HUMAN RIGHTS IN EUROPE - PART II
THE EUROPEAN COURT OF JUSTICE AND HUMAN RIGHTS

In a previous contribution on the protection of human rights in Europe, I discussed some developments taking place in the Conference on Security and Cooperation in Europe (CSCE). Despite the major changes that have occurred in the CSCE during the last year, I would like to address the matter this time from quite a different perspective. This short note will focus on the importance of human rights in the legal order of the European Communities - cynical as it may seem to address this rather 'sophisticated' issue at a time that in the Yugoslavian civil war human rights are violated with a harshness that has been unknown to Europe for decades.

In an extensive series of judgements, the Court of Justice of the European Communities has defined a place for human rights in the Community legal order. The interaction between human rights and the Community is fascinating from a legal perspective. At the same time it can be highly explosive from a political point of view. This summer, the Court was even asked to rule on a case in which the validity of the prohibition of abortion in Ireland was at stake. To put the matter in perspective, it seems wise to start with a short description of the background of these developments.

1. HUMAN RIGHTS AND THE LEGAL ORDER OF THE EUROPEAN COMMUNITIES

It will hardly come as a surprise that the treaties establishing the three Communities do not contain any references to classical human rights, like the prohibition of torture or the right to a fair trial. Given the strong emphasis on economic matters and the fact that the competence of the community authorities was initially rather limited, the lack of human rights provisions was not conceived as a problem. Of course, the EEC Treaty does contain several social rights and the four freedoms which the citizens of the Member States benefit from as well.

2. In November 1990, the CSCE states adopted the 'Charter for a New Europe' in Paris. See P.H. Fuwalda, M.W.J. Lak, Een Handvest voor Europa, 45 Internationale Spectator 256-262 (1991). The third conference on the human dimension of the CSCE was held in Moscow from Sept. 10 to Oct. 4. 1991. The 38 participating states (including Albania and the newly admitted three Faltic states) were able to agree on a substantive document. The most interesting features are the adoption of a new human rights supervision system, introducing inter alia the use of independent experts and a further erosion of the consensus requirement. In fact, much of the proposal of P.H. Kooijmans has been adopted; see 3 LJIL Special Issue, at 87-98 (1990). More in general, an interesting collection of articles on the CSCE can be found in the new All-European Yearbook on Human Rights (1991).
The absence of explicit provisions relating to classical human rights (and the scope of this contribution will be limited to that category of rights) did, however, give rise to problems. On the one hand, as the powers of the Communities gradually expanded, the question was raised to what extent it is still acceptable to transfer powers to a Community that lacks a full-fledged constitution, including human rights provisions. The lack of a human rights catalogue led, according to some people, to the absence of legitimacy. On the other hand, more acute problems, involving judicial protection against alleged violations of human rights, occurred. Certain acts of the Community institutions appeared to have an unforeseen impact on the enjoyment of some of these rights. One can think of measures taken in order to reorganize certain branches of industry. Mr Nold owned a small wholesale coal firm and lost his business as a consequence of such a measure. He argued that his right to property was impaired as well as his right to free pursuit of business activity (which is guaranteed by the German constitution). Could these rights be protected, although they were not explicitly mentioned in Community law? Other questions arose - sometimes in practice, and more often perhaps in the minds of scholars. To what extent is the Commission bound by rules of due process when investigating allegedly unfair competition practices of companies? Could Ms Prais, a British citizen of Jewish religion who had applied for a post at the Council’s service, rely on the freedom of religion in order to protest against the fact that the qualification test had been held on the first day of the Jewish feast of Shavuot? On that day, she was not permitted to travel or to write, as a consequence of which she was unable to undergo the test and another candidate got the job.

On first sight, Ms Prais could not invoke the freedom of religion although it was obviously at stake in her case. Despite the fact that this right is guaranteed by Article 9 of the European Convention of Human Rights (ECHR), Ms Prais could not present a complaint against the Council to the Convention’s organs. As the EC has never signed the Convention, the European Commission for Human Rights considers itself not competent ratione personae to examine decisions of Community organs.

Neither could Mr Nold invoke the fundamental freedoms that were enshrined in his national constitution against the Commission’s decision to reconstruct the coal industry. The basic principle of uniformity of EC law throughout the Community demands that national rules yield for Community legislation. If one were to accept the possibility that individuals could invoke national rules to invalidate, e.g. a regulation, the force of such a measure would be severely weakened. It would remain

valid in some Member States and be illegal in others at the same time. In such a situation, EC law cannot function effectively in all Member States. As the Court of Justice said:

In fact, the law stemming from the [EEC] Treaty, an independent source of law, cannot by its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to fundamental rights as formulated by the constitution of that State.\(^5\)

From the perspective of Community law, this is a perfectly coherent view. But it gave way to a situation in which the most fundamental values of society could -at least in theory- be set aside by some technical rules of secondary EC legislation; a point which is even more disturbing if one takes into account the weak position of the European Parliament.

This development also met with scepticism in some national constitutional courts, whose task it is to uphold the fundamental rights of their country. One can understand their difficulties in accepting that the constitutional rights they were supposed to protect could be set aside by EC legislation.\(^6\) Moreover, at least in the nine monist Member States, the national judiciary is faced with two competing demands. It has to apply Community legislation, but it is under an obligation to implement the provisions of the ECHR as well. How should a national court solve possible conflicts between the two?\(^7\)

The best way out of this problem is, of course, to prevent these problems completely by ensuring that the Community will respect human rights. As the ECHR is not directly applicable to the EC and national constitutions cannot serve as a

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6. See, e.g., the German Bundesverfassungsgericht, May 29, 1974, Para. 23: “The Community [...] in particular lacks a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future the same way as the substance of the [German] Constitution [...]. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation [that this Court will hold some rule of EC legislation unconstitutional when violating basic rights] applies”. II CMLR 551 (1974). See also the Italian Corte Costituzionale in the Fragd case, discussed by G. Gaja, New Developments in a Continuing Story: the Relationship between EEC Law and Italian Law. 27 CMLRev. 93-95 (1990).
7. See A. Drzemczewski, The Domestic Application of the ECHR as European Community Law, 30 ICLQ 127 (1981). One solution might be derived from Art. 234 EEC, which confirms Article 41 Vienna Convention on the Law of Treaties: obligations arising out of the ECHR (1950) shall not be affected by the EEC Treaty (1957). National courts would thus have to give precedence to the ECHR, when conflicts with EC law legislation occur. Of course, this approach has the disadvantage that it would impair the effectiveness and uniformity of Community law.
constraint either, a human rights standard relating specifically to the EC had to be established. Given the absence of treaty provisions in this respect, it was the Court of Justice that had to provide for an alternative means of protecting human rights. More or less improvising on the basis of Article 164 EEC Treaty ("The Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed") the Court argued in the case of Mr Nold, mentioned above:

[...] fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. In safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.⁸

This reasoning of the Court is quite remarkable. National constitutions and the ECHR are not directly binding on the EC, but the Court is bound to take them into account; the result is therefore almost similar. Thanks to this ‘diversion’ the Court remains the only authority that is entitled to interpret Community law and decide on its validity. The uniformity of EC legislation thus remains intact, and, at the same time, the respect for human rights is ensured. On the other hand, this decision left room for uncertainty. Did the Court imply with the phrase “the constitutional traditions common to the Member States” that all these states should recognize a right, before it is accepted by the Court? What is meant by the words ‘inspiration’ and ‘guidelines’? Are the Communities still allowed to depart from the provisions of the ECHR? Also, it remains unclear to what extent the Court holds the Communities bound by the jurisprudence of the ECHR-organs.

Most of these questions were solved in the years that followed. Adding colours and details to the faint sketch in the Nold case, the Court made very specific references to distinct provisions of the ECHR. In the Rutili case, for example, the Court referred to Articles 8, 9, 10 and 11 of the European Convention as well as Article 2 of the Fourth Protocol thereto.⁹ Other treaties, like the European Social Charter and ILO-conventions, have also served as a guideline to the Court when interpreting Community law.¹⁰ In recent years, there has been a whole series of competition law cases in which companies invoked Article 6 ECHR, the right to a fair trial, and Article 8, the right

⁹ Case 36/75, Rutili. ECR 1975, 1232.
to privacy. These companies argued that the Commission had violated these rights while carrying out investigations on allegedly unfair trading practices.11

Pescatore argues that this case law of the Court is inspired by the concept of state succession. As the states that originally founded the Community were all bound by the European Convention, the Community must have inherited the obligations deriving from it.12 However, he remarked that in spite of the relatively frequent references to the European Convention, its human rights provisions are most often used as an auxiliary argument, confirming conclusions that the Court had already drawn from positive Community law.13 We can nevertheless conclude that this so-called praetorial protection of human rights has, over the years, resulted in a well-established branch of case-law. In a joint declaration of 1977, the European Parliament, the Council and the Commission expressed their support for the approach of the Court.14 As a last general remark, it should be noted that the human rights, thus protected, form part of a larger body of 'general principles of Community law'. This concept also contains notions like legal certainty, equality and proportionality.15

2. EXPANDING THE PROTECTION: THE COURT OF JUSTICE AND NATIONAL VIOLATIONS OF HUMAN RIGHTS

So far so good. Whenever an individual feels that his or her rights have been violated by one of the EC institutions, it is possible to invoke fundamental rights before the Court of Justice. This applies both to legislation, allegedly infringing human rights (the case of Mr Nold), and the actual behaviour of the institutions in day-to-day management (see the case of Ms Prais).

The discussion takes a very interesting turn when we direct our attention to a violation of human rights by national authorities. In principle, the protection against such violations of human rights is to be afforded by the national judiciary, eventually supplemented by the organs of the European Convention on Human Rights. But it might very well be that an alternative way of protecting human rights on the European

12. P. Pescatore, La Cour de justice des Communautés européennes et la Convention européenne des Droits de l’Homme, in F. Matscher, H. Petzold (eds.), Protecting Human Rights - the European Dimension 450 (1988). One might, however, point to the fact that the Court only considers the ECHR as a ‘guideline’, from which it apparently is free to deviate. Probably the Court would have chosen different phrases if it completely shared Mr Pescatores view.
13. Id., at 444.
level is emerging. On some occasions, the Court of Justice did not limit its human rights test to acts of the Community institutions, but also monitored the performance of the Member States in this respect. Let us take a look at three different situations:

a. national acts intended to implement Community legislation;
b. national acts within the field of existing Community rules;
c. national acts that have so far remained within the scope of national sovereignty.16

In the following review we will assess the case law of the Court in these instances. I have tried to elaborate on the factual background of some of the cases, as they illustrate the kind of problems that come before the Court of Justice. Moreover, as an Advocate General once remarked: “although the questions [before the Court of Justice] appear dry and technical, there are, underlying those questions, issues of importance” with a distinct impact on human rights.17

It is relatively easy to accept that the Court applies human rights standards when the national authorities simply carry out Community legislation. As the Court holds that the institutions of the Community are bound by human rights and actually tests whether their acts or decisions are compatible with them, it is only logical that the same test is applied whenever national authorities act as executive for the Communities.18 An example was offered in 1986 when the Court reviewed the orders of the Luxembourg Secretary of State for Agriculture, laying down detailed rules in order to execute the Community regulations imposing additional levies on milk. According to some of the milk producers involved, the Luxembourg orders were discriminatory and, thereby, violated Article 40(3) of the EEC Treaty. In response to this complaint the Court held that the latter provision “covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down”. Interestingly enough, the Court continued with an obiter dictum: “[...] the prohibition of discrimination laid down in Article 40(3) of the EEC Treaty is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law”.19 Although the Court could have simply applied Article 40(3) as such, it pointed explicitly to the fact that a general principle of Community law was at stake. The judgement thus indicated that

16. More or less similar divisions have been made by, e.g., M. Flesheuvel, supra note 11. at 664, and A. Clapham, A Human Rights Policy for the European Community, to be published in 10 Yearbook of European Law (1990).
18. Even the more so since the European Commission of Human Rights considers complaints against these acts to be inadmissible and therefore cannot give protection. See M. & Co., supra note 4.
the Court was also prepared to apply these general principles—which include, as we have just seen, human rights—to Member States when implementing Community policy. One distinguished commentator concluded from this judgement:

neither the Community, nor its Court of Justice, should ever accept that within an area of positive Community policy, through Member State action the individual should be subject of conduct which violates general principles of law and standards of human rights which are considered unacceptable within the EC legal order.20

And indeed, in 1989, the Court confirmed explicitly that “the requirements of the protection of fundamental human rights in the Community legal order [...] are also binding on the Member States when they implement Community rules”.21 In his opinion on that case, Advocate General Jacobs stated

[i]t appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for human rights, as the Community legislator.22

And so a circle seems to be completed. The Community is considered to be bound by human rights because the states that established it were bound by them; and now the Community in turn obliges its Member States to live up to what in fact are their own standards. A crucial consequence of this circle is, by the way, that the European Court of Justice has assumed a role in the supervision of national respect for these rights.

This development will probably continue to prove its importance in the near future. The approach of Court is also applicable to the national implementation of directives—an increasingly important issue in the light of ‘1992’. The Court will have to see to it that the national legislation, implementing directives, will respect general principles of Community law, inter alia human rights and the principle of non-discrimination.23

The next category of cases concerns those acts of states which do not amount to the direct implementation of Community legislation, but nevertheless have a clear link with Community law. One can think of the rules in EEC Regulation 1612/68,24

22. Id., at 2629.
which define the principles of the freedom of movement for workers. Article 10 of this regulation concerns the settlement of family members of migrant workers. When Germany applied too strict requirements for the distribution of residence permits to family members, the Court, in a 1989 judgement, not only considered that this policy violated the Regulation but also referred to the right to respect for family life as protected by Article 8 ECHR. The difference with the Luxembourg milk levies-case will be clear: Germany was not required to adopt implementing legislation by Regulation 1612/68, but once it had formulated rules relevant to the subject, the Court was entitled to review their compatibility with both Community law and human rights standards.

A similar reasoning can be found in the case of Ms Johnston. From 1974 to 1980, she had a function with the Royal Ulster Constabulary (RUC) as police officer. The RUC serves as the police force in Northern Ireland and is frequently confronted with violence. In view of the situation, the Chief Constable of the RUC decided that male police officers should carry fire-arms, although the police are not usually armed in the UK. Their female colleagues would however not be equipped with arms and particular ‘safe’ tasks were assigned to them. In 1980, the Chief Constable decided not to offer or renew any contracts for women, except where they had to perform duties assigned only to women officers. As a consequence, Ms Johnston was refused a new contract in 1980. She appealed against this decision, alleging that she had suffered from unjustifiable discrimination, but the Secretary of State issued a certificate in defence stating national security was at stake. This was of great importance. According to the UK Sex Discrimination Order, such a certificate is conclusive evidence preventing an act, otherwise discriminatory, from being considered illegal by the English courts. The certificate thus frustrates any effective judicial review of the discrimination complaint. In return, Ms Johnston invoked Community legislation: Council Directive 76/207 on the implementation of the equal treatment of men and women. Article 6 of this directive requires Member States to introduce effective remedies when a person claims to be the victim of discrimination. In a preliminary ruling, the Court held that the certificate system of the Sex Discrimination Order was indeed incompatible with the directive. As in the cases cited above, the Court did not limit itself to invoking and applying the directive, but emphasized that “the requirement of judicial control reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention”. Again, the Court was prepared to apply human rights to national legislation that was not

25. Case 249/86, Commission v. Germany, ECR 1989, 1290. This judgement illustrates the remark of Pescatore, that references to the ECHR usually serve to confirm conclusions drawn from positive Community law; see, supra note 13.
adopted strictly in order to execute Community policy, but, nevertheless, had a clear bearing on it.

Quite a large number of cases in the same category have as a common denominator that a Member State was applying a restriction to one of the fundamental freedoms offered by Community law. An early case, from 1975, concerned Mr Rutili, an Italian national who had lived in Lorraine (in the eastern part of France) since his birth. Mr Rutili played an active part in the local branch of his trade union and was allegedly involved in the riots of May 1968. The French authorities considered that his continued presence in Lorraine was “likely to disturb public policy” and replaced his residence permit by a new one that contained the prohibition of settling in Lorraine. In fact, this amounted to an internal deportation order. Rutili brought proceedings before the French court for annulment of this decision and since he was an Italian national working in France, he invoked the freedom of movement for workers, as provided for by Article 48 EEC Treaty. More in particular, he relied on Article 8 of Regulation 1612/68, mentioned above, which provides for the exercise of trade union rights. The French authorities on the other hand invoked Paragraph 3 of Article 48, which provides for limitations on the freedom of movement justified on grounds of public policy. In a request for a preliminary ruling, the French judge then asked the Court of Justice how exactly the clause “justified on grounds of public policy” should be interpreted. In its intervention the Commission argued that

fundamental human rights [...] form a basic criterion for determining at what point an activity may be regarded as constituting 'a danger to society'. Thus, an activity which consists of the legitimate exercise of a freedom [...] can scarcely be considered to affect adversely the public policy of a State [...]. The exercise of trade union rights cannot be regarded as in itself constituting an offence against public policy.  

In the ruling itself, the Court agreed that the possibility for Member States to derogate from the fundamental freedoms, like the freedom of movement for workers, should be interpreted strictly. With respect to the specific case, the Court held that Member States are under a duty to refrain from limitations on the principle of free movement, if this would adversely affect the exercise of trade union rights.

But the broad wordings, used in the judgement, indicated that, more in general, human rights had to be taken into account whenever a state was derogating from the fundamental freedoms of the EEC Treaty. A very recent example of the same approach concerned the Greek state monopoly with respect to television broadcasting. The Court accepted that the Greek legislation made an exception to several principles

27. The Commission always uses the possibility of Article 20 Statute of the Court to intervene in a procedure for a preliminary ruling, in order to give its own opinion on the case. 
28. Rutili case, supra note 9, at 1225. 
29. Id., especially at 1232, Para. 32.
of Community law based on public interest, but, at the same time, ruled explicitly that these exceptions should be compatible with the freedom of expression, as guaranteed by Article 10 ECHR.\textsuperscript{30}

Now, how would the Court react in a third category of cases, i.e. where there is no clear Community legislation? In the case of Cinéthique of 1985, the Court gave a seemingly clear answer to that question:

> Although it is true that it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.\textsuperscript{31}

The issue at stake was a French law of 1982 that provided that films, shown in cinemas, could not be sold or hired simultaneously in the form of video-tapes. The aim of the law was, according to the French government, to protect the cinema as a means of cultural expression. On the basis of the law the French authorities took measures against Cinéthique. This video-tape distributor had obtained the exclusive rights to sell video-tapes of ‘Merry Christmas, Mr Lawrence’ while the movie was still running in the cinemas. In the French court proceedings, Cinéthique argued that the intra Community trade was restricted, as video-tapes could not be sold despite the fact that they were free to circulate on the territory of other Member States. Moreover, the company relied on Article 10 ECHR arguing that its freedom of expression was impaired. In the preliminary ruling that followed, the Court conceded that the French regulation was justified given its goal, non-discriminatory nature and limited effect, and concluded that, thus, Article 30 EEC Treaty was inapplicable. Subsequently the Court refused to entertain the merits of the latter argument in the terse recital quoted above. Apparently, when a matter falls outside the scope of Community law an alleged violation of human rights as such cannot serve as an independent basis for the Court. Consequently, the Cinéthique judgement convinced many commentators that the Court was not prepared to monitor the actions of national authorities in areas “which fall within their jurisdiction”.\textsuperscript{32}

This impression was confirmed in the case of Meryem Demirel, the wife of a

\textsuperscript{30} Case 260/89, ERT, judgement of June 18, 1991 (not yet reported), Paras. 43-45. See the comments on this case by P.J. Slot, 28 CML Rev. 964-988 (1991). He submits (at 1987) that the ERT case “is the first in stance where the Court tests the conformity of national legislation with provisions of the ECHR”.

\textsuperscript{31} Joined Cases 60, 61/84, Cinéthique, ECR 1985, 2627. A more or less similar approach can be found in Case 149/77. Defrenne III. ECR 1978, 1378: the Court recognized the need to ensure equality of working conditions for men and women employed by the Community itself, but acknowledged that the Community at that time had not assumed any responsibility for supervising and guaranteeing the observance of this principle in the Member States.

\textsuperscript{32} See, e.g., P. Pescatore, supra note 12 and S. Prechal, T. Heukels, Algemene Beginselen in het Nederlandse Recht en het Europese Recht, 34 SEW 313 (1986).
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Turkish national who had legally been working in Germany since 1979. They had got married in 1981, when according to German legislation, family reunification would become possible after three years of residence, i.e. in 1982. Then the legislation changed, and, although the Demirels had had a son in the meantime, they were not allowed to live together in Germany until 1987. In 1984, Mrs Demirel nevertheless joined her husband, together with her son, on a visitors visa. When she had to leave after two months, she was pregnant and she stayed -illegally- in Germany. She argued that she had no accommodation or funds in order to settle herself in Turkey. In 1985, she was ordered to leave Germany within a week; if she refused she and her children would be expelled. Pregnant once again, she appealed to the Stuttgart Verwaltungsgericht and tried to rely, inter alia, on both the Association Agreement between the EEC and Turkey and Article 8 ECHR, guaranteeing the rights of the family. In Article 12 of the Association Agreement, the states agreed to progressively secure the freedom of movement of workers between them and as a family member, Mrs Demirel hoped to benefit from the rights that complement this principle. The Court, however, ruled that Article 12 is not directly applicable. Consequently, the Court reiterated much of its Cinéthque decision with respect to Article 8 ECHR:

although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation lying outside the scope of Community law.

Although this judgement has been severely criticized, and the words “outside the scope of Community law” seemed just a little broader than the Cinéthque formula, the situation seemed to be very clear. In practice, however, it is difficult to delineate this “domestic area” and, as we will see, it is difficult to predict which matters still fall within this area. A few years after the Cinéthque judgement another dispute originated in France. The football club Lille Olympic had engaged Mr Heylens, a football trainer with the Belgian nationality. He was, according to Belgian legislation, fully qualified to act as a trainer, but the French authorities did not recognize his diploma. In line with the French practice, this decision was not made subject to effective review, or were the reasons for the refusal notified to him. As a result of the refusal, Heylens was not allowed to work as a trainer in France. He, nevertheless, continued to work for Lille Olympic until the French football-trainers’ trade union summoned him before a criminal court. There the question was raised to what extent the matter was compatible with the principles of the free movement of workers,

34. Case 12/86, Demirel, ECR 1987, 3754.
established in Article 48 EEC Treaty. One should realize that the conditions of access to the occupation of football trainer were not harmonized at the time, so the Member States were still entitled to lay down the qualifications needed. Despite this large amount of discretion, the European Court of Justice held that the French proceedings did not comply with the requirements of Articles 6 and 13 of the European Convention. In this respect the case of Heylens much resembles the Johnston case. But in the latter case Johnston could rely on the Equal Treatment Directive which already demanded effective judicial review. In the Heylens judgement the Court did not simply use the ECHR as an auxiliary argument confirming a rule of positive Community law. The only positive rule at stake in the Heylens case was Article 48, the free movement of workers - a principle that, as such, does not contain any requirements as to judicial review. The application by the Court of the human rights provisions to the French practice, therefore, functioned as a rather independent human rights test. The only “excuse” for doing so is that a fundamental principle of Community law was involved in the case.\footnote{Case 222/86. Heylens. \textit{supra} note 10. at 4117: “\textquoteleft Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of this right is essential in order to secure for the individual effective protection for his right”. \textit{See also} C. Timmermans. 38 Ars Aequi 289 (1989).}

The rather ‘activist’ attitude in this case seemed to be reinforced when, in June 1991, the Court held that “ne sauraient être admises dans la Communauté des mesures incompatibles avec le respect des droits de l’homme ainsi reconnus et garantis”.\footnote{ERT-case. \textit{supra} note 30. emphasis added. RL: no English translation yet available.} Although the Greek television monopoly, which was the issue of that case, had a clear impact on Community law, the very broad statement seemed to indicate that the Court was now prepared to interpret the notion of “the scope of Community law” (used in the Demirel case and stretched in the Heylens case) very extensively. The timing of this indication was interesting at least, as the Court was about to decide one of the most controversial cases of the last few years.

Consider the following case. In Ireland abortion is prohibited. According to legislation from 1861, it is a criminal offence if a pregnant woman attempts abortion, as well as providing assistance to that end (unless the life of the mother is threatened). This attitude was confirmed in a referendum in 1983 which resulted in the insertion of an express acknowledgement of the right to life of the unborn being in the Irish Constitution. In 1988 the Irish Supreme Court ruled that it is unlawful to assist pregnant women to travel abroad to obtain abortions or even to provide information about clinics abroad that are willing to carry out abortions.\footnote{The \textit{Open Door Counseling} judgement. The case is at present pending before the European Court of Human Rights. \textit{See} the report of the Commission. Applications 14234/88 and 14235/88 (Decision of March 7, 1991, not yet reported), where a small majority concluded that Article 10 ECHR. freedom of expression, had been violated. I have made a more extensive review of this case in 17 NJCM- Bulletin 47-55 (1992).} Nevertheless, some student...
associations decided to keep a section containing information for pregnant students in their annual guidebooks for students. As the guidebooks provided names and addresses of clinics in the UK where medical termination of pregnancy is available, the Society for the Protection of the Unborn Child started proceedings against the associations. Their representative, Mr Grogan, invoked the freedom of expression, guaranteed by Article 10 ECHR. But, more surprisingly perhaps, he also tried to rely on Community law. His argument ran as follows. The principle of free movement of services (Articles 59 and 60 EEC Treaty) also applies to medical services. According to Luxembourg case law, this implies that Irish women derive from Article 60 the right to go to the UK and receive the service as they desire. In turn, the right to receive information on this possibility is inextricably linked to the enjoyment of this right. So, if the Irish judge were to impose a prohibition to publish information on English abortion clinics, he would infringe upon Community law. The Irish court subsequently decided to ask the Court of Justice for a preliminary ruling - thus forcing it to rule on a very delicate issue.

The tensions grew when, to a large extent, the argument of Grogan was adopted by the Advocate General Van Gerven who very convincingly showed that Community law indeed was applicable to the case. However, he was prepared to accept that the Irish legal practice was justified on grounds of public policy. In his appraisal, he checked inter alia whether the Irish system complied with the demands of subsidiarity and proportionality. Interestingly enough, the Advocate General then proceeded to test the Irish practice once more, but this time from a human rights perspective:

Once a national rule is involved which has effects in an area covered by Community law (in this case Article 59 of the EEC Treaty) and which, in order to be permissible, must be able to be justified under Community law with the help of concepts or principles of Community law, then the appraisal of that national rule no longer falls within the exclusive jurisdiction of the national legislature.

He thus elaborated on the requirements of Article 10 ECHR and checked if the Irish practice met these requirements, much like the European Court of Human Rights

41. As a telling example, the present Irish judge in the European Court of Human Rights, F. Walsh, devoted over one third of an article to "the fear that under the guise of 'health care'. Community legislation might in some way bring about the introduction of legalized abortion in Ireland": see F. Walsh, Reflections on the Effects of Membership of the European Communities in Irish Law, in F. Caportoti, et al. (eds.), supra note 20, at 805-820, quotation at 815.
would have done. Once again, he concluded that the Irish practice interfered with the freedom of expression, but was permitted under the limitation grounds of Article 10 (2) ECHR.

Against this background, the actual judgement of the Court was an anti-climax. The Court recognized explicitly that the medical termination of pregnancy is to be considered as a service within the meaning of the EEC Treaty. However, the Court immediately stressed the fact that the student association had no link at all with the foreign clinics, nor were they paid for their publicity. Since the publication of information in the student guidebooks appeared not to be an economic activity, it lost its relevance to Community law. “The information”, the Court remarks in a rather laconic manner, “constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by the clinics in another Member State”. Thus, as far as the Court is concerned, the Irish law is free to prohibit ‘voluntary’ publications.

Three observations can be made. In the first place, the Court has evaded a substantive ruling on a sensitive issue. But, in the long run, it will probably be confronted with the same matter. If, for example, the students associations establish a link with the UK clinics (and are paid to some extent for their information), the publication of the guidebooks acquires an economic dimension. In that case, the Court will have to rule on the compatibility of the Irish practice with Community law. Secondly, although one can understand that the Court pays respect to the remains of the national sovereignty of the EC Member States, it is interesting to note the sharp contrast between this attitude and the ease with which the Court sets aside elements of the national judicial system whenever the effective application of Community law is impaired. In the third place, the Court has confirmed its Cinétèque judgement. It will only apply a human rights test to national legislation when (economic) activities with a bearing on Community law are involved. Hence the difference with the Heylens and Johnston judgements.

3. **ENHANCING THE PROTECTION: SOME CONCLUDING REMARKS**

In the two decades that the Court of Justice has endeavoured to enter the arena of classical human rights, it has been confronted with a bewildering variety of cases. Trade union activists, large multinational companies, a female police officer whose...
contract was not renewed, television advertisers and a Turkish woman who wanted to live with her husband in Germany: they all turned to the Court of Justice and demanded that their human rights be guaranteed. Confronted with these demands, the Court has taken a prudent approach, but could not avoid ruling on cases of great political sensitivity.

The Court is hesitant, at least, to examine the compatibility with the European Convention on Human Rights of national legislation when there is no obvious link with the Community legal order. Rather, it confines itself to monitoring the acts of the Community itself, national measures of implementation and national acts “within the scope of Community law” (as in the Heylens case). However, the Irish abortion case shows that this separation is difficult to maintain. Only those cases which clearly and completely fall within the national sovereignty will remain outside the reach of the Court. I would submit that, to a large extent, this development was bound to take place - not because the Court on purpose tries to expand its power, but simply because individuals force the Court time and again to speak out on human rights issues.

This leaves us with a most interesting situation. The ongoing expansion of Community competence clearly reinforces the need to subject the Community institutions to a well-defined set of human rights. At the same time, just because the scope of Community competence will continue to expand, the number of cases that belong to the exclusive national jurisdiction will decrease. Again, the Irish abortion dispute is a case in point. As more and more situations will at least have a bearing on Community law, the Court will increasingly be addressed with requests to apply its ‘Heylens doctrine’. The present tendency that the Court of Justice offers a second ‘European’ way to challenge national acts that violate human rights, next to the organs of the ECHR, will thus inevitably be reinforced. One might even argue that the ‘Luxembourg route’ is more attractive, as the Court of Justice is very easily (and quickly) accessible through the preliminary ruling procedure of Article 177 EEC Treaty. No exhaustion of local remedies is required, like for the Strasbourg organs. To put it differently: if I were a lawyer defending a human rights case, I would certainly try to find a ‘Community law component’ in my clients’ case and persuade the national judge to ask a preliminary ruling.\(^46\)

In the meantime, some problems remain. It will be clear that the protection offered by the Court cannot be equated with the situation in which the Communities were formally bound to a narrowly defined set of rights. The Court has always kept some discretion for itself, referring to the ECHR as a mere ‘guideline’ (see the Nold case). Apparently, the Court reserves the right not to apply the ECHR if necessary. It needs

\(^46\) Hence I cannot agree fully with K. Lenaerts, who maintains that there is a very clear distinction between the praetorial protection offered by the Court and the protection of human rights within the ‘residual powers’ of the Member States which eventually is a matter for the European Court of Human Rights. See K. Lenaerts, Fundamental Rights to be Included in a Community Catalogue. 16 ELRev. 372 (1991).
to be stressed that this situation of legal uncertainty is not cured by the addition of a general provision to the revised EEC Treaty. The new Treaty on the European Political Union, adopted in Maastricht on December 10, 1991, contains the following article:

The Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community law.

I doubt whether this provision will adequately meet the demands of legal protection and legitimacy that the expanding European legal order poses. What will the legal force of the new provision be? Can individuals rely on it, i.e. is it directly applicable? If so, which rights can be derived from it? Is the case law of the European Court of Human Rights covered by that provision as well?

With respect to the last question, it should be realized that the immense value of the ECHR is not its text, but rather the interpretation that has been developed in the case law of the European Court and Commission of Human Rights over the past decades. When the relation between the Communities and the ECHR is discussed, it is therefore crucial to take into account the jurisprudence of the Strasbourg Court. At present, there are no guarantees against diverging interpretations of human rights provisions.47

In fact, this issue is only a reflection of the underlying problem: the fact that the European Court of Justice considers itself bound to the substantive parts of the European Convention whereas the procedural parts are ignored. Although the Court applies human rights, its judgements escape supervision by the Strasbourg organs. Of course, the Court could hardly be expected to change this situation unilaterally, e.g. by encouraging individuals to lodge complaints against the Community in Strasbourg. Moreover, as long as the Commission continues to regard such complaints as inadmissible, that would not make much sense.48 Be that as it may, the net result is that while Eastern Europe embraces the notion of human rights and rapidly tries to accede to the European Convention, at the same time we witness, in Western Europe, a continuously growing area - the expanding Community legal order - that evades the

47. In the Hoechst case (supra note 11), the Court "noted that there is no case law of the European Court of Human Rights on the subject" involved in that case. However, the Court did not indicate that it would actually follow case law if existing. As a matter of fact, the Strasbourg Court had delivered a relevant judgement more than half a year before the Luxembourg Court made this observation. See the Chappel case (Series A. Vol. 152) of March 30, 1989.
48. See supra note 4. Pescatore (supra note 12, at 448-449) has criticized this approach severely. The Dutch member of the Commission seemed to indicate that the Commission may change its attitude: H.G. Schermers, The European Communities Bound by Fundamental Human Rights, 27 CMLR 258 (1990).
scrutiny of the very organs that were established under the ECHR to interpret and safeguard human rights.49

As a last remark, the example of the Demirel case shows that non-EC nationals cannot fully benefit from the protection offered by the Court. As long as the Court still considers as a starting point for its protection that a situation must fall within the scope of Community law, it can only protect those individuals that are able to invoke a rule of Community law - hence the difference between the Johnston and Heylens cases on the one hand and the Cinétèque and Demirel cases on the other. Since most rights in Community law are confined to nationals of EC Member States (notably Article 48 EEC Treaty), the Court can only be expected to protect the rights of non EC-nationals in a limited number of cases - despite the universal vocation of the concept of human rights and their applicability to anyone within the jurisdiction of the states parties to the ECHR.

In an attempt to fill some of these gaps, the Commission of the EC has recently proposed that the Community accede to the European Convention.50 Unfortunately it is beyond the scope of this note to elaborate on the many interesting elements in this proposal, but I hope to have demonstrated that this issue is most certainly not beyond the scope of the Community legal order.

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49. It is most interesting, in this respect, to consider the criteria that the twelve Member States have adopted for the recognition of new states. Respect for human rights and democracy take a very important place among these criteria (see Agence Europe of Dec. 18, 1991). Would the Communities themselves pass this test without any problem?