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

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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"). 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

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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, 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, in the view of some scholars a weak compromise to the European Parliament’s (the "Parliament") 1984 Draft Treaty on European Union, 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") and the European Social Charter.

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].


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-


\(^9\) 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.”

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 proposal 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.” 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. This result might be more likely if the Community Charter is


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

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

The German Constitutional Court's reference to the lack of a viable legislative power was termed the "democratic deficit." 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. That instrument underlined the pri-


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

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.\(^2\) 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,\(^2\) 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-
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-

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\(^{24}\) 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, secondary Community legislation, and, most importantly, the jurisprudence of the Court of Justice. 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.

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." The Commission noted that efforts to expand the European Convention on Human Rights to include economic and social rights had not met "striking success." 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. 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).
30. Memorandum, supra note 14, at 8, ¶ 5.
31. Id. at n.1.
medical assistance; and compulsory education.  

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. 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," 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," 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-


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).


36. Id. art. 22.
nomic" nature can often be blurred. The rights to property\textsuperscript{37} and education\textsuperscript{38} 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,\textsuperscript{39} and freedom of expression\textsuperscript{40} 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 \textit{ne bis in idem} (double jeopardy) and \textit{nulla poena sine lege}\textsuperscript{41} arise in such cases,\textsuperscript{42} as do questions of procedural due process, privilege, and confidentiality.\textsuperscript{43}

There are several clear examples of the applicability of
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, and on article 11, guaranteeing freedom of association. 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. 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). Undisputed was the fact that the case involved the trade's second largest labor organization, exclusion thus being a *prima facie* case of discrimination.

A petition before the French Conseil d'Etat had been rejected for want of jurisdiction over the EC Council; 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. The European Commission on Human Rights also dismissed the complaint on jurisdictional grounds because the Community is

48. See Alkema, *supra* note 47.
not party to the European Convention (article 66) 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. 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.

The EC Council remedied the obvious wrong by appointing a member of Confédération Française Démocratique du Travail to the ECSC Consultative Committee in 1978. 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. 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’État.


52. See id., ¶ 6.

53. Id., ¶ 7.


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 Rights' omission of any reference to accession, combined with futile efforts to have the issue raised in the Committee of Permanent Representatives, 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. The requisite political will seems to be lacking, despite continued pressure by the Parliament 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 F.J.G. KAPTEYN & P.V. Van Themaaat, 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 the 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. 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. 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
Commission in Strasbourg in 1981. 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.

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. It side-stepped the Court of Justice’s 1970 ruling in Internationale Handelsgesellschaft 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.” 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.

Citing the 1974 case of Nold v. Commission, the German Con-
institutional 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.” 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 themselves the foreground was occupied naturally by fundamental rights and freedoms relating to economic activities. 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.

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

72. See EEC Treaty, supra note 1, arts. 48-73 [footnote adapted from n.44 in original].
from the rule of law: prohibition of excessive action; proportionality;\textsuperscript{75} prohibition of \textit{ex post facto} laws resulting from the principle of legal certainty;\textsuperscript{76} prohibition of double penalties;\textsuperscript{77} and the obligation to state reasons for individual decisions.\textsuperscript{78} The right to effective judicial protection for the safeguard of rights\textsuperscript{79} and the duty to grant a legal hearing were also cited as “essential requirement[s] of a fair procedural system.”\textsuperscript{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,\textsuperscript{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-

\begin{itemize}

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


\item [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).


\end{itemize}
European Parliament, Council, and Commission, and the European Council’s April 1978 Declaration on Democracy. It concluded that while the “case-by-case” or common law method of protecting human rights resulted in “gaps,”

[what 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.]

The German Constitutional Court, in essence, retracted its earlier insistence on a codified catalogue of fundamental rights and a parliament empowered to enact legislation. 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.” That the Community is not party to the European Convention on Human Rights and that the “catalogue” derives from common law rather than codification are deemed inconsequential.

Reminiscent of the Italian Constitutional Court’s decision in Frontini, the Bundesverfassungsgericht reserved its right to subordinate Community law to fundamental rights guaranteed...
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 Constitution . . . .

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. In some cases stronger but often weaker than

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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. 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. Those rights and principles, some of which are found in the European Convention on Human Rights and in the EC treaties, 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.


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

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. 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." 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 wages and the broader right of men and women to equal treatment in addition to equal pay. 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. 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." 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.

The general minimum age (fifteen) established for admission to employment under the European Social Charter was raised to sixteen years under the Commission's Draft Community Charter, but was lowered back to fifteen in the final text. The European Social Charter provides a higher minimum age for dangerous and unhealthy occupations and "special protection against physical and moral dangers;" 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. 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." Both Charters require vocational training and equitable remuneration for young persons.

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. 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-

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109. Community Charter, supra note 2, art. 16.
110. Id.
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." 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." 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." 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. This right, in the view of some, creates a compulsory and enforceable obligation upon States to provide health care. 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." 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-

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," 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").
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.
Community 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. The Community Charter relies upon a more general guarantee of adequate social protection—“[a]ccording to the arrangements applying in each country.” Similarly, the European Social Charter’s right of mothers and children to social and economic protection, 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.” The final draft, however, restricts this right to workers. This broad guarantee is qualified on various grounds, and restrictions may be applied on the basis of public order, safety, or health. 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.

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.” It calls special attention to the living and working conditions of workers residing in frontier regions. Under the Commission’s draft, guarantees of working conditions and social protection apply to “Community workers engaged in non-temporary
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, but also with respect to subcontracting services. 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 . . . ." 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 . . . ." 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. 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." 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.