rights is, in the view of all Community organs, secured under Community law at present, and that such protection is to be developed by the Court of Justice on the basis of general legal principles. Such a declaration would, in my opinion, not change the existing legal position, but could none the less help to deal with existing legal uncertainties and dispel misgivings.