

Fordham International Law Journal

Volume 14, Issue 3

1990

Article 4

Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights

Mary Frances Dominick*

*

Copyright ©1990 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights

Mary Frances Dominick

Abstract

This Article considers the Commission's initial step toward a Community bill of rights-its 1979 proposal for accession to the European Convention. That proposal was prompted in large measure by a 1974 decision of the German Constitutional Court. Due to the importance of this rulings for Community human rights jurisprudence, their significance and substance are examined in some detail in Part II of the Article. In Part III, the Council of Europe's European Social Charter is contrasted with the Community Charter, the former document having been signed, though not ratified, by all twelve Community Member States.

TOWARD A COMMUNITY BILL OF RIGHTS: THE EUROPEAN COMMUNITY CHARTER OF FUNDAMENTAL SOCIAL RIGHTS

*Mary Frances Dominick**

INTRODUCTION

In October 1989, the Commission of the European Communities (the "Commission") took its second major step in ten years toward a Community bill of rights by submitting a draft Community Charter of Fundamental Social Rights to the Council of Ministers of the European Communities (the "Council of Ministers" or the "Council").¹ The first step was its 1979 proposal to the Council of Ministers that the European Community (the "Community" or the "EC") should accede to the European Convention on Human Rights and Fundamental Freedoms, a document designed primarily to protect classic civil and political rights rather than economic and social

* Legal Officer, U.N. Administrative Tribunal; Jervey Fellow, Wein Fellow, Columbia University; L.L.M., Columbia University, 1984; J.D., Vanderbilt University, 1980; B.A., Vanderbilt University, 1977. The views expressed herein are those of the Author and do not necessarily reflect the views of the United Nations. The Author is indebted to Bernard Paulin, formerly of the Legal Service, Commission of the European Communities, and to Professor Alejandro Garro, Columbia Law School, for making this research possible. She also wishes to thank Professor George Bermann of Columbia Law School, Professor Matthias Herdegen of Bonn University, Dr. Rainer Hofmann of the Max-Planck Institute für ausländisches Recht und Völkerrecht, and Dr. Ulrich Wölker of the Legal Service, Commission of the European Communities for helpful comments during the preparation of this Article.

1. COM(89) 471 final, 2 Oct. 1989, adopted by the Commission of the European Communities [hereinafter Commission] on Sept. 27, 1989 [hereinafter Draft Community Charter]. The Council of Social Affairs Ministers amended the text on October 30, 1989, before submission to the European Council in Strasbourg, a body separate and distinct from the Council of Ministers of the European Community.

"Community," "European Community," and "EC" will be used throughout this Article to refer to the three separate Communities: European Coal and Steel Community (ECSC), European Atomic Energy Community (Euratom), and the European Economic Community (EEC). Treaty Establishing the European Coal and Steel Community, April 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-I & II), 298 U.N.T.S. 169 (1958).

rights. The Community Charter of Fundamental Social Rights (the "Community Charter"), adopted by an eleven-to-one majority of the European Council at its December 8-9, 1989 meeting in Strasbourg,² contains thirty articles elaborating ten basic social and economic "rights" of workers and citizens: (1) freedom of movement; (2) employment and remuneration; (3) improvement of living and working conditions; (4) social protection; (5) freedom of association and collective bargaining; (6) vocational training; (7) equal treatment for men and women; (8) workers' right to information, consultation, and participation; (9) health and safety protection at the workplace; and (10) protection of children and adolescents, elderly persons, and disabled persons.

The Community Charter is significant for several reasons, the most important being the recognition that constitutionalization of fundamental rights—civil and political as well as economic and social—is an essential feature of a choate federal system. The Single European Act,³ in the view of some scholars a weak compromise to the European Parliament's (the "Parliament") 1984 Draft Treaty on European Union,⁴ omits that body's recommendation that the Community consider accession to both the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention on Human Rights")⁵ and the European Social Charter.⁶

2. The Charter was adopted over the objection of the United Kingdom. See *Agence Europe*, Dec. 11-12, 1989, No. 5151, at 3; European File, Community Charter of Fundamental Social Rights of Workers, May 1990, at 2 [hereinafter Community Charter].

3. Single European Act, O.J. L 169/1 (1987), Common Mkt. Rep. (CCH) ¶ 21,000. See generally Jacqu , *L'Acte unique europ en*, 22 *REV. TRIM. DE DROIT EUROP EN* 575 (1986); Pescatore, *Some Critical Remarks on the Single European Act*, 24 *COMMON MKT. L. REV.* 361 (1987); Glaesner, *The Single European Act: Attempt at an Appraisal*, 10 *FORDHAM INT'L L.J.* 446 (1987); Bermann, *The Single European Act: A New Constitution for the Community?*, 27 *COLUM. J. TRANS. L.* 529 (1989) (all discussing Single European Act).

4. Draft Treaty Establishing the European Union, O.J. C 77/33 (1984) [hereinafter Draft Treaty]; see F. CAPOTORTI, M. HILF, F. JACOBS & J.-P. JACQU , *THE EUROPEAN UNION TREATY* (1986) (trans., *LE TRAIT  D'UNION EUROP ENNE* (1985)); R. BEIBER, J.-P. JACQU  & J. WEILER, *AN EVER CLOSER UNION* (1984); Jacqu , *The Draft Treaty Establishing the European Union*, 22 *COMMON MKT. L. REV.* 19 (1985).

5. *Opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

6. *Opened for signature* Oct. 18, 1961, 529 U.N.T.S. 89.

Both the European Convention on Human Rights and the European Social Charter were concluded under the auspices of the Council of Europe, the twenty-one member state organization which includes all twelve EC Member States. While the preamble to the Single European Act acknowledges "the fundamental rights recognized in the constitutions and laws of Member States, in the [European Convention on Human Rights], and the European Social Charter, notably freedom, equality, and social justice," it does not contain the Parliament's proposal that a declaration on fundamental rights tailored to the Community's needs be adopted.⁷ The Community Charter begins the process to meet the Parliament's demands (however inadequate Parliament believes it to be)⁸ despite its disclaimer that "the implementation of the Charter must not entail an extension of the Community's powers as defined by the Treaties."⁹

On a jurisprudential level, the Community Charter challenges the Community's adoption, in fact if not in theory, of British common law creation of constitutional principles. It elevates judicial decisions to the level of a primary source of law, reifying judicial discretion and relying upon the doctrine of precedent to protect Community citizens' fundamental rights. It reflects a continental or civil law bias toward text, a prefer-

7. Single European Act, *supra* note 3, preamble, O.J. L 169/1, at 1; see Draft Treaty, *supra* note 4, O.J. C 77/33, at 36-37, art. 4(3). One author suggests that inclusion of reference to the Convention in the Preamble of the Single European Act prompted the Court of Justice of the European Communities to refer to it "as a source of law in terms which differ slightly but significantly from those of a comparable dictum a year earlier." Edward, *Constitutional Rules of Community Law in EEC Competition Cases*, 13 FORDHAM INT'L L.J. 111, 119-20 n.45 (1989-1990), 1989 FORDHAM CORP. L. INST. 383 (B. Hawk ed. 1990) (citing UNECTEF (Union of Football Trainers) v. Heylens & Ors., Case 222/86, 1987 E.C.R. 4097, 4117, ¶ 14, Common Mkt. Rep. (CCH) [1989] 1 CEC 131; Johnston v. Chief Constable of Royal Ulster Constabulary, Case 222/84, 1986 E.C.R. 1651, 1682, ¶ 18, Common Mkt. Rep. (CCH) ¶ 14,304, at 16,887).

8. The European Parliament "[c]ondemns the inadequacy of the Social Charter adopted by the Council." See Resolution of December 14, 1989 on the European Council in Strasbourg and the French Presidency's Six Months in Office, O.J. C 15/315, 316 (1990); see also Texts adopted by the European Parliament: Community Charter of Fundamental Social Rights—Social and economic cohesion, O.J. C 323/44 (1989); Resolution adopting the Declaration of Fundamental Rights and Freedoms, O.J. C 120/51 (1989). For a critique of the latter resolution, which is limited to rights concerning working conditions (article 13) and social assistance (articles 2, 15), see *Editorial Comments*, 26 COMMON MKT. L. REV. 589 (1989).

9. Community Charter, *supra* note 2, preamble.

ence for codification rather than judicial pronouncement of basic rights, and a partial remedy for what has come to be known as the European Community's "democratic deficit."¹⁰

On a pragmatic level, the Community Charter endorses such controversial concepts as "codetermination," a worker/management participation plan that seems to reinvigorate the controversial Vredling proposal¹¹ and its progeny, albeit without mechanisms for enforcement. As will be discussed below, the Community Charter arguably invites affirmative action for women by providing that "[e]qual opportunities for men and women must be developed."¹² Many of the rights enumerated are already the subject of existing provisions of the Treaty Establishing the European Economic Community (the "EEC Treaty"), decisions of the Court of Justice of the European Communities (the "Court of Justice" or the "Court"), and Community legislation; nonetheless, the Community Charter could eventually provide clearer constitutional status and potentially affect issues such as standing, and perhaps level of scrutiny, should this doctrine ever emerge in the Community's constitutional jurisprudence. Though such an outcome is certainly not preordained, especially because the final draft ascribes the ambiguous character of "declaration" to the Community Charter, this catalogue conceivably could be directly invoked by Community citizens as part of their bill of rights.¹³ This result might be more likely if the Community Charter is

10. See *Internationale Handelsgesellschaft*, Case 2 BvL 52/71, 37 BVerfGE 271, [1974] 2 C.M.L.R. 540 [hereinafter *Solange I*] (discussing term "democratic deficit"); see also Edward, *supra* note 7, at 113 (comparing Bill of Rights' role in U.S. constitutional law with lack of such catalogue in EC); *Editorial Comments: Judicial harmonisation*, 25 COMMON MKT. L. REV. 5 (1988); Mendelson, *The European Court of Justice and Human Rights*, 1981 Y.B. EUR. L. 125 (F. Jacobs ed. 1982). For a discussion of judicial expansion of individual standing to challenge acts of Community organs, see Roberts, *Judicial Review of Legislative Measures: The European Court of Justice Breathes Life into the Second Paragraph of Article 215 of the Treaty of Rome*, 26 COLUM. J. TRANS. L. 245 (1988).

11. Proposal for a Directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings, O.J. C 297/3 (1980), as amended, O.J. C 217/3 (1983); see Single European Act, *supra* note 3, art. 22, O.J. L 169/1, at 9 (supplementing EEC Treaty Article 118 with 118B).

12. Community Charter, *supra* note 2, art. 16; see *infra* notes 96-97 and accompanying text (discussing equal rights requirement for men and women).

13. The Parliament regretted "that the Charter has not been embodied in Community law by means of binding instruments." Doc. A 3-69/89, ¶ 2, O.J. C 323/44, at 45 (1989).

accompanied by formal accession to the European Convention on Human Rights, thus encompassing civil and political as well as economic and social "rights" in the Community's written catalogue.

This Article considers the Commission's initial step toward a Community bill of rights—its 1979 proposal for accession to the European Convention.¹⁴ That proposal was prompted in large measure by a 1974 decision of the German Constitutional Court, the Bundesverfassungsgericht, which was overturned by a 1986 ruling dubbed, in memory of its predecessor, *Solange II* (literally, "So long as . . .").¹⁵ Due to the importance of these *Solange* rulings for Community human rights jurisprudence, their significance and substance are examined in some detail in Part II of the Article. In Part III, the Council of Europe's European Social Charter is contrasted with the Community Charter, the former document having been signed, though not ratified, by all twelve Community Member States. This Article concludes with a plea that the Community, in observing the Community Charter, should accede to the European Convention on Human Rights.

I. THE FIRST STEP: THE COMMISSION'S PROPOSAL FOR ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In April 1979, the Commission submitted a far-reaching proposal to the Council of Ministers, formally recommending that the Community accede to the European Convention on Human Rights.¹⁶ Its effort was in large part prompted by the 1974 *Solange I* decision of the Bundesverfassungsgericht, which held that "so long as" there existed neither a viable legislative power sufficient to balance the other Community organs nor a written catalogue of fundamental rights, the German Basic

14. Accession of the Communities to the European Convention on Human Rights—Commission Memorandum, E.C. BULL., Supp. 2/79, adopted April 4, 1979 [hereinafter Memorandum]; see E.C. BULL. No. 4, at 16 (1979).

15. Re Wünsche Handelsgesellschaft, Case 2 BvR 197/83, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225 [hereinafter *Solange II*]; see Frowein, Note, *Solange II* (BVerfGE 73, 339). *Constitutional Complaint Firma W.*, 25 COMMON MKT. L. REV. 201 (1988); Judgment of April 10, 1987, Case 2 BvR 1236/86, 1987 EUROPA RECHT 269, as cited in P.J.G. KAPTEYN & P.V. VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 352 n.408 (2d Eng. ed. L. Gormley ed. 1989).

16. Memorandum, *supra* note 14, at 8, ¶ 6.

Law would be considered superior to Community law.¹⁷ A less flagrant but similarly assertive judgment of the Italian Corte Costituzionale that same year also contributed to this "constitutional crisis."¹⁸ Demands for an unambiguous enumeration of guaranteed rights that could be invoked against Community institutions subsequently grew, especially in the European Parliament.¹⁹

The German Constitutional Court's reference to the lack of a viable legislative power was termed the "democratic deficit."²⁰ The situation was improved by the direct election of Parliament's members in 1979, but that body's substantive powers remained exceedingly weak in comparison with those of the Commission and the Council or with those of Member States' parliaments.

Universal suffrage was preceded by a 1977 Joint Declaration of the Parliament, the Council, and the Commission on Fundamental Rights.²¹ That instrument underlined the pri-

17. *Solange I*, Case 2 BvL 52/71, 37 BVerfGE 271, [1974] 2 C.M.L.R. 540. This decision prompted a special report of the Commission of February 4, 1976 to the European Parliament and the Council on "The Protection of Fundamental Rights as Community Law Is Created and Developed." Protection of Fundamental Rights within the European Community, E.C. BULL., Supp. 5/76. The report includes a study by R. Bernhardt on "The Problems of Drawing Up a Catalogue of Fundamental Rights for the European Community." See Weber, *The Supranationality Problem*, in RIGHTS, INSTITUTIONS AND THE IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 223, 233 (C. Starck ed. 1987). The Court of Justice had explicitly rejected such a holding in *Internationale Handelsgesellschaft v. Einfuhr—und Voratsstelle für Getreide und Futtermittel*, Case 11/70, 1970 E.C.R. 1125, Common Mkt. Rep. (CCH) ¶ 8126.

18. *Frontini v. Ministero delle Finanze*, Giust. civ. 1974-III, Case 183/73, at 410, [1974] 2 C.M.L.R. 372; see Petriccione, *Supremacy of Community Law over National Law*, 11 EUR. L. REV. 320 (1986), cited in P.J.G. KAPTEYN & P.V. VAN THEMAAT, *supra* note 15, at 353 n.410.

19. See Resolution of April 27, 1979, O.J. C 127/69 (1979) (Scelba Report); Resolution of Oct. 29, 1982, O.J. C 304/253 (Gonnella Report); Resolution embodying the opinion of the European Parliament on the memorandum from the Commission of European Communities on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, O.J. C 304/253 (1982). The question has continued to be raised within the Parliament, mainly by the Institutional Affairs Committee and the Committee on Legal Affairs and Civil Rights. See O.J. Annex No. 2-337, *Débats du Parlement européen, Compte rendu des séances du 11 au mars 1986*, at 99-103, 105-11 (then acting President, EC Council of Ministers, Van den Broek (Neth.), participating).

20. See *supra* note 10 and accompanying text (discussing "democratic deficit").

21. Declaration of April 5, 1977, O.J. C 103/1 (1977) [hereinafter Joint Declaration]; see Bermann, *supra* note 3, at 575.

mary importance of rights reflected both in Member States' constitutions and in the European Convention on Human Rights. It also affirmed the Court of Justice's gradual incorporation of the European Convention on Human Rights into its own jurisprudence and pledged Member States' efforts to continue to safeguard fundamental rights.²² It did not proclaim the need for a written bill of rights, however, and neither the Parliament nor the Commission thought the measures taken were sufficient to cure the German Court's complaint.

Without repeating the wealth of literature that the Commission's proposal generated when it was first promulgated,²³ its main points are worth noting. First, the Commission established that the European Convention on Human Rights, designed to protect traditional civil and political rights, is indeed applicable to the European Community. This was no easy task, given the skepticism of many legal pragmatists toward hortatory proclamations of rights. By a review of case law and a projection of situations that would confront the Community institutions in relations with both Community and non-Community actors, the Commission demonstrated that classic rights such as free expression, due process, and equal protection are implicated by Community actions. The Community was not affected only by traditional economic and social rights included in the EC Treaties.

The main problems envisaged by the Commission were technical in nature. A primary concern was Community repre-

22. Joint Declaration, *supra* note 21; see *Stauder v. City of Ulm*, Sozialamt, Case 29/69, 1969 E.C.R. 419, Common Mkt. Rep. (CCH) ¶ 8077; *Internationale Handelsgesellschaft v. Einfuhr*, Case 11/70, 1970 E.C.R. 1125, Common Mkt. Rep. (CCH) ¶ 8126 (1971); *Nold v. Commission*, Case 4/73, 1974 E.C.R. 491; *Rutili v. Minister for the Interior*, Case 36/75, 1975 E.C.R. 1219, Common Mkt. Rep. (CCH) ¶ 8322.

23. See, e.g., Minch & Paulin, *The European Community and the European Convention on Human Rights*, 15 GVT. & OPPOSITION 31 (1979); Economides & Weiler, *Reports of Committees*, 42 MOD. L. REV. 683 (1979); Ehlermann, *Accession of the European Community to the European Convention on Human Rights*, in *DO WE NEED A BILL OF RIGHTS?* 114 (C. Campbell ed. 1981); Brown & McBride, *Observations on the Proposed Accession by the European Community to the European Convention on Human Rights*, 29 AM. J. COMP. L. 691 (1981); Sperduti, *Comment concevoir, dans sa spécificité, l'adhésion des Communautés européennes à la Convention de Rome sur la sauvegarde des Droits de l'Homme et des libertés fondamentales*, in *VÖLKERRECHT ALS RECHTSORDNUNG: INTERNATIONALE GERICHTSBARKEIT MENSCHENRECHTE, FESTSCHRIFT FÜR HERMANN MOSLER* 903 (R. Bernhardt, W. Geck, G. Jaenicke & H. Steinberger eds. 1983). For a bibliography of leading works on this topic, see A. BLECKMANN, *DIE BINDUNG DER EUROPÄISCHEN GEMEINSCHAFT AN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION* 2-3 n.7 (1986).

sentation in the Council of Europe organs, particularly the European Court of Human Rights and the Commission of Human Rights.²⁴ Some feared that as the Community expanded, the influence of those belonging to both the Community and the Council of Europe would increase to the detriment of non-Community members. Others raised objections to a superior specialized human rights court, including some involved in a series of exchanges or "study missions" between the Court of Justice and the European Court of Human Rights, an effort coordinated by the Council of Europe's Human Rights Directorate.

The Commission's conclusion was that accession, as a preliminary step to creation of the Community's own catalogue of rights, is legally possible. While the technical problems are generally agreed to be surmountable, however, the stumbling block would prove to be a lack of political will on the part of Member States, particularly the United Kingdom.²⁵ Having done well for centuries without a written constitution and bill of rights, the United Kingdom favors the customary creation of rights protections—on a case-by-case basis through the courts. Its most cogent argument against accession is that sufficient protection already exists in the EC Treaties themselves, the 1978 European Declaration on Democracy and its follow-up 1986 Declaration on Human Rights,²⁶ the 1977 Joint Declara-

24. For a discussion of the mechanics of Community accession to the Convention, see Memorandum, *supra* note 14, ¶¶ 30-34 & 43-46; Parliamentary Assembly of the Council of Europe, Doc. 4649, Report on Accession of the European Communities to the Convention on Human Rights (M.M. Blenk & Krieps) (Dec. 11, 1980).

25. The United Kingdom fears, with good reason, direct applicability of the European Convention on Human Rights through the back door of Community legislation. Under U.K. law, the European Convention on Human Rights is a treaty without binding domestic effect. The rights it conveys on U.K. citizens can be raised in U.K. courts but can only be adjudicated in Strasbourg. The British also led the opposition to the European Social Charter.

26. See E.C. BULL. No. 5 (July 21, 1986); E.C. BULL. No. 3, at 5-6 (April 8, 1978). The latter Declaration was promulgated at the time of impending enlargement of the Community by Greece, Spain, and Portugal, and reflected concern with their relatively recent returns to democracy from dictatorship. The European Parliament expressed similar sentiment in its Resolution on the prospects of enlargement of the Community, O.J. C 39/47, at 48 (1979). Parliament demanded that failure to respect civil and political rights and pluralist traditions embodied in Member States' constitutions and international instruments to which they are signatories, as "established by the Court of Justice, should constitute incompatibility with membership of the Community." See Ehlermann, *supra* note 23, at 118.

tion,²⁷ secondary Community legislation, and, most importantly, the jurisprudence of the Court of Justice.²⁸ In rejecting the Commission's proposal for accession, the House of Lords Select Committee on the European Communities did not exclude the possibility of accession sometime in the future. Rather, the Select Committee admonished that the Council of Europe's human rights machinery needed attention, an indirect rebuke to France's failure to accept the right of individual petition.²⁹

Why was accession recommended by the Commission only as a step intermediate to a custom-made catalogue? In its words: "If [such a separate catalogue] were undertaken too hastily, there is the fear that it would bring to light differences between the Member States, particularly with regard to economic and social rights, and that agreement would be possible only on the basis of the lowest common denominator."³⁰ The Commission noted that efforts to expand the European Convention on Human Rights to include economic and social rights had not met "striking success."³¹ A Council of Europe Committee of Experts for the Extension of the Rights Established in the European Convention has been considering the question since 1978, a follow-up measure to the Council of Europe's own Declaration on Human Rights of April 27, 1978.³² In this forum, the Federal Republic of Germany has joined France, the Netherlands, and the United Kingdom in opposing proposals to include economic and social rights. Nonetheless, rights tentatively agreed upon for inclusion are: adequate compensation in the event of expropriation; equal pay for equal work for men and women; equal treatment with respect to employment and occupation for men and women; social and

27. See *supra* note 21 and accompanying text (discussing Joint Declaration).

28. See, e.g., *Hauer v. Land Rheinland-Pfalz*, Case 44/79, 1979 E.C.R. 3727, Common Mkt. Rep. (CCH) ¶ 8629 (holding European Convention on Human Rights to be part of Community's constitutional order); *Rutili v. Minister for the Interior*, Case 36/75, 1975 E.C.R. 1219, Common Mkt. Rep. (CCH) ¶ 8322 (relying upon Convention as source of inspiration, not as binding catalogue).

29. See House of Lords Report of the Select Committee on the European Communities, Session 1979-80, 71st Report No. 362, at xvi-xvii; *infra* notes 52-55 and accompanying text (discussing French acceptance of right to petition).

30. Memorandum, *supra* note 14, at 8, ¶ 5.

31. *Id.* at n.1.

32. See Parliamentary Assembly Recommendation 838, of September 27, 1978; Official Report of Debates, Parliamentary Assembly, 30th Sess., vol. II, at 311.

medical assistance; and compulsory education.³³

In fact, "haste" was much less the problem for creating a Community bill of rights than traditional opposition from Member States that have viewed economic and social rights as programmatic, more aspirational than constitutional in nature. Coordination of Member States' social legislation could be facilitated by the Commission, and in some cases by the Council of Europe, but implementation of social rights is considered better left to each individual Member State's discretion.³⁴ Even under the Single European Act, Article 118A of the EEC Treaty calls for harmonization of Member State measures to protect workers' health and safety by means of directives setting "minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States,"³⁵ hardly a revolutionary advance with respect to the Community's social policy. (At the same time, Article 118A is a clear recognition of federal competence.) An even weaker Article 118B merely obliges the Commission to "endeavor to develop the dialogue between management and labour at [the] European level which could, if the two sides consider it desirable, lead to relations based on agreement,"³⁶ a ratification of the status quo.

As efforts to expand the European Convention on Human Rights to include economic and social rights and the Community's own jurisprudence demonstrate, the dividing line between rights of a "civil and political" and "social and eco-

33. See Jacobs, *The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights*, 3 *HUMAN RIGHTS REV.* 166 (1978).

34. The European Social Charter requires State Parties to make periodic implementation reports to a committee of independent experts appointed by the Council of Europe. See *European Social Charter*, *supra* note 6, arts. 21-24. This mechanism for monitoring compliance is similar to those established by the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social, and Cultural Rights. See *Covenant on Economic, Social and Cultural Rights*, Jan. 3, 1976, 993 U.N.T.S. 3, 9, arts. 16-17; *Covenant on Civil and Political Rights*, Mar. 23, 1976, 999 U.N.T.S. 171, 181-82, art. 40; see also *infra* notes 90-142 and accompanying text (discussing *European Social Charter*).

The United States has been even more loathe to proclaim "federal" economic and social rights. See Henkin, *Economic and Social Rights as "Rights": A United States Perspective*, 2 *HUMAN RIGHTS L.J.* 223 (1981).

35. *Single European Act*, *supra* note 3, art. 21, O.J. L 169/1, at 9 (amending EEC Treaty Art. 118).

36. *Id.* art. 22.

conomic" nature can often be blurred. The rights to property³⁷ and education³⁸ guaranteed in the First Protocol to the European Convention on Human Rights have been invoked before the Court of Justice in Luxembourg. Provisions of the European Convention on Human Rights that safeguard the rights to respect for private life, home and correspondence,³⁹ and freedom of expression⁴⁰ affect EC rules on competition and prices as well as free movement of goods and persons within the Community. Similarly, increasing instances of business and tax fraud, while largely within the criminal enforcement realm of the Member States, also have Community law implications. Fundamental prohibitions of *ne bis in idem* (double jeopardy) and *nulla poena sine lege*⁴¹ arise in such cases,⁴² as do questions of procedural due process, privilege, and confidentiality.⁴³

There are several clear examples of the applicability of

37. For a discussion of the right to property, see *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225, ¶ 39 (citing *Nold v. Commission*, Case 4/73, 1974 E.C.R. 491; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, 1979 E.C.R. 3727, Common Mkt. Rep. (CCH) ¶ 8629; *Agricola Commerciale Olio v. Commission*, Case 232/81, 1984 E.C.R. 3881, Common Mkt. Rep. (CCH) ¶ 14,148; *SAVMA v. Commission*, Case 264/81, 1984 E.C.R. 3915, Common Mkt. Rep. (CCH) ¶ 14,149).

38. See *Casagrande v. Landeshauptstadt München*, Case 9/74, 1974 E.C.R. 773, Common Mkt. Rep. (CCH) ¶ 8280; *Alaimo v. Préfet du Rhone*, Case 68/74, 1975 E.C.R. 109, Common Mkt. Rep. (CCH) ¶ 8301; *Gravier v. City of Liege*, Case 293/83, 1985 E.C.R. 593, Common Mkt. Rep. (CCH) ¶ 14,152; *Blaizot v. University of Liege*, Case 24/86, 1988 E.C.R. 379, Common Mkt. Rep. (CCH) [1989] 1 CEC 392; *Barra v. Belgian State and City of Liege*, Case 309/85, 1988 E.C.R. 355, Common Mkt. Rep. (CCH) [1989] 2 CEC 461; *Lair v. Universität Hannover*, Case 39/86, 1988 E.C.R. 3161, Common Mkt. Rep. (CCH) [1990] 1 CEC 106 (all discussing right to education).

39. European Convention on Human Rights, *supra* note 5, art. 8(1).

40. *Id.* art. 10(1).

41. *Id.* art. 7.

42. See generally *Boehringer Mannheim GmbH v. Commission*, Case 7/72, 1972 E.C.R. 1281, 1289-90, Common Mkt. Rep. (CCH) ¶ 8191; *Racke v. Hauptzollamt Mainz*, Case 98/78, 1979 E.C.R. 69, 85-87, Common Mkt. Rep. (CCH) ¶ 8541; *Regina v. Kirk*, Case 63/83, 1984 E.C.R. 2689, Common Mkt. Rep. (CCH) ¶ 14,070.

43. See, e.g., Edward, *supra* note 7, at 123-37; Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, 9 FORDHAM INT'L L.J. 1, 39 n.114, 39-41 & 48 (1985-1986); Harding, *The European Communities and Control of Criminal Business Activities*, 31 INT'L AND COMP. L.Q. 246 (1982); Kuyper & van Rijn, *Procedural Guarantees and Investigatory Methods in European Law, with Special Reference to Competition*, in [1982] 2 Y.B. EUR. L. 1 (F. Jacobs ed. 1983). For a view of the non-applicability of criminal law to the Community, see Statement by Chairman Lord Fraser, House of Lords Report of the Select Committee on the European Communities, Session 1979-80, 71st Report No. 362, at 2, ¶ 3.

civil and political rights to acts of Community institutions. Community personnel have relied upon both article 9 of the European Convention on Human Rights, prohibiting restrictions on freedom of religion,⁴⁴ and on article 11, guaranteeing freedom of association.⁴⁵ The Convention's provisions even affect Community citizens who do not have contractual relations with the institutions. In one case demonstrating the *lacunae* in fundamental rights protection, a French labor organization, Confédération Française Démocratique du Travail, filed a petition with the European Commission on Human Rights against the European Community and, alternatively, their Member States, jointly and severally.⁴⁶ The organization claimed violations of European Convention on Human Rights articles 11 (freedom of association), 13 (right to an effective remedy for violations), and 14 (prohibition of discrimination).⁴⁷ Undisputed was the fact that the case involved the trade's second largest labor organization, exclusion thus being a *prima facie* case of discrimination.⁴⁸

A petition before the French Conseil d'Etat had been rejected for want of jurisdiction over the EC Council;⁴⁹ a complaint filed in Luxembourg was declared inadmissible by the Court of Justice on grounds that only a Member State or the EC Commission is entitled under article 38 of the Treaty Establishing the European Coal and Steel Community (the "ECSC Treaty") to set aside a decision of the Council.⁵⁰ The European Commission on Human Rights also dismissed the complaint on jurisdictional grounds because the Community is

44. See *Prais v. Council*, Case 130/75, 1976 E.C.R. 1589.

45. See *Rutili v. Minister for the Interior*, Case 36/75, 1975 E.C.R. 1219, Common Mkt. Rep. (CCH) ¶ 8322.

46. Application No. 8030/77, Eur. Commission of Human Rights, Decision of July 10, 1978, 13 EUR. COM. H. RTS. DEC. & REPS. 231, 21 Y.B. EUR. CONV. H.R. 530 (1978); see 16 COMMON MKT. L. REV. 498 (1979).

47. 13 EUR. COM. H. RTS. DEC. & REPS. 231 (1978); see Alkema, *Comment: The EC and the European Convention of Human Rights—Immunity and Impunity for the Community?*, 16 COMMON MKT. L. REV. 501 (1979); European Parliament Written Question 911/77 (Patijn), O.J. C 60/1 (1977).

48. See Alkema, *supra* note 47.

49. Judgment of Feb. 10, 1978, Case 05.225, [1978] Recueil des décisions du Conseil d'Etat 61.

50. Confédération Française Démocratique du Travail v. Council, Case 66/76, 1977 E.C.R. 305.

not party to the European Convention (article 66)⁵¹ and France had not accepted the right of the individual to petition the European Commission on Human Rights under European Convention on Human Rights article 25.⁵² The European Commission on Human Rights also said that the other Community Member States, which were also Contracting Parties to the European Convention, had not exercised their "jurisdiction" within the meaning of article 1 of the European Convention on Human Rights; merely taking part in Council decision-making was not sufficient.⁵³

The EC Council remedied the obvious wrong by appointing a member of *Confédération Française Démocratique du Travail* to the ECSC Consultative Committee in 1978.⁵⁴ This case established, however, that the Community's liability for an alleged violation of the European Convention on Human Rights lies within the jurisdictional discretion of the Court in Luxembourg. Whether the European Commission on Human Rights or the European Court of Human Rights would hear such a case today, perhaps rendering the earlier decision an anomaly rather than precedent, is an open question now that France has granted the right of individual petition to its citizens.⁵⁵ The logic of excluding the Community, together with the European Commission on Human Rights' refusal to hold the Member States liable either individually or collectively, would likely lead it in a subsequent case to a no competence ruling similar to that of the *Conseil d'Etat*.⁵⁶

51. See Application No. 8030/77, European Commission of Human Rights, Decision of July 10, 1978, 13 EUR. COM. H. RTS. DEC. & REPS. 231, 21 Y.B. EUR. CONV. H.R. 530 (1978); 16 COMMON MKT. L. REV. 498 (1979), ¶ 3.

52. See *id.* ¶ 6.

53. *Id.* ¶ 7.

54. Council Decision of Oct. 16, 1978, O.J. L 314/5 (1978).

55. France adhered to article 25 of the European Convention on Human Rights granting individuals the right to petition the European Commission on Human Rights on October 2, 1981. Council of Europe, "Discours de M. Andre Chandernagor, Ministre Délégué aupre du Ministre des Relations Extérieures de France," D(81)10, E 49.838.

56. In his comment on the Commission's decision in Application No. 8030/77, Mr. Alkema suggests that the EC Council of Ministers could ask the Council of Europe's Committee of Ministers to request an advisory opinion from the Court under the Second Protocol to the European Convention. Alkema, *supra* note 47, at 507-08. He also argues that since the original six Community Member States were already party at that time to the European Convention on Human Rights, article 18 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155

Efforts by both the Commission and the Parliament to move forward have been thwarted by various Member States in the Council of Ministers, including France, Denmark, and the United Kingdom. The 1986 European Council Declaration on Human Rights⁵⁷ omission of any reference to accession, combined with futile efforts to have the issue raised in the Committee of Permanent Representatives,⁵⁸ have led many to the conclusion that accession to the European Convention on Human Rights, with or without extension to social and economic rights, is a dead letter.⁵⁹ The requisite political will seems to be lacking,⁶⁰ despite continued pressure by the Parliament⁶¹ and interest by Commission President Jacques Delors.

U.N.T.S. 331, obliges them to refrain from acts inconsistent with the object and purpose of the prior obligation, here, to avoid redress of a Convention violation. He warns that the European Commission on Human Rights by this decision excludes consideration of acts of other regional bodies such as the European Free Trade Association (EFTA), BENELUX, and the Nordic Council. Alkema, *supra* note 47, at 503-04; see BLECKMANN, *supra* note 23, at 79 (comparing Community incorporation of GATT and European Convention on Human Rights).

57. See *supra* note 26 and accompanying text (discussing Declaration on Human Rights).

58. See Com. ESC (86)605, April 14, 1986. COREPER is the acronym for the Council of Ministers Committee of Permanent Representatives, meeting in permanent session in Brussels. COREPER functions on two levels: the Permanent Representatives meeting to discuss and resolve policy issues on behalf of the Member States whom they represent as ambassadors; and delegated representatives, Member State officials with functional or technical expertise, dealing with more "routine matters." See P.J.G. KAPTEYN & P.V. VAN THEMAAT, *supra* note 15, at 257-59. The Council of Ministers, as COREPER, is chaired on a six-month rotating basis by the Member States' Permanent Representatives.

59. In April 1986, then President of the Council, Ambassador Van den Broek, was reported to have said that "he would assess whether or not it was feasible once again to put this business on the next Council's agenda or whether it should be considered as well and truly buried." *Agence Europe*, April 23, 1986, at 9.

60. At its meeting of October 13-14, 1986, the Committee on Institutional Affairs of the European Parliament considered a report by Mr. De Gucht (Belgium) on establishing a list of fundamental rights for European citizens. The report rejected the notion that accession to the European Convention on Human Rights could adequately protect individuals. See Report of the Council of Europe's Colombo Commission, CE Doc. 4.660, June 1985. The report was compiled by a group of eminent Europeans convened under Recommendation 994 of the Council of Europe Parliamentary Assembly (October 3, 1984) to establish "perspective for European co-operation beyond the present decade." See *id.* at 7, pt. d. In an Appendix to the Report, the Secretariat reiterated its support for accession by the Community to the European Convention. *Id.* at 11, ¶ 23. Furthermore, it concluded that

[t]he fact that a future European Union might adopt a catalogue of human rights is no obstacle to accession to the [European] Convention by the Community, any more than the catalogues that the States Parties to the [Euro-

II. SOLANGE II

In the civil law-dominated European Community, it is surprising the extent to which Member States have accepted judicial precedent as sufficient guarantee of fundamental rights. In 1986, the Bundesverfassungsgericht abandoned its earlier insistence on a written bill of rights in *Solange II*, a landmark case both for the German legal system as well as for the Community.⁶² Not only did the case resolve the supremacy issue in the Community's favor, but it also rendered its own common law catalogue of judicial precedents.

The facts of *Solange II* were quite mundane—German authorities denied an application for the importation of preserved mushrooms from non-EC Member States, a decision upheld by the Bundesverwaltungsgericht, the German High Administrative Court, after an EEC Article 177 referral to the European Court in Luxembourg.⁶³ The substantive issue was as follows: when Community law is deemed to be in conflict with German Basic Law protecting fundamental rights, which law is supreme?

Several external developments affected the German Court's 1974 *Solange I* ruling. Community-wide protection of human rights had improved when France belatedly ratified the European Convention on Human Rights in 1974, and when it recognized individuals' rights to petition the Human Rights

pean] Convention embody in their systems of domestic law prevent those states from acceding to the [European] Convention.

Id. ¶ 24; see *supra* note 24 (discussing Community accession).

61. See European Parliament Declaration on Fundamental Rights and Freedoms, O.J. C 120/52 (1989).

62. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225. In a decision of July 25, 1979, the German Court had rendered a ruling in *Fa. Steinike und Weinlig v. Bundesamt für Ernährung und Forstwirtschaft*, Case 2 BvL 6/77, 52 BVerfGE 187, [1980] 2 C.M.L.R. 531, commonly referred to as the "Veil leicht" or "perhaps" decision. In partial retreat from its 1974 posture in *Solange I*, it "expressly left open the question whether or to what extent (having regard to the political and legal developments which might take place in the meantime in the European Community matters) the principles laid down in the judgment of 29 May 1974" would prevail. *Solange II*, [1987] 3 C.M.L.R. at 258-59, ¶ 34; see *Hilf, Solange II: wie lange nach Solange?*, 14 EUROPÄISCHE GRUNDRECHT ZEITSCHRIFT [EuGRZ] 1 (1987); *Herdegen, Europäisches Gemeinschaftsrecht und die Bindung deutscher Verfassungsorgane an das Grundgesetz*, 16 EuGRZ 309-14 (1989).

63. *Wünsche Handelsgesellschaft v. Germany*, Case 126/81, 1982 E.C.R. 1479, Common Mkt. Rep. (CCH) ¶ 8830.

Commission in Strasbourg in 1981.⁶⁴ Moreover, the 1979 direct election of the European Parliament was a step toward making the Community's institutional structure more democratic, even if Parliament's powers were not significantly increased.⁶⁵

While the "democratic deficit" and the incomplete participation of EC Member States in the European Convention on Human Rights system were significant, what the German Constitutional Court found to be most important were decisions of the Court of Justice.⁶⁶ It side-stepped the Court of Justice's 1970 ruling in *Internationale Handelsgesellschaft*⁶⁷ that Community law "[could] not be affected by an allegation that it runs counter to either fundamental rights as formulated by the constitution of [a Member] State or the principles of a national constitutional structure."⁶⁸ Instead it found that the Court of Justice

would still have to consider however whether an analogous guarantee under Community law had been disregarded, for the safeguarding of fundamental rights formed part of the general principles of law which the Court had to protect. Whilst the protection of such rights must be supported by the constitutional traditions of the member States they must also operate within the structure and objectives of the Community.⁶⁹

Citing the 1974 case of *Nold v. Commission*,⁷⁰ the German Con-

64. See *supra* note 55 (discussing French adherence to article 25 of European Convention on Human Rights).

65. See REPORT ON EUROPEAN INSTITUTIONS, presented by the Committee of Three to the European Council, Doc. 1-33/80, Oct. 1979 (1980) (B. Biesheuvel, E. Dell & R. Marjolin), referred to as the Report of the Three Wise Men, at 57-62. See Dominick, *La procédure de décision dans la Communauté et le nouveau règlement intérieur du Parlement européen*, 248 REVUE DU MARCHÉ COMMUN 274 (1981) (discussing Parliament's attempts to enhance powers after direct election). For later efforts, see Bermann, *supra* note 3, at 575-83; Bieber, Pantalis, & Schoo, *Implications of the Single Act for the European Parliament*, 23 COMMON MKT. L. REV. 767 (1986) (discussing enhancement under Single European Act).

66. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 259, ¶ 36(aa).

67. Case 11/70, 1970 E.C.R. 1125, 1134, Common Mkt. Rep. (CCH) ¶ 8126 (1971).

68. *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 259, ¶ 37.

69. *Id.*

70. Case 4/73, 1974 E.C.R. 491.

stitutional Court described the outer parameters of the Court of Justice's powers in safeguarding fundamental rights as "the common constitutional traditions of the member States," a limit which prohibits all measures "incompatible with fundamental rights recognised and guaranteed by the constitutions of those States."⁷¹ The logical result is that, according to German law, the catalogue of fundamental rights found in the German Basic Law and the European Convention on Human Rights is binding on the Court of Justice.

Relying upon these general principles of Community law, the next ten years saw the recognition of specific rights by the Court, many of which have already been described in the preceding discussion of the Commission's Memorandum:

Side by side with the express guarantees of liberties contained in Community Treaties themselves⁷² the foreground was occupied naturally by fundamental rights and freedoms relating to economic activities.⁷³ . . . In addition . . . [the European Court] cited other basic rights, such as freedom of association, the general principle of equal treatment and the prohibition on arbitrary acts, religious freedom or the protection of the family, as standards of assessment.⁷⁴

Reflecting the important distinction drawn between fundamental rights and general principles of law, the Bundesverfassungsgericht identified additional principles that follow

71. *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 260, ¶ 38.

72. See EEC Treaty, *supra* note 1, arts. 7, 48-73 [footnote adapted from n.44 in original].

73. See *Nold v. Commission*, Case 4/73, 1974 E.C.R. 491; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, 1979 E.C.R. 3727, Common Mkt. Rep. (CCH) ¶ 8629; *Agricola Commerciale Olio v. Commission*, Case 232/81, 1984 E.C.R. 3881, Common Mkt. Rep. (CCH) ¶ 14,148; *SAVMA v. Commissioner*, Case 264/81, 1984 E.C.R. 3915, Common Mkt. Rep. (CCH) ¶ 14,149 [footnote adapted from n.45 in original].

74. See *Union Syndicale, Massa and Kortner v. Council*, Case 175/73, 1974 E.C.R. 917; *Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen*, Cases 117/76 and 16/77, 1977 E.C.R. 1753, Common Mkt. Rep. (CCH) ¶ 8457; *Biovilac v. EEC*, Case 59/83, 1984 E.C.R. 4057, Common Mkt. Rep. (CCH) ¶ 14,150; *Finsider v. Commission*, Case 250/83, 1985 E.C.R. 142; *Kupferberg II v. Hauptzollamt Mainz*, Case 253/83, 1985 E.C.R. 166; Common Mkt. Rep. (CCH) ¶ 14,175; *Samara v. Commission*, Case 266/83, 1985 E.C.R. 196; *Michel v. Commission*, Case 273/83, 1985 E.C.R. 354; *Defrenne III v. SABENA*, Case 149/77, 1978 E.C.R. 1365, Common Mkt. Rep. (CCH) ¶ 8500; *Prais v. Council*, Case 130/75, 1976 E.C.R. 1589; *Diatta v. Land Berlin*, Case 267/83, 1985 E.C.R. 567, Common Mkt. Rep. (CCH) ¶ 14,169 [footnote adapted from n.46 in original].

from the rule of law: prohibition of excessive action; proportionality;⁷⁵ prohibition of *ex post facto* laws resulting from the principle of legal certainty;⁷⁶ prohibition of double penalties;⁷⁷ and the obligation to state reasons for individual decisions.⁷⁸ The right to effective judicial protection for the safeguard of rights⁷⁹ and the duty to grant a legal hearing were also cited as "essential requirement[s] of a fair procedural system."⁸⁰

These due process guarantees developed on a case-by-case basis. Judicial precedents and the Court of Justice's references to the European Convention on Human Rights and its additional protocols,⁸¹ however, were not the only sources of the German Court's common law catalogue. Like the Commission in its 1979 proposal of accession to the European Convention on Human Rights, the Bundesverfassungsgericht in 1986 highlighted both the April 5, 1977 Joint Declaration of the Eu-

75. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 260-61, ¶ 40; see also *Internationale Handelsgesellschaft*, Case 2 BvL 52/71, 37 BVerfGE 271, [1974] 2 C.M.L.R. 540; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, 1979 E.C.R. 3727, Common Mkt. Rep. (CCH) ¶ 8629; *Testa v. Bundesanstalt für Arbeit*, Cases 41, 121, and 796/79, 1980 E.C.R. 1979, 1997; *National Panasonic v. Commission*, Case 136/79, 1980 E.C.R. 2033, 2059, Common Mkt. Rep. (CCH) ¶ 8682; *Public Prosecutor v. Heijn*, Case 94/83, 1984 E.C.R. 3263, Common Mkt. Rep. (CCH) ¶ 14,120; *Fearon v. Irish Land Commission*, Case 182/83, 1984 E.C.R. 3677, Common Mkt. Rep. (CCH) ¶ 14,126; *Public Prosecutor v. ADBHU*, Case 240/83, 1985 E.C.R. 538, Common Mkt. Rep. (CCH) ¶ 14,164; *M. Hilf*, 1985 EuGRZ 647, 649.

76. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225.

77. See *id.*; see also *Boehringer Mannheim GmbH v. Commission*, Case 7/72, 1972 E.C.R. 1281, Common Mkt. Rep. (CCH) ¶ 8191; *Racke v. Hauptzollamt Mainz*, Case 98/78, 1979 E.C.R. 69, Common Mkt. Rep. (CCH) ¶ 8541; *Regina v. Kirk*, Case 63/83, 1984 E.C.R. 2689, Common Mkt. Rep. (CCH) ¶ 14,070.

78. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225; see also *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, Common Mkt. Rep. (CCH) ¶ 14,154; *Netherlands v. Commission*, Cases 296 & 318/82, 1985 E.C.R. 809, Common Mkt. Rep. (CCH) ¶ 14,170; *M. Hilf*, *supra* note 75, at 650.

79. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225; see also *Johnston*, *supra* note 7, at ¶ 17, 18 (citing constitutional traditions of Member States and European Convention on Human Rights article 13).

80. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, 3 C.M.L.R. 225; see also *Pecastaing v. Belgian State*, Case 98/79, 1980 E.C.R. 691, Common Mkt. Rep. (CCH) ¶ 8654; *National Panasonic v. Commission*, Case 136/79, 1980 E.C.R. 2033, 2058, Common Mkt. Rep. (CCH) ¶ 8682.

81. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 261, ¶ 41; see also *Rutili v. Minister for the Interior*, Case 36/75, 1975 E.C.R. 1219, 1232, Common Mkt. Rep. (CCH) ¶ 8322; *Johnston v. Chief Constable of Royal Ulster Constabulary*, Case 222/84, 1986 E.C.R. 1651, Common Mkt. Rep. (CCH) ¶ 14,304.

ropean Parliament, Council, and Commission,⁸² and the European Council's April 1978 Declaration on Democracy.⁸³ It concluded that while the "case-by-case" or common law method of protecting human rights resulted in "gaps,"

[w]hat is decisive nevertheless is the attitude of principle which the Court maintains at this stage towards the Community's obligations in respect of fundamental rights, to the incorporation of fundamental rights in Community law under legal rules and the legal connection of that law (to that extent) with the constitutions of Member-States and with the European [Human Rights] Convention, as is also the practical significance which has been achieved by the protection of fundamental rights in the meantime in the Court's application of Community law.⁸⁴

The German Constitutional Court, in essence, retracted its earlier insistence on a codified catalogue of fundamental rights and a parliament empowered to enact legislation.⁸⁵ The guarantees developed by the Court of Justice are now, in its opinion, "substantially similar to the unconditional protection of fundamental rights under the [German] Constitution."⁸⁶ That the Community is not party to the European Convention on Human Rights⁸⁷ and that the "catalogue" derives from common law rather than codification are deemed inconsequential.

Reminiscent of the Italian Constitutional Court's decision in *Frontini*,⁸⁸ the Bundesverfassungsgericht reserved its right to subordinate Community law to fundamental rights guaranteed

82. See *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 261, ¶ 42; *supra* note 21 and accompanying text (discussing Joint Declaration).

83. *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 262, ¶ 43; *supra* note 26 and accompanying text (discussing 1978 Declaration).

84. *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 262, ¶ 44(e).

85. See *id.* at 258, ¶ 33[c]; *id.* at 263, ¶ 45.

86. *Id.* at 262, ¶ 44(e).

87. See *id.* at 264, ¶ 46.

88. See Giust. civ. 1974-III, Case 183/73, at 410; [1974] C.M.L.R. 372; A. MANGAS MARTIN, DERECHO COMMUNITARIO EUROPEO Y DERECHO ESPAÑOL 140 (1986), as reviewed by Hofmann, 23 COMMON MKT. L. REV. 930, 931-32 (1986); Santaolalla Gadea & Martinez Lage, *Spanish Accession to the European Communities: Legal and Constitutional Implications*, 23 COMMON MKT. L. REV. 11, 14 (1986) (discussing Spanish Constitution's potential incompatibility with Community law in field of Community rights).

in the German Basic Law only if the level of protection in the Community should falter.

[So] long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign power of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of fundamental rights contained in the Constitution⁸⁹

In other words, "so long as" the protection of fundamental rights within the Community by the Court of Justice remains "substantially similar" to that which would be afforded by German courts, *i.e.*, the Court of Justice is itself enforcing the rights guaranteed in the German Basic Law and in the European Convention on Human Rights to which Germany is a party, then the Bundesverfassungsgericht will no longer exercise jurisdiction to determine the constitutionality of Community legislation. Both the European Convention on Human Rights and, by logical extension, the European Social Charter, are incorporated by common law.

III. *THE EUROPEAN SOCIAL CHARTER*

Though less frequently cited than the European Convention on Human Rights as part of the Community's unwritten catalogue of rights, the European Social Charter is another source of human rights protection and a subject for Community accession.⁹⁰ In some cases stronger but often weaker than

89. *Solange II*, Case 2 BvR 197/33, 73 BVerfGE 339, [1987] 3 C.M.L.R. at 265, ¶ 48(f). There is some speculation in the Federal Republic of Germany that two recent decisions by the European Court of Human Rights may give rise to a "Solange III" decision. See *Groppera Radio AG v. Switzerland*, Judg. No. 14/1988/158/214 of March 28, 1990; *Autronic AG v. Switzerland*, Judg. No. 15/1989/175/231 of May 22, 1990.

90. See *Defrenne III v. SABENA*, Case 149/77, 1978 E.C.R. 1365, 1378, ¶¶ 26-29, Common Mkt. Rep. (CCH) ¶ 8500 (concerning equal employment conditions for men and women). Recognizing its duty to respect fundamental personal human

the European Convention on Human Rights in the specificity of its provisions, it is also the instrument which most closely resembles the Commission's latest push toward a codified bill of rights—*i.e.*, the Community Charter.

As stated above, the European Social Charter binds only nine of the twelve Member States, unlike the European Convention on Human Rights to which all Community Member States are party.⁹¹ The final document was a compromise between those who sought a binding catalogue of enforceable rights and those who wanted a mere declaration of intention to coordinate general social principles.

The preamble to the European Social Charter contains a blanket non-discrimination clause, followed by a statement of purpose to pursue "by all appropriate means" the "attainment of conditions" conducive to the realization of nineteen enumerated rights and principles.⁹² Those rights and principles, some of which are found in the European Convention on Human Rights and in the EC treaties,⁹³ are developed in detail in the second part of the European Social Charter. Because it is the existing bill of European economic and social rights, its

rights as "one of the general principles of Community law," including the elimination of discrimination based on gender, the Court of Justice observed that generally the same concepts "are recognized by the European Social Charter . . . and by Convention No. 111 of the International Labour Organization." *Id.* at 1378, ¶ 28. It established that only equal pay was covered by Article 119, not other conditions of work. *Id.* at 1379, ¶ 33.

91. All twelve Member States have signed the European Social Charter, but Belgium, Luxembourg, and Portugal have not yet ratified it. The European Parliament called upon all Member States to do so in its Resolution of Nov. 22, 1989, *supra* note 13, O.J. C 323/44, at 47, ¶ 11. The European Social Charter was concluded in 1961 under the auspices of the Council of Europe. *See generally* COUNCIL OF EUROPE, THE EUROPEAN SOCIAL CHARTER: ORIGINS, OPERATION, RESULTS (1981); D. HARRIS, THE EUROPEAN SOCIAL CHARTER (1984) (discussing history of European Social Charter); COUNCIL OF EUROPE, CASE LAW ON THE EUROPEAN SOCIAL CHARTER (1982) (interpreting various provisions); Riley, *The European Social Charter and Community Law*, 14 EUR. L. REV. 80 (1989); Gould, *The European Social Charter and Community Law—A Comment*, 14 EUR. L. REV. 223 (1989).

92. *See* European Social Charter, *supra* note 6, preamble.

93. *See, e.g.*, EEC Treaty, *supra* note 5, art. 119 (establishing right of men and women to do equal work); *see also* Equal Treatment Directive, Council Directive No. 76/207, regarding access to employment, vocational training and promotion, and working conditions, O.J. L 39/40 (1976); Curtin, *Effective Sanctions and the Equal Treatment Directive: The Van Colson and Harz Cases*, 22 COMMON MKT. L. REV. 505 (1985); S. PRECHAL & N. BURROWS, GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY 48-103, 104-64 (1990).

basic provisions are summarized here and contrasted with the Community Charter.

First, individuals are guaranteed the freedom to choose their occupations freely, a right made more effective by guaranteed access to free public placement services. The European Social Charter is more specific than the Community Charter, mandating, for example, a minimum two-week paid vacation and additional paid holidays or reduced working hours for those engaged in dangerous or unhealthy occupations.⁹⁴ The Community Charter, like the European Social Charter, leaves the burden of establishing safe and healthy working conditions with the Member States. It contains a proviso, however, stating that "[t]he provisions regarding implementation of the internal market shall help to ensure such protection."⁹⁵

The right to fair remuneration, including equal pay for work of equal value and the right to a reasonable period of notice for termination, are addressed under different parts of the Community Charter. These include provisions on garnishment of wages⁹⁶ and the broader right of men and women to equal treatment in addition to equal pay.⁹⁷ Moreover, articles 17 and 18 of the Community Charter provide the rights to information, consultation, and participation for workers, not just mere notification of management decisions.⁹⁸ These measures are subject to collective bargaining agreements and to the laws and practices of Member States.

Community Charter provisions on the rights to organize and bargain collectively differ from the European Social Charter—they stress the need for dialogue between the two sides of industry at the European level, "in particular at [the] inter-occupational and sectoral level."⁹⁹ The right to strike under the European Social Charter is qualified by obligations arising under collective bargaining agreements, while in the Community Charter the right is subject to "national regulations and

94. See European Social Charter, *supra* note 6, art. 2(3)-(4).

95. Community Charter, *supra* note 2, art. 19.

96. *Id.* art. 5(iii).

97. *Id.* art. 16.

98. See *id.* arts. 17-18.

99. *Id.* art. 12.

collective agreements.”¹⁰⁰

The general minimum age (fifteen) established for admission to employment under the European Social Charter¹⁰¹ was raised to sixteen years under the Commission's Draft Community Charter,¹⁰² but was lowered back to fifteen in the final text.¹⁰³ The European Social Charter provides a higher minimum age for dangerous and unhealthy occupations and “special protection against physical and moral dangers;”¹⁰⁴ there are no comparable provisions in the Community Charter. For those under eighteen years, the European Social Charter requires not less than three weeks paid vacation, no night work (with certain exceptions by law or regulation), and mandatory regular medical control.¹⁰⁵ The Community Charter contains no special provisions for child laborers' holidays or medical control, but does require that work duration must be limited and night work prohibited for those under eighteen, except for “certain jobs laid down in national legislation or regulations.”¹⁰⁶ Both Charters require vocational training and equitable remuneration for young persons.¹⁰⁷

The rights of employed women to protection under the European Social Charter include paid leave before and after childbirth up to a total of at least twelve weeks, a prohibition against dismissal during absence on maternity leave, provision for sufficient time off for nursing of infants, regulation of night work in industrial employment, and prohibition of underground mining and all other work which is unsuitable for women by reasons of its dangerous, unhealthy, or arduous nature.¹⁰⁸ The Community Charter, reflecting both the non-discrimination holdings of the Court of Justice and a seeming tendency toward less specificity befitting a “bill of rights,” in-

100. *Id.* art. 13. The Commission draft would have subjected it only to “existing legislation.” Draft Community Charter, *supra* note 1, at 13, ¶ 16.

101. See European Social Charter, *supra* note 6, art. 7. Exceptions are given for light work. *Id.* art. 7(1).

102. Draft Community Charter, *supra* note 1, at 18, ¶ 23.

103. See Community Charter, *supra* note 2, art. 20.

104. European Social Charter, *supra* note 6, art. 7(10).

105. *Id.* art. 7(7-9).

106. Community Charter, *supra* note 2, art. 22.

107. See *id.* arts. 21-23; European Social Charter, *supra* note 6, arts. 7(4)-(5) & 10.

108. See European Social Charter, *supra* note 6, art. 8.

stead establishes the rights of men and women to equal treatment;¹⁰⁹ it seeks achievement of that goal not only through special attention to "access to employment, remuneration, working conditions, social protection, education, vocational training and career development," but also through "[m]easures . . . enabling men and women to reconcile their occupational and family obligations."¹¹⁰ It is doubtful that this vague wording meets the existing "direct effects" test making its provisions invocable in national courts. That test is a determination both that the obligation is sufficiently clear, precise, and unconditional, and that neither the Community institutions nor the Member States are allowed a margin of discretion in implementation.¹¹¹ One could argue that the Community Charter adds little to current protections, but for the remote possibility that challenges to affirmative action might be defeated should the Court of Justice read Community Charter article 16 as a more than hortatory endorsement of positive discrimination.¹¹²

Protection for young workers is strengthened in the Com-

109. Community Charter, *supra* note 2, art. 16.

110. *Id.*

111. See *Hurd v. Jones*, Case 44/84, 1986 E.C.R. 29, 83, Common Mkt. Rep. (CCH) ¶ 14,283; see also *Defrenne v. SABENA*, Case 43/75, 1976 E.C.R. 455, Common Mkt. Rep. (CCH) ¶ 8346 (establishing that Member States' obligation to ensure equal pay could impose on private parties a consequential obligation to do so). But see *Marshall v. Southampton and South-West Hampshire Area Health Authority*, Case 152/84, 1986 E.C.R. 723, 749, Common Mkt. Rep. (CCH) ¶ 14,295 (contrary holding). On the horizontal effect of Community measures, that is, their effect between private individuals, see P.J.G. KAPETYN & P.V. VAN THEMAAT, *supra* note 15, at 333-38; Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983); Arnulf, *Sanctioning Discrimination*, 9 EUR. L. REV. 267 (1984) (reviewing *Van Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, 1984 E.C.R. 1891, 1909, Common Mkt. Rep. (CCH) ¶ 14,092 and *Harz v. Deutsche Tradax GmbH*, Case 79/83, 1984 E.C.R. 1921, Common Mkt. Rep. (CCH) ¶ 14,093); see also Curtin, *The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context*, 15 EUR. L. REV. 195, 220-23 (1990).

112. See *Hofmann v. Barmerersatzkasse*, Case 184/83, 1984 E.C.R. 3047, Common Mkt. Rep. (CCH) ¶ 14,117; Herdegen, *The Relation Between the Principles of Equality and Proportionality*, 22 COMMON MKT. L. REV. 683, 692-96 (1985); see also *Burton v. British Rys. Bd.*, Case 19/81, 1982 E.C.R. 555, Common Mkt. Rep. (CCH) ¶ 8808; Council Directive No. 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, O.J. L 6/24, at 25, art. 4 (1979). The European Parliament argues that the Community Charter has the "potential for jeopardizing existing social rights in certain Member States." Resolution of Dec. 14, 1989 to wind up the debate on the conclusions of the European Council, Doc. B3-671/89, O.J. C 15/321, ¶ 1 (1990).

munity Charter to require, “[f]ollowing the end of compulsory education, . . . initial vocational training of a sufficient duration to enable them to adapt to the requirements of their future working life; for young workers, such training should take place during working hours.”¹¹³ The Commission’s Draft Community Charter, reflecting the case law of the Court of Justice, stated that vocational training courses, “including those at [the] university level,” shall be enjoyed by “[e]very European Community citizen . . . on the same terms as those enjoyed by nationals of the Member State in the territory of which the courses take place.”¹¹⁴ The final draft, however, omitted this specific protection.

Under the European Social Charter, the right to health protection is guaranteed under a most general State commitment to take “appropriate measures . . . to remove as far as possible the causes of ill-health.”¹¹⁵ This provision is complemented by a right to social and medical assistance which guarantees that those without “adequate resources” be granted “the care necessitated” by an illness.¹¹⁶ This right, in the view of some, creates a compulsory and enforceable obligation upon States to provide health care.¹¹⁷ The Community Charter, however, is limited to the rights of workers to health protection and safety at the workplace, calling merely for “[a]ppropriate measures” with a view toward “further harmonization of conditions.”¹¹⁸ It states that “[a]ny person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence, must be en-

113. Community Charter, *supra* note 2, art. 23. The Commission draft specified a period of two years training. Draft Community Charter, *supra* note 1, at 18, ¶ 25.

114. See Draft Community Charter, *supra* note 1, at 14, ¶ 18; see also Gravier, *supra* note 38. This can be contrasted with the United States, where tuition fee discrimination on the basis of state citizenship is permitted.

115. European Social Charter, *supra* note 6, art. 11.

116. *Id.* art. 13(1).

117. In the conclusions of the Committee of Independent Experts on article 13 of the European Social Charter, it was found that it is compulsory for those States accepting the article to accord assistance to needy persons as of right: “[T]he Contracting Parties are no longer merely empowered to grant assistance as they think fit; they are under an obligation, which they may be called on in court to honour.” Conclusions I, 64, as quoted in Council of Europe DH-EX (84)1, at 7, Committee of Experts for the Extension of the Rights Embodied in the European Convention on Human Rights, Feb. 20, 1984.

118. Community Charter, *supra* note 2, art. 19.

titled to sufficient resources and to medical and social assistance specifically suited to his needs,"¹¹⁹ but children and disabled persons are protected only to the extent that they qualify as workers.¹²⁰

The European Social Charter commits States to the requirements of the International Labour Convention No. 102 concerning Minimum Standards of Social Security,¹²¹ and obliges them to "raise progressively the system of social security to a higher level."¹²² The Community's existing secondary legislation on social security protection is reinforced in the Community Charter by a right to social protection, still subject, however, to the "arrangements applying in each country."¹²³ Community Charter article 10 provides further that "[e]very worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits."¹²⁴ Article 10 also makes mention of unemployed persons no longer eligible for unemployment benefits, including those who have been unable to enter the labor market at all, who lack adequate means of subsistence.¹²⁵

Rights of the physically or mentally disabled are strengthened in the Community Charter by a guarantee of "concrete measures" in the areas of "vocational training, ergonomics, accessibility, mobility, means of transport and housing."¹²⁶ The wording of this provision is mandatory—"[t]hese measures *must* concern" at least those mentioned fields.¹²⁷ Again, the question is whether these obligations could be argued to be sufficiently precise, clear, and unconditional to meet the test of direct effect, *e.g.*, whether a disabled person may sue under Community law because his or her State of residence does not provide housing. Perhaps it is for this reason that the Commu-

119. *Id.* art. 25.

120. *See, e.g., id.* arts. 22 & 24 (each referring to "worker").

121. ILO Social Security (Minimum Standards) Convention, June 28, 1952, 210 U.N.T.S. 131.

122. European Social Charter, *supra* note 6, art. 12(3).

123. Community Charter, *supra* note 2, art. 9.

124. *Id.* art. 10.

125. *Id.*

126. *See id.* art. 26.

127. *Id.*

nity Charter does not contain a counterpart to the European Social Charter's undertaking to promote the right of the family to social, legal, and economic protection by providing for family housing and benefits for the newly married.¹²⁸ The Community Charter relies upon a more general guarantee of adequate social protection—"[a]ccording to the arrangements applying in each country."¹²⁹ Similarly, the European Social Charter's right of mothers and children to social and economic protection,¹³⁰ even though only programmatic in its implementation, is not specified in the Community Charter.

The right to engage in gainful occupation in the territory of other Contracting Parties and the right of migrant workers and their families to protection and assistance are restricted in the Community Charter to Community citizens. Reflecting the "People's Europe," the Commission's draft entitled all citizens, not just workers, to "equal treatment with nationals of the host country in all fields, including social advantages and taxation."¹³¹ The final draft, however, restricts this right to workers.¹³² This broad guarantee is qualified on various grounds, and restrictions may be applied on the basis of public order, safety, or health.¹³³ It is also less broad than the European Social Charter's provision, which mandates that Contracting Parties will not expel workers lawfully residing in their territories in the absence of a danger to national security or an offense against public interest or morality.¹³⁴

The Community Charter's right to freedom of movement applies to any occupation or profession in the Community, and implies, *inter alia*, harmonization of residency requirements, "particularly those concerning family reunification."¹³⁵ It calls special attention to the living and working conditions of workers residing in frontier regions.¹³⁶ Under the Commission's draft, guarantees of working conditions and social protection apply to "Community workers engaged in non-temporary

128. See European Social Charter, *supra* note 6, art. 16.

129. Community Charter, *supra* note 2, art. 10.

130. See European Social Charter, *supra* note 6, art. 17.

131. Draft Community Charter, *supra* note 1, at 6, ¶ 3.

132. See Community Charter, *supra* note 2, art. 10.

133. See *id.* art. 1.

134. See European Social Charter, *supra* note 6, art. 19(8).

135. Community Charter, *supra* note 2, art. 3(i).

136. See *id.* art. 3(iii).

gainful employment in a Member State other than their country of origin," implying that temporary employees are excluded not only with respect to public works contracts,¹³⁷ but also with respect to subcontracting services.¹³⁸ These articles were designed to address the possibility that, for example, a Greek construction company might import temporary labor for a building project in Germany, having won a competitive bid by avoiding the social costs mandated for workers under German law. The articles, however, were excluded from the final version.

Community Charter article 27 stipulates that it is "the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights in this Charter"¹³⁹ The Commission was invited to present an action program "as soon as possible . . . with a view to the adoption of legal instruments for . . . effective implementation"¹⁴⁰ It was also instructed to submit yearly implementation reports to the European Council (not to the Council of Ministers), the European Parliament, and the Economic and Social Committee.¹⁴¹ The Commission communicated a program to the Council of Ministers on November 29, 1989, stating that "responsibility for the initiatives to be taken as regards the implementation of social rights lies with the Member States, their constituent parts on the two sides of industry as well as, within the limits of its powers, with the European Community."¹⁴² This somewhat non-committal view seems to restrict a presumption of Community preemption in the fields

137. Draft Community Charter, *supra* note 1, at 7, ¶ 5.

138. *Id.* art. 6.

139. Community Charter, *supra* note 2, art. 27.

140. *Id.* art. 28.

141. *See id.* arts. 29-30.

142. Communication from the Commission concerning Its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89) 568 final, Nov. 29, 1989, at 4, ¶ 3 [hereinafter Communication]. The "new initiatives" contain a number of revived proposals, many of which have not yet been acted upon by the Council. They also contain various monitoring, reporting, and evaluating efforts, some of which had been undertaken previously under different guises. In January 1989, for example, the Commission proposed revision of two Council directives concerning free movement of workers (1612/68 and 68/360), explaining that if such revision should succeed, it would propose amendment of its regulation of June 19, 1970 (Regulation 1251/70) "on the right of workers to remain

covered and to weaken the claim that the enumerated rights may be directly enforceable. Nonetheless, such a position could at least be argued in a Member State court, should that State fail to take measures in a clearly prescribed area.

CONCLUSION

Giving content to human rights, making them more than mere platitudes or declarations of good intention, is a formidable and often unsuccessful task. The Community has thus far avoided the creation of a bill of rights, even by accession to the European Convention on Human Rights and the European Social Charter. These seemingly apparent steps should be easy

on the territory of a Member State after [being] employed in that State" in order to strengthen the principle of equal treatment. Communication, *supra*, at 22-23.

The proposal for a Community instrument on procedures for the information, consultation, and participation of workers in European-scale undertakings contains a recital of frustrated initiatives. *Id.* at 32-33. It includes the principles that "[i]nformation must be provided and consultations should take place before taking any decision liable to have serious consequences for the interests of employees, in particular, closures, transfers, curtailment of activities, substantial changes with regard to organization, working practices, production methods, long-term cooperation with other undertakings, etc." *Id.* at 33. The Commission has indicated that the proposal will be accompanied by an instrument on equity-sharing and financial participation by workers. *Id.* at 33-34.

The recommendations concerning equal treatment for men and women include, *inter alia*, re-endorsement of an initiative on parental leave proposed to the Council of Ministers in 1982. There are no specific proposals for child care provision at the Community level. For its proposed Code of Good Conduct on the Protection of Pregnancy and Maternity, the Commission reiterates that the principle of subsidiarity, *i.e.*, national control, should be respected, stating that "the Community should only intervene further if necessary." *Id.* at 38.

In the area of vocational training, the Commission calls in its implementation report for an updating of its 1963 proposal for a Council decision on the general principles for implementing a common vocational policy, particularly "in the light of the definition of the notion of vocational training given by the Court of Justice in recent judgments." *Id.* at 41. There have been ten proposals for directives presented to the Council concerning safety, health, and hygiene at work since October 1987, three of which had been adopted at the time of the Commission's communication. *Id.* at 43-44. They include a proposal for the establishment of an agency to monitor progress in the field. *Id.* at 48.

On the protection of children and adolescents, the Commission calls for a Council directive on approximation of laws. *Id.* at 50. For the elderly, while "most action in this area falls within the direct responsibility of the Member States," a draft decision on an action program providing for pilot projects and exchanges of communication between groups representing the elderly is envisaged. *Id.* at 51. For the disabled, the Commission plans to propose a Council decision establishing a third Community action program for the period 1992-1996. *Id.* at 54.

as all Member States have already accepted the former and most have accepted, albeit with reservations, the latter. Instead, the protection of individuals *vis-à-vis* the Community has been left largely to *ad hoc*, case-by-case determination by the Court of Justice. The result is a common or customary law amalgam of declarations and decisions that should suffice with less comfort for the civil law Member States.

The Community Charter is a partial step toward the constitutionalization of a bill of individual and collective human rights, an effort that would be strengthened by parallel Community accession to the European Convention on Human Rights. One of the less often stated objections to both steps by the British Government is that within the discretion of the Court of Justice is the legal possibility that the rights both instruments contain would have direct effect—*i.e.*, they could be invoked by U.K. citizens in U.K. courts, superceding anterior or posterior U.K. law. These objections are similar to those raised by signatory states, like the United States, which are reluctant to ratify the United Nations Covenants on Civil and Political and Economic and Social Rights.

Civil and political as well as economic and social rights are implicated by the ever-expanding jurisdiction of the Community. To assume benevolently that the Community's conduct will always be such that it will not violate the rights of citizens who empower it is to ignore the constitutional wisdom of its constituent parts. As a federated Europe comes closer to reality, it is essential that its institutional framework contain explicit, invocable, and directly effective fundamental protections for those whom the governments are designed to serve.