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## Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective

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# Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective

By  
Roza Pati\*

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# INTRODUCTION

In the 2004 Treaty Establishing a Constitution for Europe,<sup>1</sup> the European Union (EU) took a bold step toward integrating the Continent. A key component of this enterprise is Part II of the Treaty, the Charter of Fundamental Rights. It establishes for the first time a detailed system of legal defense shields for citizens of the Union against the exercise of Union power. Whether the European Constitution is seen as just a “tidying-up exercise” or a “blueprint for a European super-state,”<sup>2</sup> it has been a thorny issue to tackle. It intensifies the process of integration while, at the same time, extending it through the accession of new members in May 2004. Before EU members agreed upon a final text, constitution-making for Europe encountered serious difficulties over the issue of representation of certain Member States in decision-making processes.<sup>3</sup> On June 18, 2004, Mr. Bertie Ahern, the Irish Prime Minister and the President of the European Council of the EU at that time, announced the finalization of the Constitution, commenting that “you’ll get a few generations out of it.”<sup>4</sup>

This article will focus on the concept of rights under the new Constitution, especially its innovative part, the Charter of Fundamental Rights, and explore the approach taken to limit these rights. This article also places this discussion within the context of fundamental rights in general, starting with the assumption that the legal effect of a right cannot be assessed properly by only ascertaining

1. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, Dec. 16, 2004, O.J. (C 310) 47 (2004), available at <http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>. The Convention on the Future of Europe, which prepared this treaty, was established in December 2001. Led by former French president Valéry Giscard d’Estaing, the Convention was composed of 16 representatives from the EU Parliament, 32 representatives of national parliaments, 15 representatives of national governments, and two representatives from the Commission. The Convention produced a draft Constitution, which was agreed upon by consensus at the Convention on June 13, 2003 and then presented to the heads of governments and states in Thessaloniki, Greece on June 20, 2003. Following further negotiations, the EU leaders agreed on a final text on June 17-18, 2004 in Brussels, Belgium. The Constitution Treaty is composed of four parts: Part I—Definition and Objectives of the Union; Part II—The Charter of Fundamental Rights of the Union; Part III—The Policies and Functioning of the Union; Part IV—General and Final Provisions.

2. Simon Jeffery, *Q & A: The European Constitution*, GUARDIAN UNLIMITED, at <http://www.guardian.co.uk/theissues/article/0,6512,1092917,00.html> (Nov. 25, 2003). For further discussion and analysis of the EU Constitution, see, for example, Eckart Klein, *Europäische Verfassung im Werden*, at [http://www.europa-bremen.de/europa/charta/TEIL\\_E.pdf](http://www.europa-bremen.de/europa/charta/TEIL_E.pdf) (last visited Feb. 12, 2005); Joanna Griffin, *The European Press and the European Constitution*, at [www.worldpress.org/Europe/1232.cfm](http://www.worldpress.org/Europe/1232.cfm) (June 26, 2003); EUR. CONVENTION, DRAFT EU CONSTITUTION PRESENTED TO THE THESSALONIKI COUNCIL, at <http://www.eiro.eurofound.ie/2003/07/feature/eu0307204f.html> (last visited Feb. 12, 2005); *Excerpts: Europe’s draft constitution*, BBC NEWS, UK EDITION, at [http://news.bbc.co.uk/1/hi/uk\\_politics/2938272.stm](http://news.bbc.co.uk/1/hi/uk_politics/2938272.stm) (June 21, 2004); Thomas Fuller, *In a Europe of 25 Equals, No Consensus on a Charter*, N.Y. TIMES, Oct. 6, 2003, at A4; William Pfaff, *Constitution for Europe*, INT’L HERALD TRIB., Nov. 4, 2002, at 6.

3. For developments in the negotiations regarding the Treaty, see Paul Ames, *European Constitution Summit Collapses*, Boston.com News, Dec. 14, 2003, at [http://www.boston.com/news/world/europe/articles/2003/12/14/european\\_constitution\\_summit\\_collapses/#](http://www.boston.com/news/world/europe/articles/2003/12/14/european_constitution_summit_collapses/#); *Ireland Begins EU Presidency With Constitution Headaches*, EU BUSINESS, at <http://www.eubusiness.com/afp/031228021601.psvrd1gm> (Dec. 28, 2003).

4. Honor Mahony, *Constitution for Europe Agreed*, EU OBSERVER, available at <http://www.euobserver.com/?sid=9&aid=16671>, available at <http://www.unieurope.org/showarticle.php?id=741> (June 18, 2004).

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the definition of its substantive scope. The limitations on a right are as important as its scope in determining its legal content,<sup>5</sup> as virtually no right is absolute in light of the need to balance individual interests and the requirements of community life. Since the very first formulations of human and civil rights instruments, jurists have had to interpret the limits on those rights. For example, can domestic constitutional rights, which can be limited “by law,” be made legally meaningless by a domestic legislature? Can international guarantees be outmaneuvered by domestic measures in the case of a right guaranteed only through, or within the confines of, national legislation?

Thus, the doctrine of limitations on rights arose within the context of the general doctrine of fundamental rights. Particular guarantees of rights are tethered to the context and text of the specific document embodying both rights and limits. Still, the various national, regional, and universal guarantees have cross-fertilized each other. In the context of the EU, limits to Union power, in the absence of a Union rights catalog, were drawn up in close approximation to national rights catalogs and the regional human rights instrument—the European Convention on Human Rights (ECHR). So were the limits to those limits. Section 3<sup>6</sup> of Article 52 of the Charter of Fundamental Rights of the European Union, now Article II-112 of the Constitution, reflects this heritage by attempting to harmonize the interpretation of Charter rights with the jurisprudence of rights under the ECHR and common domestic constitutional traditions. Section 1 of this general provision on the Charter’s limitation of rights,<sup>7</sup> refers to categories of limitations derived from both domestic constitutions and the ECHR and other rights catalogs, such as the United Nations’ International Covenant on Civil and Political Rights (ICCPR).

It is apposite, therefore, to present first the nature of this new Europe, as envisioned and defined by the new Constitution. This article will then delimit the rights under the Constitution by reference to (1) the history of rights, (2) important domestic traditions—in particular, the U.S. Bill of Rights and the German Basic Law, and (3) international guarantees and their limits, such as those established universally under the ICCPR and regionally under the ECHR. Fi-

5. Eckart Klein, *The Position under International Law*, in *BEFORE REFORMS: HUMAN RIGHTS IN THE WARSAW PACT STATES (1971-1988)* 7 (Georg Brunner et al. eds., 1990).

6. Article 52(3) of the 2000 Charter, now Article II-112 of the 2004 Constitution, states: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” *CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION*, Dec. 7, 2000, O.J. (C 364) 21 (2000). For details of the Charter and its legal nature, see *infra*, notes 257-264. The 2000 Charter became, in essence, Part II of the 2004 Constitution for Europe. In the official version of the Constitution, *supra* note 1, the articles of the Charter were renumbered consecutively, succeeding upon the 60 articles of Part I. Thus, e.g., Article 52 of the Charter became Article II-112 of the Constitution. In this article, the Constitution’s enumeration of the Charter’s provisions will be used.

7. Article 52(1), now Article II-112(1), states: “Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.” *Id.*

nally, this article will evaluate the limits drawn in the Charter of Fundamental Rights. In addition to analyzing the contents of the Charter, this comparative and international legal analysis will allow us to answer the question: Does the Charter do justice to the critical issue of how to properly limit rights?

## I.

### THE CONSTITUTION FOR EUROPE

The “constitutionalization” of a community is properly characterized as the “solidification of structures, the definition of community interests, and the creation of rights for individuals and the protection of such rights against violations.”<sup>8</sup> The inherited notion of a constitution is that of the “basic law of the state,” “governing law of the land,” or “fundamental law of society,” thus referring to the founding document of a nation-state that aims at self-rule and claims for itself ultimate authority.<sup>9</sup> In modern democratic times, this claim to “ultimate authority” would usually require, for the constitution to be legitimate, that the process of constitutionalization be a voluntary act involving direct participation of the people. Generally, a constitution is embodied in a written text, and most of the EU Member States do have a written constitution.<sup>10</sup> International organizations (such as the International Labour Organization or the Universal Postal Union) might also be founded on the basis of a “constitution.” Consequently, merely having a basic document designated as a constitution does not reveal much about the existing or prospective nature of the EU.<sup>11</sup> The broader, functional definition of a constitution, however, would allow the inclusion of deliberate legal acts constituting a political community beyond the nation-state, through the integrative processes mentioned above.<sup>12</sup> In Europe, the process of constitutionalization appears to have been set in motion.

As to the integrative processes of the exercise of legislative powers and judicial review, the doctrines of “direct effect” and “supremacy” of European law over national laws, though sometimes challenged by national constitutional courts,<sup>13</sup> have been established since the Community’s early years.<sup>14</sup> According

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8. Klein, *supra* note 2, at 2 (translation).

9. Peter Badura, *Verfassung*, in EVANGELISCHES STAATSLERIKON 2708 (Hermann Kunst et al. eds., 2d ed. 1975).

10. The United Kingdom does not have a written constitution but makes up for this deficiency with ironclad “constitutional conventions.” Also, some in the United States argue that the Constitution does not consist only of the written document, but also includes the “basic legal order” of the country. In this view, the U.S. Constitution consisted of both the written document and the common law at the time the document was adopted. However, although the written constitutional document supersedes the common law where they might be in conflict, it does not replace it. The courts must refer to the common law for guidance where the written document is silent or ambiguous. For more detail, see CONST. SOC’Y, SUMMARY OF CONSTITUTIONAL RIGHTS, POWERS AND DUTIES, at <http://www.constitution.org/powright.htm> (last visited Feb. 12, 2005).

11. See Franklin Dehousse & Wouter Coussens, THE PERILS OF A EUROPEAN CONSTITUTION 1-2 (2002), at <http://www.irri-kiib.be/papers/ConstitutionofEuropemotivation.pdf>.

12. Klein, *supra* note 2, at 2.

13. For comparative legal interpretations of the decisions of the German Constitutional Court and the Danish Supreme Court, see Beate Kohler-Koch, A CONSTITUTION FOR EUROPE? 4-5, (Mannheimer Zentrum für Europäische Sozialforschung, Working Paper No. 8, 1999), available at <http://www.mannheimer-zentrum.de/working-papers/working-paper-no-8-1999>.

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to proponents of the Treaty, the formalization of the European Constitution not only simplifies and reorganizes existing treaties, but also provides a clearer picture of the nature of the Union, making it more transparent, effective, and participatory.<sup>15</sup> Simply stated, the Constitution for Europe radically reforms the institutions.<sup>16</sup> Despite various modifications, the document as a whole remains coherent. Most importantly, it accelerates the transformation of the mainly diplomatic European system into a powerful system of political decision-making.

Others see the Constitution as simply another step in the gradual process of European constitutionalization since there already exists a "material" constitution central to the legal and institutional framework of the European communities and the EU.<sup>17</sup> So, is this new "Constitution for Europe" a real constitution?

Even under the traditional concept of a constitution as the foundational document of a state, one element is virtually always present: a catalog of fundamental individual rights. The EU Constitution not only solidifies Union structures for decision-making, it also formulates the EU's system of values. By integrating *expressis verbis* the Charter of Fundamental Rights,<sup>18</sup> the EU Constitution not only makes these common values "more visible,"<sup>19</sup> but it also makes them justiciable; it ordains the observance and judicial enforcement of fundamental rights in the EU. It adds one more layer to the "multi-level constitutionalism"<sup>20</sup> that protects human rights in Europe. In light of future EU enlargement, the protection of fundamental rights will likely become an essential component of negotiations with candidate countries. Also, Article I-9(2) of the Constitution mandates EU accession to the European Convention on Human Rights, which would lead to external scrutiny of Union power. Most importantly, limits on individual rights vis-à-vis Union power will enhance the perception of European citizens that they are connected to the process of European

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[www.mzes.uni-mannheim.de/publications/wp/wp-8.pdf](http://www.mzes.uni-mannheim.de/publications/wp/wp-8.pdf); Line Olsen Ring, *Dänemarks EU-Mitgliedschaft zwischen Politik und Recht. Schwierige freiwillige Abgabe von Hoheitsrechten*, NEUE ZÜRCHER ZEITUNG, May 28, 1998, at 7.

14. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585; VOLKER ROEBEN, CONSTITUTIONALISM OF INVERSE HIERARCHY: THE CASE OF THE EUROPEAN UNION (N.Y.U. Sch. of L., Jean Monnet Working Paper 8/03, 2003), at <http://www.jeanmonnetprogram.org/papers/03/030801.pdf>.

15. Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 5, 8 (2001) (referring to a "catalytic constitution"), available at <http://newleftreview.net/PDFArticles/NLR24501.pdf>.

16. For an analysis of the argument that the Nice Treaty did not provide answers to the challenge of European enlargement and more on this issue, see FRANKLIN DEHOUSSE & WOUTER COUSSENS, *The Enlargement of the European Union: Opportunities and Threats*, in *STUDIA DIPLOMATICA* 54, 97-101 (2001).

17. DARIO CASTIGLIONE, FROM THE CHARTER TO THE CONSTITUTION OF EUROPE? NOTES ON THE CONSTITUTIONALISATION PROCESS IN THE EU 2-4 (Queen's Papers on Europeanisation No. 5, 2002).

18. The EU Charter of Fundamental Rights was adopted in Nice in December 2000 as a political declaration. Though not legally binding, the Charter nevertheless set standards; the EU Court institutions have already referred to the Charter in several cases. See *infra*, at notes 260-264.

19. Preamble, Charter of Fundamental Rights of the European Union, CONSTITUTION FOR EUROPE, *supra* note 1, at para. 4.

20. Kohler-Koch, *supra* note 13, at 4.

integration.<sup>21</sup> Thus, the elements of a functional concept of a constitution, set out at the beginning of this section, appear to be met.<sup>22</sup>

As these fundamental rights are being chiseled out in the text of the Charter, their limits are also being formulated in broad concordance with member states' constitutional traditions and regional human rights jurisprudence. To properly evaluate these limits, a brief recounting of the history of rights and their limitations must be undertaken.

## II.

### RIGHTS AND THEIR LIMITS: AN OVERVIEW

The EU's Charter of Fundamental Rights is only the most recent regional catalog of individual rights. The notion of "rights" is commonplace; to understand this notion properly, however, it is necessary to ask more profound questions: Where do "rights" come from? Where are they properly anchored? Are there any limits to "rights"? If yes, what are they, and where are they to be found? What justifications are persuasive?

It is widely held that the concept of human rights stems from the doctrine of natural rights,<sup>23</sup> which holds that individuals are entitled to fundamental rights beyond those prescribed by law, merely by virtue of being humans possessed with sympathy and psychological imagination. The idea of human rights is an essential part of the liberal creed, since it refers more to a state of feeling, rather than to a statutory provision. The positive manifestation of human rights law can be traced back hundreds of years through the development of the legal history of many Western countries, which progressively recognized that human rights cannot be created or granted, but are firmly grounded in the basic dignity and equality of each person.<sup>24</sup>

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21. This would especially hold true for the citizens of Member States (i.e., Czech Republic, Denmark, France, Ireland, Luxembourg, the Netherlands, Poland, Portugal, Spain and the United Kingdom) that have already committed themselves to holding a referendum on the ratification of the Constitution, see <http://alde.europarl.eu.int/content/default.asp?PageID=607>. The people of Spain just approved the Constitution for Europe by a wide margin, see *Spain Voters Approve EU Charter* at <http://news.bbc.co.uk/1/hi/world/europe/4280841.stm>. In the United Kingdom, France and Germany, there was great pressure to have the Constitution approved by referendum. It was argued, *inter alia*, that it would be "hopelessly weak unless founded on clearly expressed public support." See DAVID HEATHCOAT-AMORY, *THE EUROPEAN CONSTITUTION AND WHAT IT MEANS FOR BRITAIN* 35 (2003), available at [http://www.v63.net/wellsconservatives/Newgraphics/the\\_european\\_constitution.pdf](http://www.v63.net/wellsconservatives/Newgraphics/the_european_constitution.pdf). Prime Minister Tony Blair and President Jacques Chirac will hold a referendum on the Constitution for Europe in their respective countries, but a constitutional prohibition on referenda on the federal level stands in the way of Germany allowing for a similar direct expression of the will of the people.

22. Klein, *supra* note 2.

23. See LOUIS HENKIN, *THE AGE OF RIGHTS* 1-5 (1990).

24. See *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* (David Kretzmer & Eckart Klein eds., 2002). For insights regarding the use of the term "human dignity" in legal parlance, see Doron Shultziner, *Human Dignity – Functions and Meanings*, 3 *GLOBAL JURIST TOPICS* No. 3-3 (2003), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1110&context=gj>.

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For example, elements of human rights were enshrined in early English law, mainly the Magna Carta<sup>25</sup> of 1215 and the Bill of Rights<sup>26</sup> of 1689. Though these instruments are primarily contracts between, respectively, the King and the barons, and the King and the House of Barons, thus applicable only to aristocracy or to members of Parliament, and deal very little with the rights and issues of ordinary people, they are still significant in the development of human rights because they granted certain individuals limited rights against the sovereign, puncturing holes into the feudal obligations of perpetual allegiance and total obedience.

Also worthy of mention is the principle of non-discrimination on the basis of religion, developed by various treaties between countries and declarations within countries, such as the Treaty of Westphalia between Roman Catholics and Protestants in 1648,<sup>27</sup> Turkey's guarantees to Russia regarding Orthodox Christians in the 1774 Treaty of Kuchuk Kainarji,<sup>28</sup> or Napoleon's emancipation of the Jews.<sup>29</sup> In particular, the *jus emigrationis*<sup>30</sup> for persons who espoused a religion different from that of their feudal lord, has been viewed by some as the first human right. Such elements and statements of human rights gradually developed into a more comprehensive international law of human rights.

The 1789 French Declaration of the Rights of Man and the Citizen, which arose out of the French Revolution, is a much fuller expression of human rights than that found in early English law. The first legal enactment of a catalog of rights, however, was made on the other side of the Atlantic.

The Virginia Bill of Rights of June 12, 1776 expressed for the first time the idea of natural rights for human beings;<sup>31</sup> the United States Declaration of Inde-

25. Paragraph 1 reads: "We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever." The text is available at <http://www.constitution.org/cons/magnacar.htm> (last visited Feb. 13, 2005).

26. The English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, is similar in structure to today's resolutions and declarations. The text is available at <http://www.yale.edu/lawweb/avalon/england.htm> (last visited Feb. 13, 2005). Another interesting document that sets out the rights and liberties of the subject as opposed to the prerogatives of the Crown, favoring the common man, is the Petition of Right of 1628, championed by Sir Edward Coke, Speaker of the House of Commons, Attorney General, Chief Justice of the Court of Common Pleas and Chief Justice of the King's Bench. The text is available at <http://www.britannia.com/history/docs/petition.html> (last visited Feb. 13, 2005).

27. Peace Treaty between the Holy Roman Emperor and the King of France and Their Respective Allies, Oct. 24, 1648, in 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F.L. Israel ed., 1967).

28. Relevant here is the part of the Treaty that conceded to Russia the role of protector of the Sultan's Orthodox subjects. Information about the treaty is available at <http://reference.allrefer.com/encyclopedia/R/RussoTur.html>.

29. A summary of resolutions and decrees on this issue, in chronological order, is available at <http://www.virginia.edu/history/courses/fall.01/hieu210/intro/chronology.html> (last visited Feb. 13, 2005).

30. The 1555 Augsburg Treaty of Religious Peace granted individuals, formerly devoid of positive rights because of their status as feudal subjects owing perpetual allegiance to their feudal lord, a right to emigrate (*jus emigrationis*) for religious reasons. Siegfried Wiessner, *Blessed be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 499 (1986).

31. HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 103-04 (9th ed. 1973).



pendence immediately followed on July 4, 1776. After further formulation of rights in other state constitutions, the 1791 "Bill of Rights" amendments to the U.S. Constitution established the first positive law recognition of rights that were universal in their application to all citizens of a country. Nowadays, most countries' constitutions contain an extensive rights catalog.

The early human rights documents reflected the political and philosophical thought of the time. Although sometimes contradictory, the various interpretations of the concept of "natural rights," have been essential parts of the French Enlightenment movement, as well as the 17th century works of Hugo Grotius and John Locke; the 18th century works of Jean-Jacques Rousseau, Thomas Paine and Edmund Burke; and the 19th century works of John Stuart Mill.<sup>32</sup> In particular, the German philosopher Immanuel Kant contributed substantially to the conception and essence of rights. In 1785, he expressed the view that we, as human beings, should always treat humanity with liberty and equality, without one trying to overpower the other purely for personal gains in the most selfish manner.<sup>33</sup>

While Kant's philosophy is idealistically grounded in the principle of the autonomy of the will of the "rational being," religious views—in particular, the Catholic tradition—anchor rights in God's will since He created man in His own vision, maintaining that "men are by grace the children and friends of God and heirs of eternal glory."<sup>34</sup> According to Catholic social teachings, since all human beings are endowed with intelligence and free will, they have rights and obligations flowing directly and simultaneously from their own nature. Similarly, these rights and obligations are universal and inviolable, so they cannot be surrendered. On the other hand, these natural rights are inseparably connected

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32. "As soon as any part of any persons conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion." JOHN STUART MILL, *OF THE LIMITS TO THE AUTHORITY OF SOCIETY OVER THE INDIVIDUAL* (1859), *reprinted in HUMAN RIGHTS IN WESTERN CIVILIZATION: 1600-PRESENT*, at 52 (John A. Maxwell & James J. Friedberg eds., 1994).

33. Kant states that "the imperative [is to] act in such a way that you treat humanity . . . always as an end in itself" and to him this imperative is universal. He also adds that "[t]his principle of humanity . . . is the supreme limiting condition of everyman's freedom of action." Of course, Kant does not base it on experience because "no experience is capable of determining anything about [rational beings]." He also recognizes dignity "infinitely beyond all price, with which it cannot in the least be brought into competition or comparison without, as it were, violating its sanctity." He finds autonomy as "[t]he ground of the dignity of human nature and of every rational nature" because "the will of every rational being is a will that legislates universal law." IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 36-37 (James W. Ellington trans., 3d ed. 1993) (1785). Reference to Kant's philosophy can also be found in the reasonings of the Federal Constitutional Court of Germany. For example, in the *Life Imprisonment* case, the Court held that "even in the community the individual must be recognized as a member with equal rights and an intrinsic value. It is therefore contrary to human dignity to make persons the mere objects of the state . . . . The phrase 'the human being must always remain an end in himself' is of unlimited validity in all areas of law; for the dignity of the human being as a person which cannot be lost, consists exactly of the maintenance of his recognition as an autonomous personality." 45 BVerfGE 187, 227-28 (1977). See also Eckart Klein, *Human Dignity in German Law, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 145-59 (David Kretzmer & Eckart Klein eds., 2002).

34. For a full enumeration of the rights to which man is entitled, see JOHN XXIII, *PACEM IN TERRIS: THE ENCYCLICAL LETTER OF POPE JOHN XXIII ON ESTABLISHING UNIVERSAL PEACE IN TRUTH, JUSTICE, CHARITY AND LIBERTY* (Apr. 11, 1963), at <http://www.osjspm.org/cst/pt.htm>.

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with just as many respective duties. Rights as well as duties find their source in natural law, which grants or enjoins them. In other words, natural law, by granting every fundamental human right, imposes at the same time a corresponding obligation—thus, there should exist limitations to rights.<sup>35</sup>

Another interesting approach to the concept of liberty, which underlies positive law in the civil law tradition, stems from the assumption that rights guarantee relatively autonomous spheres of life and gradually bring about new developments and social change. According to this view, the individual is a “part of the human community, not isolated but embedded in a number of structures and interactions which are supported by law.”<sup>36</sup> This concept of liberty includes limitations on individual action as well as obligations, allowing for “fast adaptations to public necessities, which result in restrictions on individual rights, may this be in the field of economic or social legislation or in that of private behaviour or individual lifestyle.”<sup>37</sup>

### III.

#### NATIONAL TRADITIONS: LIMITATIONS ON RIGHTS IN CONSTITUTIONAL LAW AND JURISPRUDENCE

##### A. *The United States Constitution and the Jurisprudence of the Supreme Court*

Strangely enough, the United States Constitution has been the best export article in a country whose business is business.<sup>38</sup> It has influenced many other constitutional orders, not only with respect to its Bill of Rights, but also with respect to fundamental structurings of authority, such as federalism, separation of powers, and judicial review.

The original Bill of Rights, a catalog of ten amendments added to the 1787 Constitution as a virtual afterthought in 1791, as well as the rights added via amendment in subsequent years, (most notably the abolition of slavery and the equal protection clause), focus on the guarantee itself without, in many cases, spelling out express limitations on the right formulated. For example, the First Amendment guarantees apodictically that “Congress shall make no laws abridging the freedom of speech, or of the press . . .” It was left to the Supreme Court, however, to formulate the limits that any right must have in a well-ordered society.

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35. “The natural rights with which We have been dealing are, however, inseparably connected, in the very person who is their subject, with just as many respective duties; and rights as well as duties find their source, their sustenance and their inviolability in the natural law which grants or enjoins them.” *Id.* at para. 28.

36. Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 55 (Ulrich Karpen ed., 1988).

37. *Id.*

38. Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 *NEW EUR. L. REV.* 129 (1993); *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert J. Rosenthal eds., 1990).

In drawing these limits, the Supreme Court did not try to codify, via its power of precedent, “formal or “substantive” limitations in a general and abstract sense. Instead, it followed a more pragmatic approach; guided as much by the country’s common law tradition as its deep distrust of government, the Court developed a case-by-case jurisprudence that strikes a balance between individual rights and interests of the community. The Court’s jurisprudence tries to minimize restrictions on individual freedom, while still protecting against real, concrete threats to the community that could materialize in spasms of unauthorized violence and coercion. Thus, for example, politically subversive action could only be criminalized if it incited imminent lawless action, and that action was likely to occur—the famous two-prong *Brandenburg* test of “clear and present danger” to the community.<sup>39</sup> “Fighting words” could only be prohibited if they would have “caused an average addressee to fight.”<sup>40</sup> Even incitement to racial hatred was protected<sup>41</sup> unless it amounted to a “true threat.”<sup>42</sup> Public figures, such as well-known politicians or celebrities, could not successfully file a libel suit, even if defamatory and false statements of fact were made about them, unless those statements were made with “actual malice” (that is, with knowledge of their falsity or reckless disregard for the truth).<sup>43</sup> Injunctions against the publication of any communication could only be obtained if there was a specified threat to national security, an impending breach of internal peace, or if obscene material was involved, under the prior restraint theory inherited from the English common law.<sup>44</sup> Less protection was afforded commercial expression.<sup>45</sup> Thus the Supreme Court developed a highly diverse and concrete set of tests applied to different fields of expression: a theme park of jurisprudence focusing on the context of the particular communication involved.

Similarly, the equal protection clause was differentiated out into quite disparate “standards of review.” The highest standard, “strict scrutiny,” requires the demonstration of a “compelling governmental interest” for differential treat-

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39. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that a state could not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). This interpretation of the “clear and present danger” doctrine, formulated first in *Schenck v. United States*, 249 U.S. 47 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919), is the most speech-protective theory of the limits on freedom of expression encountered not only in domestic constitutional systems, but also internationally.

40. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (explaining that “face-to-face words” could be banned if “men of common intelligence” considered them “likely to cause an average addressee to fight”).

41. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *but cf.* *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (holding that it is constitutional to enhance the penalty for a non-speech related crime if it is motivated, for example, by racial hatred).

42. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

43. *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

44. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

45. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (“There are commonsense differences between speech that does ‘no more than propose a commercial transaction’ . . . and other varieties. . . . [T]hey . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.”) (citation omitted).

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ment, and the “narrow tailoring” of the means to achieving the end of this governmental objective. This standard was reserved for discrimination on the basis of race or ethnic origin,<sup>46</sup> or if certain “fundamental rights,” such as the right to vote<sup>47</sup> or the right to travel,<sup>48</sup> were involved. On the other end of the spectrum, only rational basis review<sup>49</sup> is guaranteed, applying to the residual of all other differentiating criteria or interests that are not subject to heightened judicial scrutiny—an easy standard to pass for governmental action. In between, the court developed standards of “intermediate strict scrutiny” (for instance, with respect to illegitimate children<sup>50</sup>), “enhanced intermediate scrutiny” (regarding gender, focusing on “exceedingly persuasive justifications”<sup>51</sup>), “enhanced rational basis tests” (for instance, for the handicapped,<sup>52</sup> homosexuals,<sup>53</sup> etc.). Aliens enjoyed strict scrutiny vis-à-vis state governmental discriminatory action, but only if they were not excluded from jobs that went to the “heart of representative government;” there was no special equal protection for them against exclusionary acts by the federal government.<sup>54</sup>

The famous right to “privacy,” found by the U.S. Supreme Court in *Griswold v. Connecticut*<sup>55</sup> to be within the “penumbra” of other rights (that is, the First, Fourth, Fifth, Ninth, and Fourteenth Amendments), reviving older concepts of a “substantive” due process clause, does not exist in this generality. It is largely confined to the facts of the case decided, originally to the right to use contraceptives<sup>56</sup> and later to the right to choose an abortion within certain time frames of pregnancy.<sup>57</sup> Arguably, a “right to loiter” has now been deduced from

46. Applied first in the Japanese-American internment case, *Korematsu v. United States*, 323 U.S. 214 (1944), the strict scrutiny test is now used to review all forms of differential treatment of racial or ethnic groups, regardless of intent.

47. Interpreted as giving a right to cast a ballot, the limitations of which have to pass strict scrutiny, see, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), this “fundamental” right, however, also ensures the approximately equal impact of each vote on representative bodies, which has led to decisions forcing redistricting, see, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Shaw v. Reno*, 509 U.S. 630 (1993); *Hunt v. Cromartie*, 532 U.S. 234 (2001).

48. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

49. See, e.g., *Ry. Express Agency v. New York*, 336 U.S. 106 (1949); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980).

50. See *Clark v. Jeter*, 486 U.S. 456 (1988).

51. See *United States v. Virginia*, 518 U.S. 515 (1996).

52. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

53. See *Romer v. Evans*, 517 U.S. 620 (1996).

54. *Sugarman v. Dougall*, 413 U.S. 634 (1973) (applying scrutiny with respect to the exclusion of aliens from state jobs that do not go to the “heart of government”); see also *In re Griffiths*, 413 U.S. 717 (1973); *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (holding that the federal government, based on its authority to control immigration, was not obligated to provide equal access to federal jobs to aliens as long as the President or Congress made that determination); *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny with respect to access to state government benefits); *Mathews v. Diaz*, 426 U.S. 67 (1976) (denying strict scrutiny with respect to federal assistance programs).

55. 381 U.S. 479, 486 (1965) (“We deal with a right to privacy older than the Bill of Rights . . .”).

56. *Id.*

57. *Roe v. Wade*, 410 U.S. 113 (1973); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (reaffirming the essential holding in *Roe v. Wade* but reinterpreting the ability of states to regulate).

the substantive due process clause of the Constitution.<sup>58</sup> In the summer of 2003, however, in *Lawrence v. Texas*,<sup>59</sup> a broader right to intimate sexual contact, including private homosexual activity, was proclaimed by the Court.

In sum, there is no general doctrine of limitations upon rights under American constitutional jurisprudence. Courts impose and affirm limits in response to the particular circumstances of fact patterns. This pragmatic archetype contrasts starkly with the more formal constitutional arrangements found mostly in civil law countries. Their ideas about rights and limits thereof are of a more general and abstract nature, as exemplified in the jurisprudence of the German Federal Constitutional Court.

*B. The German Basic Law and the Jurisprudence of the Federal Constitutional Court*

The German Constitution of May 23, 1949, designated as the Basic Law of the Federal Republic of Germany,<sup>60</sup> determines the relationship between the State<sup>61</sup> and the individual in addition to shaping the organization and the institutions of the Republic. The Basic Law puts individual rights and the protection of human dignity front and center, at the very beginning of the document. Rights are seen not only as shields against the state, but also as constitutive of the purposes and structure of government. The liberty of the individual, as recognized in Articles 1 and 2, is at the core of the Basic Law and is derived from the dignity of man/woman and his/her right to self-determination. Consequently, liberty cannot be granted, but is only recognized by the positive provisions of the Basic Law. The role of the State in the Basic Law, therefore, is to secure the liberty of the people.<sup>62</sup> The State exists for the benefit of the human

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58. *City of Chicago v. Morales*, 527 U.S. 41 (1999) (overturning loitering prohibition on vagueness grounds).

59. 539 U.S. 558 (2003), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

60. The Basic Law of the Federal Republic of Germany of May 23, 1949, or Grundgesetz [GG] (F.R.G.), consists of 146 Articles. Articles 1 through 19 include a catalog of basic rights that guarantee mainly civil liberties. These initial articles either recognize and guarantee human rights or expressly grant rights to German citizens only. The Basic Law also contains more articles that function similarly to the basic rights, including GG art. 20(4) (F.R.G.): The right to resist any persons seeking to abolish this constitutional order; GG art. 33 (F.R.G.): Equal citizenship of all Germans and equal access to the civil service; GG art. 38 (F.R.G.): The right to general, direct, free, equal, and secret elections; GG art. 101 (F.R.G.): The right to a legally competent judge; GG art. 103 (F.R.G.): The right to a hearing, the prohibition of retroactive laws, and the prohibition of dual punishment; and GG art. 104 (F.R.G.): Legal guarantees in the event of detention. The Basic Law is believed to have created safeguards against the emergence of either an overly fragmented and multi-party democracy, similar to the Weimar Republic (1918-1933), or overly authoritarian institutions characteristic of the dictatorship of the Third Reich (1933-1945). GERMAN CULTURE, THE CONSTITUTION, at [http://www.germanculture.com.ua/library/facts/bl\\_constitution.htm](http://www.germanculture.com.ua/library/facts/bl_constitution.htm) (last visited Feb. 13, 2005).

61. This article uses the term "State" with a capital "S" to refer to all governmental authority in Germany, be it on the federal, the state (*Länder*), or local level.

62. Eckart Klein, *The Concept of the Basic Law*, in MAIN PRINCIPLES OF THE GERMAN BASIC LAW 15-16 (Christian Starck ed., 1983).

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being and not the reverse—a concept wholly different from, say, Communist ideology.<sup>63</sup>

The Basic Law prescribes rights, the majority of which can be claimed by “everyone.” This category of rights can be referred to, in the German context, as “human” rights. There is also a set of rights<sup>64</sup> linked to citizenship that are applicable to German citizens only, including freedom of assembly, Article 8(1); freedom of association, Article 9(1); and freedom of profession and business, Article 12(1). These rights are granted to “all Germans,” though there are other German laws that extend these rights to aliens as well.<sup>65</sup> European and international law appears now to go further and overrule such citizenship limitations.<sup>66</sup>

The Basic Law guarantees through its articles a free democracy governed by the rule of law, ensuring the liberty of the individual. Unlike the Weimar Republic constitution, however, it is a *wehrhafte Demokratie*—a democracy that can defend itself.<sup>67</sup>

The Basic Law, as the supreme law of the State, guarantees a democracy where the majority is not identical with the people and the State is not identical with society. Consequently, neither the State nor the majority can claim absolute power.<sup>68</sup> The idea of limited government adopted by the Basic Law, as well as its guaranteed respect for liberty and fundamental rights, is obvious in the institutional precautions it takes to avoid potential abuse of powers. Thus, certain provisions of the Basic Law cannot be amended: those providing for the essential structures of federalism; the separation of powers; the principles of democracy, social welfare, and fundamental rights; and the principle of State power based on law.

The Basic Law charges the State with the duty to refrain from violating the fundamental rights (*status negativus* or *libertatis* and the duty of the State to respect those rights), as well as the duty to ensure that the individual has realistic

63. For an analysis of this issue, see Hans von Mangoldt, *The Communist Concept of Civil Rights and Human Rights under International Law*, in *BEFORE REFORMS: HUMAN RIGHTS IN THE WARSAW PACT STATES (1971-1988)* 27-57 (Georg Brunner et al. eds., 1990).

64. Goerlich, *supra* note 36, at 47-48. Article 16(2)(2) offers protection to every refugee who fulfills the requirement of political persecution, albeit now under highly restricted conditions. GRUNDGESETZ [GG] [Constitution] art. 16(2)(2) (F.R.G.). Citizenship guarantees are also contained in GG art. 16(1) (F.R.G.) (“[citizenship] cannot be withdrawn”); GG art. 16(2)(1) (F.R.G.) (no German may be extradited); GG art. 116 (F.R.G.) (access to citizenship offered to all persons of German origin); GG art. 38 (F.R.G.) (the right to vote and to be elected); and GG art. 33(1) (F.R.G.) (access to public office).

65. § 1 of the Statute on Assemblies and Demonstrations, v. 11.15.1978 (BGBl. I S. 1790) grants the right of assembly to “everyone.” In § 1 and § 14 of the Statute on Regulating Associations, v. 8.5.1964 (BGBl. I S. 593) affords a right to associate to aliens, albeit with limits additional to those imposed on citizens.

66. Goerlich, *supra* note 36, at 47-48.

67. *The Constitution*, *supra* note 60. Article 18, which was employed twice in the 1950s to ban political parties of the extreme right and left, states: “Whoever abuses freedom of expression of opinion, in particular freedom of press (Article 5(1)), freedom of teaching (Article 5(3)), freedom of assembly (Article 8), freedom of association (Article 9), privacy of letters, posts, and telecommunications (Article 10), rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. Such forfeiture and its extent is determined by the Federal Constitutional Court.”

68. Klein, *supra* note 62, at 17.

opportunities to realize his freedoms (*status positivus* and the duty of the State to protect and ensure freedoms). All State authority is constrained by the basic rights set forth in Article 1(3), which states that the “following basic rights are binding on legislature, executive, and judiciary as directly enforceable law.”<sup>69</sup>

This formal normative enactment of the constitutional rights of the individual leaves no room for the misinterpretation of constitutional rights as purely programmatic statements or non-self-executing provisions. The fundamental constitutional rights are subjective rights. The individuals entitled to these rights can claim these rights and the courts will enforce them when rightly claimed. These rights do not merely reflect a “programmatic intent” for the legislature to make corresponding law, but are also subject to judicial enforcement (that is, they constitute standards for judicial review of governmental action at all levels). These rights are often self-executing; some of them, however, require legislative or administrative action to make them effective in the courts of law.<sup>70</sup>

It is not only the State, however, that is restricted by an obligation of the Basic Law. While respecting the autonomy of the individual, the Basic Law has to secure the liberty and freedom of all. Thus, it provides for potential governmental limitations on individual rights to benefit other individuals, the community, or society. An individual is not an island, isolated from others. Rather, human beings are social by nature and are meant to live with others. Hence, a well-ordered society requires that individuals recognize and observe each other’s rights and duties, based on perfect reciprocity. Absolute freedom for the individual would be at the expense of society and the rights and freedoms of others.

The Basic Law ensures that restrictions are set up and required in certain situations “to maintain and advance social life.” In addition, the dignity of the human personality is allowed to develop freely within the social community.<sup>71</sup> At the same time, gross inequalities in power exist between the state and the individual as well as between individuals and private organizations. Thus, there may be good reasons to extend the binding force of the basic rights to relations between private individuals and private entities.<sup>72</sup> The Federal Constitutional Court has held that the normative character of the basic rights expresses itself

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69. GRUNDGESETZ [GG] art. 1(3) (F.R.G.).

70. Goerlich, *supra* note 36, at 49.

71. Entscheidungen des Bundesverfassungsgericht [BVerGE] [Federal Constitutional Court] 7, 198 (205) (F.R.G.).

72. SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 72 (1999). The Federal Constitutional Court, in its decision of the *Lüth* case, affirmed the primary role of the basic rights as rights against the state: “The basic rights within the Basic Law have this meaning: the Basic Law is intended to emphasize the priority of the human being and his dignity over the power of the State by placing the basic rights section at the beginning of the Basic Law. It corresponds with this that the legislator has granted the special legal remedy of the constitutional complaint against acts of public authorities alone.” BVerfGE 7, 198 (204-05).

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indirectly in private law via the “interpretation of the general clauses” of the Civil Code.<sup>73</sup>

The unlimited exercise of basic individual rights can conflict with the public interest or the interests and rights of other individuals. To resolve such conflicts, there must be a legal demarcation of circumstances where the restriction of basic rights is justified. This line can be drawn in the constitution itself, or the constitution-maker, the *pouvoir constituant*, can delegate this power to other actors, such as the legislature, authorized to make decisions for the community.

Most of the rights under the Basic Law contain a statutory reservation. These reservations can be general or specific. Statutory reservations are general when the rights at issue are limited by or pursuant to law without any mention of specific requirements for the law restricting the right. For example, such general reservations are seen in Article 5(2), freedom of expression; Article 8(2), freedom of assembly; and Article 10(2), privacy of letters, posts, and telecommunications. Statutory reservations are specific when a right is restricted to protect the interests specified in the article concerned. For example, specific reservations are embodied in Article 11(2)<sup>74</sup> regarding the freedom of movement; Article 6(3) demonstrating that the right of parents to raise their children can be restricted only to guarantee the more important goal of not having children “endangered to become seriously neglected;”<sup>75</sup> and Article 13(7) regarding the inviolability of the home. There are also some basic rights that are not limited by any statutory reservation. However, this does not mean that they can be exercised without any bounds. There are cases when these rights might conflict with other rights and thus, can be restricted by conflicting constitutional interests.<sup>76</sup>

Accordingly, constitutional rights are not an isolated part of the constitution; they are part of its normative structure and must be read in conjunction with its general principles.<sup>77</sup> As mentioned above, the Basic Law contains reasonable restrictions and abridgments of those constitutional rights. However, this does not mean that the legislature has unlimited discretion in restricting basic rights. There are five requirements found in Article 19 that apply gener-

73. The basic rights have an effect on “third parties” in the private sector (“Drittwirkung der Grundrechte”) since the Basic Law has established an “objective order based on values” (“objektive Wertordnung”). *Id.* at 205.

74. Article 11(2) of the Basic Law states: “This right may be restricted only by or pursuant to a statute and only in cases in which an adequate basis for personal existence is lacking and special burdens would result therefrom for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a State (*Land*) to combat the danger of epidemics, to deal with natural disasters or particularly great accidents, to protect young people from neglect, or to prevent crime.”

75. GRUNDGESETZ [GG] art. 6(3) (F.R.G.).

76. For example, if parents do not allow a blood transfusion for their child because it runs against their religious belief, there might be a conflict between, on one side, Article 4(1), freedom of religion, and Article 6(2) regarding parental rights and on the other, Article 2(2), the right to life of the child. It would be the duty of the State to decide whether it is right to remove the need for parental consent to the blood transfusion in order to protect the child’s constitutional right to life.

77. For an analysis of constitutional principles (e.g., the democratic process, the federal principle, separation of powers, etc.), see Goerlich, *supra* note 36, at 63; see also MAIN PRINCIPLES OF THE GERMAN BASIC LAW (Christian Starck ed., 1983).



ally to limitations on rights. This clause includes certain absolute limitations on State authority and, under certain circumstances, private action (Article 19(3)). These five requirements are:

(1) The statute must guarantee the basic right's untouchable core. Article 19(2) states that "[i]n no case may the essence of a basic right be infringed."<sup>78</sup>

(2) The statute restricting the right must apply generally and not solely to an individual case. This requirement serves a dual purpose by preventing the legislature from getting involved in individual cases and also protecting the individual from arbitrariness.

(3) The statute must provide an express restriction by naming the basic right and the relevant article so that the restriction is intentional and not incidental or accidental. Article 19(1) requires the statute to articulate the restriction of a constitutional right, meaning that such limitations can only be placed by legislation and not by administrative ordinances or decrees.

(4) The statute must provide legal certainty by being clear and unequivocal.

(5) The statute must satisfy the three tests of the principle of proportionality: suitability, necessity, and appropriateness.<sup>79</sup>

The Federal Constitutional Court, as "guardian" of the constitution,<sup>80</sup> developed these requirements by establishing not only procedural safeguards and limitations, but also limits on unnecessary restrictions of rights. The Court is also vested with the power of constitutional review; it safeguards the constitutionality of the conduct of the State and its organs.<sup>81</sup> The Court's wide-ranging competencies have allowed for detailed jurisprudence regarding the content and limits of rights. The examples below illustrate how the Court<sup>82</sup> has interpreted some of the limitations on rights provided for in the Basic Law.

The *Pharmacy* case provides the Court's general interpretation of the reservations:

[W]hen becoming active in the area protected by a basic right, the legislature must take the significance of the basic right within the social order as the starting point of its regulation. The legislature does not freely determine the content of the basic right; rather, the opposite is true: the content of the basic right may result in a substantive restriction of the legislative discretion. . . . The basic right is intended to protect the freedom of the individual, the statutory reservation is intended to secure a sufficient protection of community interests.<sup>83</sup>

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78. Of course, defining the "core" of the right is quite subjective, and case law is usually expected to provide further elucidation. Nevertheless, the Federal Constitutional Court has seen little need to refer to Article 19(2). In pertinent cases, it prefers to apply the principle of proportionality, as detailed below. MICHALOWSKI & WOODS, *supra* note 72, at 82 (citation omitted).

79. *Id.* at 83-85.

80. Goerlich, *supra* note 36, at 51.

81. Klein, *supra* note 62, at 17.

82. *Id.* at 20 ("Moreover, the values-oriented interpretation of the constitutional norms, particularly of the basic rights articles, and thereby their influence on the drafting and interpretation of the legal norms regulating the relations between private persons, have had the effect that the Basic Law cannot be understood only as the framework and constitution of the State, its institutions, powers and activities, but also as the 'fundamental law' of the society, its institutions and activities.").

83. BVerfGE 7, 377 (404) (F.R.G.).

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In the *Strauss* case,<sup>84</sup> the Court balanced the principle of protection of personal honor against the freedom of expression. The Court held that in cases of defamatory criticism, the violation of human dignity can never be justified by competing constitutional interests.<sup>85</sup> This decision ignited a heavy debate, which focused mostly on the argument that such an absolute protection of human dignity and personal honor would only be possible if the concept of human dignity is interpreted narrowly.<sup>86</sup>

In the *Elfes* case, the Court interpreted the concept of “constitutional order” contained in Article 2(1), which guarantees the exercise of personal freedom as long as “it does not violate the rights of others or offend the constitutional order or morality.”<sup>87</sup> The Court stated that “[t]he individual’s freedom of action can legitimately be restricted not only by the Basic Law or by ‘fundamental constitutional principles,’ but also by every legal provision that is formally and substantively compatible with the Basic Law.”<sup>88</sup>

The Court further developed its interpretation of “constitutional order” in the *Horse Riding in the Woods* case, where it stated:

Freedom of action is only guaranteed within the restrictions imposed by Article 2(1) BL and is thus in particular subject to the constitutional order. . . . If an act of a public authority that affects freedom of action is based on a statutory provision, in the context of a constitutional complaint based on Article 2(1) BL, it will be examined whether it is formally and substantively compatible with the provisions of the Basic Law.<sup>89</sup>

Essentially, the Court subjectively interpreted objective law by holding that every governmental action impinging upon individual freedom may now be challenged if it is based on a formally or substantively unconstitutional act. Formal unconstitutionality may arise from factors such as *ultra vires* acts of legislatures or administrative bodies or procedural defects in the legislative process that amount to a violation of the constitution. Regarding substantive unconstitutionality, the Court in the same case invoked the principle of proportionality as the correct “yardstick” for measuring the permissibility of restrictions on general freedom of action.<sup>90</sup>

The Court’s broad interpretation of “constitutional order” also encompasses the interests of others and the community. In the *Safety Helmet* case, the Court argued that the obligation of motorcyclists to wear safety helmets was reasona-

84. BVerfGE 82, 43 (F.R.G.). For details on the colorful background of this case involving a prominent Bavarian political leader who was accused of “protecting fascists,” see Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797 (1997).

85. “Freedom of expression finds its limits in the general laws and the prescriptions protecting personal honor. Still, the law limiting the basic right itself has to be interpreted again in light of the right limited.” BVerfGE 82, 43 (50) (F.R.G.).

86. MICHALOWSKI & WOODS, *supra* note 72, at 107.

87. BVerfGE 6, 32 (F.R.G.).

88. “Anybody can bring a constitutional complaint on the grounds that a statute restricting his freedom of action is not part of the constitutional order since it violates, formally or substantively, individual provisions of the Basic Law or general constitutional principles, particularly, his basic right under Article 2(1).” *Id.* at 41.

89. BVerfGE 80, 137 (153) (F.R.G.).

90. *Id.*

bly necessary to avoid the costs of accidents to the public and that this duty was not disproportionate.<sup>91</sup>

However, in the *Lebach* case, the Court stated that showing a television documentary "about a criminal offence which presents the name, picture or image of the offender. . . will generally constitute a serious violation of his personal sphere."<sup>92</sup> It further added that "[t]he right to the free development of one's personality and human dignity awards every individual an autonomous sphere of private life in which he can develop and maintain his personality."<sup>93</sup> Essentially, the Federal Constitutional Court distinguished between two spheres of private life—an intimate personal sphere that cannot be violated or restricted despite an overriding community interest and a personal sphere in which the individual is not isolated but operates with others and therefore, can balance his or her privacy interest against competing interests.<sup>94</sup>

Nevertheless, differentiating between these two spheres cannot be discussed in the abstract but must rather be determined case by case. In the same decision, the Court, while balancing the importance of the "personality right" against the importance of freedom of television broadcasting, reasoned that the weight of the personality right can change at different times.<sup>95</sup> Its weight can be relatively low compared to the public right to be informed when the person commits a criminal offense and thus exposes himself to the public; whereas it becomes more important several years later, when the public interest to be informed about the offender decreases and the interest in the resocialization of the offender grows.<sup>96</sup>

The Court used the same reasoning in the *Secret Tape Recording* case, stating that "[e]ven overriding community interests cannot justify a violation of the absolutely protected core sphere of private life; a balancing process in accordance with the principle of proportionality is not to be performed."<sup>97</sup> However, the Court also added a limit on this sphere, stating:

[I]t is not the entire sphere of the private life which falls under absolute protection of the basic right under Article 2(1) in conjunction with Article 1(1) BL . . . . The individual, as part of the community, rather has to accept such state interventions

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91. "According to the Basic Law, the individual must accept restrictions on his freedom of action which the legislator imposes within the limits of what is reasonable in the particular case, for the purpose of promoting the social life of man, as long as the person's autonomy will remain intact. . . . A motorcyclist who drives without a safety helmet and who will therefore in the case of an accident, suffer great head injury, not only harms himself. . . . If the consequences of a calculable and high risk taken in the realm of traffic create a severe burden for the public, it is reasonable to expect the individual to decrease this risk by simple and easily acceptable means." BVerfGE 59, 275 (279) (F.R.G.).

92. BVerfGE 35, 202 (219) (F.R.G.).

93. *Id.* at (220).

94. "If the individual as a citizen living in a community communicates with others, or influences others by his existence or his behavior, thereby touching upon the personal sphere of others or concerns of social life, his absolute autonomy to determine his private life can be restricted, unless his inviolable most intimate sphere of life is concerned. Such a social reference, when of sufficient intensity, can make State measures for the protection of community interests necessary." *Id.*

95. *Id.* at (225).

96. *Id.* at (233-34).

97. BVerfGE 34, 238 (245) (F.R.G.).

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which are based on an overriding community interest under the strict application of the principle of proportionality, as long as they do not affect the inviolable sphere of private life.<sup>98</sup>

Similar principles apply to the use of personal diaries in criminal proceedings.<sup>99</sup>

In the *Eppler* case, the Court decided whether the personality right protects against false or inaccurate quotations attributed to one person by another.<sup>100</sup> Though this constitutional complaint was unsuccessful, it is interesting to note the Court's reasoning with respect to Article 2(1), especially regarding the individual's right to be regarded by the public in the way he wants to present himself, not as others view him:

The personality right is violated if words are put into someone's mouth which he has not voiced and which harm his claim for social respect as defined by himself. This follows from the principle of autonomy . . . [T]he content of the personality right is essentially shaped by the way he sees himself.<sup>101</sup>

In the *Flag Desecration* case, the Court addressed the issue of whether the desecration of the German flag was protected by the constitutional right of freedom of speech, Article 5(1), and the right to artistic freedom, Article 5(3), which grants broad freedom to arts and sciences.<sup>102</sup> The rights guaranteed in Article 5(1) are strictly limited in Article 5(2), but the freedom of expression in an artistic form guaranteed in Article 5(3) might be unrestricted since it is granted without express reservation. The Court held, however, that Article 5(3) BL does not exclude punishment under Section 90(a)(I)(2) of the German Penal Code (StGB) for desecrating the German flag, even through the medium of art:

Although artistic freedom is granted unreservedly, it does not generally preclude punishment under Section 90(a)(I)(2) StGB. The guarantee of Article 5(3) BL is not only limited by constitutional rights of third persons, but it can also collide with various constitutional regulations, for orderly human co-existence requires not only mutual respect of the citizens, but also a functioning public State order which secures, in the first place, the efficacy of the protection of constitutional rights.<sup>103</sup>

Here, the Court found that artistic freedom collided with the protection of the symbols of the State and that the purpose of the symbols was to appeal to the civic consciousness of its citizens.<sup>104</sup> If the flag serves as an important medium of cohesion, the desecration of the flag can undermine State authority, which is

98. *Id.* at 246. Regarding the strictly private or social dimensions of private life, the Court observed that "[w]hether secret tape recordings touch upon the inviolable sphere of private life, or whether they only concern that sphere of private life that, under circumstances, is open to State access, can hardly be described in an abstract manner. This question can only be answered satisfactorily, on a case by case basis, taking account of the particularities of any given case. In the present case, we are concerned with a business conversation. . . . Highly personal subjects which belong to the inviolable intimate sphere were not mentioned." *Id.* at (248).

99. BVerfGE 80, 367 (373) (F.R.G.).

100. BVerfGE 54, 148 (F.R.G.).

101. *Id.* at (155-56).

102. BVerfGE 81, 278 (F.R.G.).

103. *Id.* at (292).

104. "As a free State, the Federal Republic [of Germany] depends upon the identification of its citizens with basic values symbolized by the flag." *Id.* at (293).

necessary for the State's internal peace.<sup>105</sup> However, the protection of State symbols cannot immunize the State against criticism and even rejection.<sup>106</sup> Although the Court ultimately found the acts to be constitutionally protected, it still reasoned that the freedom of artistic expression, as granted by Article 5(3), is not absolutely insulated from criminal prosecution.<sup>107</sup>

In conclusion, the German Basic Law is characterized by tailor-made general and specific limitations on its rights dedicated to striking a careful balance between the interests of the community and the individual in each area of protected activity, thus ensuring the central goal of protecting and respecting human dignity. The Federal Constitutional Court, as the Basic Law's ultimate guardian, has interpreted the limits to the Constitution's general guarantee of freedom to act as necessitating formally and substantively constitutional governmental action. Substantive constitutional action not only prohibits the impairment of the essence of a right but also requires governmental action to conform with the principle of proportionality. A careful balancing is needed when overriding community interests are involved, even when the freedoms are expressly guaranteed without formal or substantive limitation.

In many important ways, the Basic Law signified a collective rejection of the country's Nazi past. The Holocaust also highlighted certain limits that any domestic legal system may encounter in curbing tyrannical and genocidal aspirations. Furthermore, it gave rise to the international legal guarantees of fundamental human rights, which any individual can raise against the awesome power of the State. The nation-states themselves agreed to such self-limitations of power as a fundamental principle of the post-World War II order, expressed in the United Nations Charter, the 1948 Universal Declaration of Human Rights and the twin UN human rights treaties of 1966, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). For purposes of comparison, this article will focus on the ICCPR.

#### IV.

##### INTERNATIONAL PRESCRIPTIONS

###### A. *Universal Parameters: The International Covenant on Civil and Political Rights*

The ICCPR,<sup>108</sup> like other liberal catalogs of basic rights, enumerates rights expressed in prohibition norms (i.e., prescriptions that require the State to refrain from performing certain acts). The ICCPR also contains various requirement norms that compel the State to take positive action in order to guarantee the enjoyment of the rights. Also, as in all catalogs of basic rights, the ICCPR

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105. Bernhard Jürgen Bleise, *Freedom of Speech and Flag Desecration: A Comparative Study of German, European and United States Laws*, 20 DEN. J. INT'L L. & POL'Y 471, 476 (1992). See also Eberle, *supra* note 84, at 863-66.

106. BVerfGE 81, 278 (294) (F.R.G.).

107. *Id.* at (292).

108. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

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provides the possibility of restricting rights for reasons of overriding general public interest or overriding interests of others, thereby circumscribing the legal ambit of individual freedom.<sup>109</sup>

Each article of the ICCPR starts with a general statement of the right concerned, followed by a more detailed formulation of the content or scope *ratione materiae* of that right, and then by limitations or restrictions where applicable. The ICCPR contains two types of provisions on limitations. It permits State Parties under closely stated conditions to restrict or condition to varying degrees the exercise of the rights enshrined in the ICCPR. In addition, Article 4 allows for derogation or the temporary and limited suspension of rights "[i]n time of public emergency which threatens the life of the nation," provided that those rights are not abridged on a discriminatory basis.<sup>110</sup> However, there are also some rights that are "emergency-proof."<sup>111</sup>

In general, the Covenant recognizes the power of State Parties to limit, in exceptional circumstances, certain rights otherwise protected. For example, Article 12(3) has a limitation clause allowing for restrictions on the right to liberty of movement and the freedom to choose a residence when it is "necessary to protect national security, public order, public health or morals, or the rights and freedoms of others." Similar permissible restrictions can be found in Article 21, the right to peaceful assembly, and Article 22(2), freedom of association. Somewhat narrower restrictions are permitted regarding the right to a fair and public hearing, Article 14(1); freedom of religion, Article 18(3); and the right to freedom of expression, Article 19(3).

Article 4(2) of the ICCPR explicitly outlines the set of rights that cannot be derogated from, even in times of emergency. It includes Article 6, the right to life; Article 7, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; Article 8, the right not to be held in slavery or servitude; Article 11, the right not to be imprisoned for failure to perform contractual obligations; Article 15, the right not to be subject to retroactive criminal prosecutions; Article 16, the right to recognition as a person before the law; and Article 18, the right to freedom of thought, conscience, and religion.

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109. Klein, *supra* note 5.

110. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1188 (1993); see also HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT-LAW, POLITICS, MORALS* 144 (2d ed., 2000).

111. Erica-Irene A. Daes, *Freedom of the Individual under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, U.N. Doc. E/CN4/Sub.2/432/Rev.2, at 197-202 (1983).

The Human Rights Committee (HRC)<sup>112</sup> is the only organ with express functions with respect to the Covenant and the Optional Protocol.<sup>113</sup> By exercising its functions through the mandatory reporting procedure, the elaboration of general comments, and application of the optional individual communications procedure, the HRC has generated a body of authoritative interpretation of the Covenant provisions. The Committee's position on the limitation clauses are found in the General Comments<sup>114</sup> regarding the implementation of Articles 4, 12, 18, and 19.

In General Comment 5, regarding Article 4 of the ICCPR, the HRC indicated that a claimed emergency would justify a derogation of rights under that article only if the circumstances are of an exceptional and a temporary nature.<sup>115</sup>

In General Comment 29, paragraph 2, which replaced General Comment 5,<sup>116</sup> the HRC emphasized that the State party officially proclaim the state of emergency and stated that this condition "is essential for the maintenance of the principles of legality and rule of law when they are most needed."<sup>117</sup> This interpretation is much stricter than that offered by the European Court of Human Rights (ECtHR), but understandably so, since the respective provisions are for-

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112. The Human Rights Committee, established under Article 28(1) of the Covenant, is a quasi-judicial organ. Professor Tomuschat has commented that, "though its members are not judges," they have the task of applying the provisions laid down in the Covenant and therefore have to exercise legal judgment. It is the duty of the Committee to ensure that the State parties fulfill their obligations under the Covenant. DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE. ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 54 (1991). For more on the Human Rights Committee, see Torkel Opsahl, *The Human Rights Committee, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 369-444 (Philip Alston ed., 1992).

113. G.A. Res. 2200A(XXI), U.N. GAOR, I 496th meeting, at 6, para. 60 (1966), available at <http://www.un.org/Depts/dhl/resguide/resins.htm>. The Optional Protocol to the International Covenant on Civil and Political Rights, which entered into force on March 23, 1976, deals with the right to petition to or against governments. Under Article 1 of the Protocol, the State party recognizes the competence of the Human Rights Committee "to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."

114. See Human Rights Committee—General Comments, available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>. The General Comments are designed to provide clear guidelines for the State parties. They also give substantive content to the articles concerned. General Comment on Article 19, regarding the limitation clauses, has been criticized as "both weak and disappointing, being little more than a reiteration of Article 19 . . . . The fundamental norms within Article 19 remain undefined and largely undeveloped." MCGOLDRICK, *supra* note 112, at 471. For a detailed analysis of the Committee's interpretation of Article 19, see *id.* at 459-79.

115. Paragraph 3 of General Comment 5, available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>, provides: "The Committee holds the view that measures taken under Article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for State Parties, in time of public emergency, to inform the other State Parties of the nature and extent of the derogations they have made and of the reasons therefore and, further, to fulfill their reporting obligations under Article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation."

116. U.N. Doc., CCPR/C/21/Rev.1/Add.11 (2001), available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

117. *Id.* at para. 2.

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mulated differently.<sup>118</sup> In General Comment 29, paragraph 3, the HRC elaborated on the prerequisites of invoking Article 4, stating:

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1 . . . . The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If State parties consider invoking article 4 in other situations than in armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over State parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.

The HRC also decided that in cases which appear before the Committee in accordance with the mechanism set forth in the Optional Protocol,<sup>119</sup> the state holds the burden of showing that these requirements have been fulfilled. The Committee considered the principles set forth in the General Comments as guidelines when it examined the state reports under the procedure provided for in Article 40.

In General Comment 22, regarding Article 18 (the right to freedom of thought, conscience, and religion), the HRC states: "Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>120</sup> The HRC adds that Article 18, paragraph 3, is to be strictly interpreted, with attention to the principles of proportionality and non-discrimination.<sup>121</sup> When it comes to restrictions based on morals, the HRC seems to ask for a wider interpretation of the term, not exclusively an interpretation suggested by one single tradition:<sup>122</sup>

[R]estrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their relig-

118. See discussion *infra* pp. 34-35.

119. An interesting discussion on the Optional Protocol can be found in JOAN FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* 83-114 (1994).

120. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

121. *Id.*

122. *Id.* The ECtHR has interpreted General Comment 22, regarding Article 18, paragraph 3, differently, widening the margin of appreciation of the State when its challenged measure is based on morals; see *generally* *Sunday Times v. United Kingdom*, No. 2 (A/38), 3 Eur. H.R. Rep. 317 (1981).



ion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.

In General Comment 10, regarding Article 19 (freedom of expression), paragraph 3, the HRC stresses that the core of the right should not be jeopardized.<sup>123</sup>

Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.

Paragraph 3 lays down the conditions under which restrictions may be imposed: the restrictions must be "provided by law," imposed for one of the purposes set out in subparagraphs (a) and (b) of Paragraph 3, and justified as being "necessary" for that State party for one of those purposes.

The HRC has, on several occasions, expressed its views regarding Article 4 and Article 19 of the ICCPR.<sup>124</sup> In *Silva v. Uruguay*,<sup>125</sup> the Government of Uruguay, in its July 10, 1980 submissions, invoked Article 4(1) of the Covenant to justify the ban imposed on the authors of the communication brought before the HRC. However, the HRC felt that the Article 4(1) requirements had not been met, stating that:

Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in the specific context of the present communication, the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant.<sup>126</sup>

The Committee found that the Government of Uruguay failed to show that interdiction of political dissent was required in order to deal with the alleged emergency situation and pave the way to political freedom.<sup>127</sup>

Article 4(2) and Article 6 of the ICCPR covers the non-derogable right to life. In *Suárez de Guerrero v. Colombia*,<sup>128</sup> the HRC examined a case in which the alleged victim and six other persons were killed during a police raid because

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123. General Comment 10, para. 3, available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

124. For the jurisprudence of the Human Rights Committee, see P.R. GHANDHI, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION: LAW AND PRACTICE* (1998).

125. Case No. 034/1978, U.N. Doc. CCPR/C/OP/1 at 65 (1984), available at [http://www1.umn.edu/humanrts/undocs/html/34\\_1978.htm](http://www1.umn.edu/humanrts/undocs/html/34_1978.htm).

126. *Id.* at para. 8.3. The Committee further noted that "even on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means."

127. *Id.* at para. 8.4.

128. Case No. 45/1979, U.N. Doc. CCPR/C/15/D/45/1979 (1982).

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they were suspected, as members of a guerilla organization, of having kidnapped a former ambassador. The Committee found that the police action was not necessary for its own defense or that of others and that "the death of Mrs. Maria Fanny Suárez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to articles 4(2) and 6(1) of the [ICCPR]." <sup>129</sup> Then, the Committee proposed a remedy where the State Party would take the necessary measures to compensate the victim's husband for the death of his wife and ensure that the right to life is duly protected by amending the law.

The HRC has published its views on Article 19 in a number of cases. These opinions establish clearly that punishment for the expression of views violates Article 19, unless justified by Paragraph 3. Among the most interesting cases is *Faurisson v. France*, in which the complainant attacked the 1990 Gayssot Act, which amended freedom of the press laws to make it an offense to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945 and applied against Nazi leaders, as a threat to academic freedom, including freedom of research and expression. <sup>130</sup> The Committee noted that it was not abstractly criticizing laws created by State Parties but rather was trying "to ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it." <sup>131</sup> The Committee held that the restrictions of the Gayssot Act were justified because they were provided by law, addressed the aims set out in Paragraph 3(a) and (b) of Article 19, and were necessary to achieve the legitimate purpose of curbing racism and anti-semitism. <sup>132</sup>

In other cases, the HRC has found insufficient evidence to justify a violation of Article 19. In *Perdoma and De Lanza v. Uruguay*, <sup>133</sup> the HRC found that because the Government of Uruguay "submitted no evidence regarding the nature of the political activities in which [the complainants] were alleged to have been engaged and which led to their arrest, detention and trial," the Committee was unable to conclude that the arrest and detention were justified on any Article 19(3) grounds.

129. *Id.* at para. 13.3.

130. Communication No. 550/1993, para. 3.1, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

131. *Id.* at para. 9.3.

132. "[Mr. Faurisson's] conviction did not encroach upon his right to hold and express an opinion in general, rather the court convicted [him] for having violated the rights and reputation of others. For these reasons, the Committee is satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant." *Id.* at para. 9.5. It is interesting to read the reasoning and arguments brought forth by the members of the Committee in several concurring opinions, for example, the opinion by Prafulla-chandra Bhagwati: "[T]he rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3(a), may relate to the interests of other persons or to those of the community as a whole. Since the statement made by author. . . was at least of such a nature as to raise or strengthen anti-semitic feelings. . . the second element required for the applicability of article 19, paragraph 3, was therefore satisfied"; cf. STEINER & ALSTON, *supra* note 110, at 755-61; see also GHANDHI, *supra* note 124, at 34.

133. MCGOLDRICK, *supra* note 112, at 465 (quoting U.N. Doc. A/35/40 at 111).

Other cases have required interpretation of what constitutes a legitimate purpose. In *Hertzberg and Others v. Finland*, the HRC considered a case in which the Finnish government invoked public morals to justify its restrictive actions.<sup>134</sup> The HRC found no violation of Article 19, stating that:

It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities. . . . According to Article 19(3), the exercise of the rights provided for in Article 19(2) carries with it special duties and responsibilities for those organs [radio and TV]. As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.<sup>135</sup>

This case's introduction of the "margin of discretion" argument is an important element in the development of HRC jurisprudence, but it seems that this concept was interpreted too broadly in this case.<sup>136</sup> There was no consideration on the part of the Committee of the necessity of the restrictions imposed.<sup>137</sup> In analyzing this case, McGoldrick commented that the HRC did not attempt to establish any standard of international morality, but only stated that "there are no universally applicable moral standards."<sup>138</sup>

The HRC has thus come far in developing a theory of limitations, drawing on national and regional rights instruments. Since it has fewer opportunities than national courts and regional bodies, such as the European Court of Human Rights, to express itself in individual case opinions, the HRC lays out its understanding in General Comments that track established human rights doctrines. The derogation clause has been strictly interpreted, while other limitations seem to have been afforded less searching scrutiny at times.

*B. The Regional Prototype: Limitations Upon Rights Under the European Convention on Human Rights and Fundamental Freedoms*

As stated above, the Holocaust made it abundantly clear that domestic guarantees could not ensure protection of human dignity against abusive governments. In response, the United Nations and regional intergovernmental organizations established standards and mechanisms designed to ensure that such abuses would not be repeated. In 1950, the Council of Europe adopted the European Convention on Human Rights and Fundamental Freedoms—the first and, to date, most effective system of protecting individual rights under international law. It set up a system of rights as well as specific limitations.

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134. U.N. Doc. CCPR/C/15/D/61/1979 (2 April 1982).

135. *Id.* at paras. 10.3-10.4. The Committee's views on morals, at that time, seem to differ from the later ones (e.g., General Comment 22 on Article 18).

136. On the other hand, it must be noted that the HRC never repeated the reference to "margin of appreciation" *per se*. The Committee appears to distrust this type of formula, fearing that states might abuse it.

137. MCGOLDRICK, *supra* note 112, at 468.

138. *Id.* at 467-68. For further analysis of the role, weaknesses, and strengths of the Committee, as well as its challenges and suggestions for change, see Henry Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 38 (Philip Alston & James Crawford eds., 2000).

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Since there are only a few “absolute” rights (for example, the right not to be tortured and the right to think whatever one pleases), it is generally accepted that restrictions on individual rights, whether express or implied,<sup>139</sup> are specifically designed to secure the liberty of individuals in a given society and to harmonize individuals’ rights with the interests of society.<sup>140</sup> When the drafters of international human rights instruments limited a right specifically or provided more general limitations, they knew that although the agreed formulation served as a compromise on controversial matters at the time of drafting, it would also lead to wider or narrower interpretations of the instrument in the future.<sup>141</sup>

At the outset, a distinction should be made between the limits to the scope of a right enshrined in the European Convention on Human Rights and the restrictions regarding the exercise of such right.<sup>142</sup> The first set of limitations has to do with the formulation of the substantive scope of a right and its express restrictions through specific qualifications. For example, Article 11 of the Convention, freedom of peaceful assembly, automatically excludes, *ratione materiae*, from the scope of the right assemblies that are not peaceful. Also, Article 12, the right to marry and to found a family, pertains, *expressis verbis*, only to men and women of marriageable age, according to national laws governing the exercise of this right—a right whose very essence cannot be denied.<sup>143</sup> Interestingly, in a recent decision based on “major social changes in the institution of marriage . . . as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality,” the European Court of Human Rights (ECtHR) dropped the restriction to “men and women” in the case of transsexuals.<sup>144</sup> The interpretation of the scope of rights by the Commission and Court has thus shown that societal values and conditions, as well as prevailing morals, work to delineate the substantive contours of rights, and allow for an evolutionary, dynamic understanding of the scope of rights. While the scope of

139. Contrary to the early doctrine of “inherent limitations” developed by the Commission, it is now established that the only permissible restrictions are the ones clearly provided for in the general provisions of the Convention or in the individual articles. The European Court of Human Rights has held that there is no room for “implied limitations” where the Convention expressly provides for the right and for its limitations. See *Golder v. U.K.*, (A/18), 1 Eur. H.R. Rep. 524, para. 44 (1979-80). Nevertheless, when a particular right is guaranteed by implication (i.e., without express provision in the Convention), the Court held that this right may be subject to implied limitations (e.g., the right of a convicted prisoner to take civil proceedings, which is derived from Article 6—the right of access to the courts). In *Deweere v. Belgium*, (A/35), 2 Eur. H.R. Rep. 439 (1979-1980), the Court held that the right to have a criminal charge determined by a court can be subject to implied limitations (e.g., the authorities may legitimately decide not to prosecute or to discontinue the proceedings).

140. Klein, *supra* note 5.

141. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 16-17, 251-56 (Gudmundur Alfredsson & Asbjorn Eide eds., 1999); see also von Mangoldt, *supra* note 63, at 33, 47.

142. LOUKIS G. LOUCAIDES, *ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS* 179 (1995).

143. See *Rees v. United Kingdom*, (A/106), 9 Eur. H.R. Rep. 56 at para. 50 (1987); *F v. Switzerland*, (A/128), 10 Eur. H.R. Rep. 411 at para. 36-40 (1988) (The Swiss court’s imposition of a three-year ban on remarriage upon a third-time divorcee “affected the very essence of the right to marry” and “was disproportionate to the legitimate aim pursued”).

144. *Goodwin v. United Kingdom*, 35 Eur. H.R. Rep. 18, at para. 100 (2002) (referring to Article 9 of the Draft Charter of Fundamental Rights of the European Union as evidence of these changes).

rights can thus be extended, it can also be limited: several complaints were dismissed on the grounds that they fell outside of the protected substantive scope of the rights invoked.<sup>145</sup>

The latter, more pertinent concept of limitations on rights pertains to the specific limitation clauses provided for in the Convention. There are three types of limitation clauses in the ECHR:<sup>146</sup>

- (1) Limitations attached to a provision of a right for certain prescribed purposes (e.g., national security, public safety, health, morals, rights of others, etc.)
- (2) Limitations referring to certain activities (e.g., political activity of aliens, activities subversive of Convention rights)
- (3) Limitations referring to the suspension of a group of rights during public emergencies threatening the life of a nation (e.g., war, earthquake, etc.).

### *1. Limitations for Certain Prescribed Purposes*

The first category of limitations affects the rights guaranteed in Articles 8 through 11 of the Convention; they also constitute the most common type of limitation. The terminology used to authorize limitations for certain prescribed purposes is more or less similar in each article, and the pertinent case law of the Commission and the ECtHR is exceptionally rich and developed.

Article 8, the right to respect for private and family life, home, and correspondence, states in paragraph 2:

There shall be no interference by a public authority with the exercise of this right, except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others.

Similar, but not identical, grounds for restrictions are provided in Article 9(2), limiting the right to freedom of thought, conscience, and religion; Article 10(2), qualifying the right to freedom of expression; and Article 11(2), limiting the right to freedom of peaceful assembly and to freedom of association, as well as the right to form and to join trade unions.<sup>147</sup> The Fourth Protocol to the Convention, Article 2, paragraph 4 also contains limitation clauses regarding freedom of movement, referring to restrictions “justified by the public interest in a democratic society” without specifying particular aims. Also, Article 1 of the Seventh Protocol refers only to “necessary” restrictions while Article 1 of the First Protocol refers to the “public interest” and the “general interest.”

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145. LOUCAIDES, *supra* note 142, at 181 (citing Application No. 87007/79, D.R., Vol.18, p.255 (obligation of drivers and passengers of motor vehicles to wear safety belts); Application No. 6454/74 (obligation of motor-cyclists to wear helmets); Application No. 9101/80 (prohibition of pigeon-feeding in public streets)).

146. *Id.* at 179.

147. For cases and the application of Article 9, see MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 315-341 (1997); Javier Martínez-Torron, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: The European Convention on Human Rights*, GLOBAL JURIST ADVANCES Vol. 3, No.2, Art. 3, available at <http://www.bepress.com/gj/advances/vol3/iss2/art3>.

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These restrictions must be (1) *in accordance with the law*, (2) *pursue one of the specific aims* described therein, and (3) be *necessary in a democratic society*.<sup>148</sup> As the main interpretative authority and “guardian” of the ECHR, the ECtHR, which supervises forty-six states’ compliance with human rights obligations,<sup>149</sup> has long been at the forefront of developing general doctrines of human rights law, including the doctrine of limitations. Its case law abounds with interpretation of limitation clauses—in particular, whether an interference with a right is in compliance with the requirements set out in the limitation clause.

a. *“In accordance with the law”*

Despite slight differences in the wording (that is, “in accordance with the law,” “prescribed by law,” or “provided for by law”), the meaning of these limitations upon limitations and their legal effect are essentially the same.<sup>150</sup> Restrictions must have an adequate basis in domestic law and the domestic law must satisfy the Convention requirements. Interference with a right is justified when the relevant domestic law is characterized by a reasonably precise delimitation of circumstances and procedures, causing the restriction on a person’s freedom to act to be sufficiently foreseeable, and by the compatibility of the law with the idea of the rule of law, shielding against the abuse of power and arbitrariness.<sup>151</sup> In *Sunday Times v. United Kingdom (No. 1)*, the ECtHR first interpreted the “prescribed by law” requirement.<sup>152</sup> The Court reasoned:

[T]he law must be adequately accessible, i.e., the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case . . . [A] norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able . . . to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>153</sup>

Furthermore, the court rejected the British government’s argument that it is sufficient for a law to qualify as such within the legal system of a country. Instead, the court adopted an autonomous interpretation demonstrating how the concept of the rule of law can be used to elucidate and consolidate the Convention safeguards.<sup>154</sup>

The court also approached developing a rule of law-based system of limitations with an awareness of its practical limitations. Analyzing the issue of sufficient precision in the text of legislation, the court accepted the notion of “initial vagueness” of laws, which was later clarified by national courts. In the above-mentioned case, the court found that:

148. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 3, 1953, 213 U.N.T.S. 222 (hereinafter “ECHR”).

149. Council of Europe, The Council of Europe’s Member States, at [http://www.coe.int/T/e/com/about\\_coe/member\\_states/default.asp](http://www.coe.int/T/e/com/about_coe/member_states/default.asp). (last visited Jan. 17, 2005).

150. A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 196 (3d ed. 1993).

151. *Olsson v. Sweden*, (A/250), 17 Eur. H.R. Rep. 134, 162 (1994).

152. (A/30), 2 Eur. H.R. Rep. 245 (1979-80).

153. *Id.* at 271.

154. ROBERTSON & MERRILLS, *supra* note 150, at 197.

whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.<sup>155</sup>

The court developed this concept further in a number of other cases.<sup>156</sup>

The court's interpretation of the living law in changing conditions includes several elements. One element is the court's interpretation of the addressees of law. Thus, in *Groppera v. Switzerland*, the court held that "the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."<sup>157</sup> Another interpretation, set forth in *The Observer and Guardian v. U.K.*, is the use of a different "application of existing rules to a different set of circumstances."<sup>158</sup> In *Leander v. Sweden*, the court noted that "account may also be taken of administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents."<sup>159</sup>

b. "Legitimate aim"

This criterion essentially requires that the authorities act in good faith when restricting rights. Though not listed exactly the same way in each qualifying provision, the concept is defined similarly in all of them. Legitimate interests include national security; territorial integrity and public safety; the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; the protection of the rights, freedoms, and reputation of others; the prevention of disclosure of information received in confidence; and the impartiality of the judiciary. The case law of the Strasbourg institutions has shown that, although the above-mentioned purposes are sometimes expressed in vague terms, they are interpreted fairly easily because they are closely related to the third requirement of the measures being "necessary in the democratic society," which plays a decisive role in defining the meaning and application of such general "legitimate aims."

These aims cannot be employed by the state in an uncontrolled or absolute way. In *Klass v. Germany*, the court held that the contracting states do not enjoy "an unlimited discretion to subject persons within their jurisdiction to secret surveillance."<sup>160</sup> The court, aware that such a law could undermine or even destroy democracy in the name of defending it, affirmed that contracting states "may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate," and that states must ensure that "whatever system of surveillance is adopted, there exist adequate and effective safeguards

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155. 2 Eur. H.R. Rep. at 271.

156. *Geywitz v. The Federal Republic of Germany*, D.R., Vol.60, p.256; *Kokkinakis v. Greece*, (A/40), 17 Eur. H.R. Rep. 397 (1994); *Zamir v. United Kingdom*, D.R., Vol.40, p.42.

157. (A/173), 12 Eur. H.R. Rep. 321, 322 (1990).

158. (A/216), 14 Eur. H.R. Rep. 153, 189 (1992).

159. (A/116), 9 Eur. H.R. Rep. 433, 451 (1987).

160. (A/28), 2 Eur. H.R. Rep. 214, 232 (1979-80).

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against abuse.”<sup>161</sup> The court further agreed with the Commission that “some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.”<sup>162</sup>

The Preamble to the “Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism,”<sup>163</sup> based primarily on the European Convention and the case law of the court,<sup>164</sup> states clearly that the fight against terrorism is a legitimate goal. Nevertheless, the guidelines concentrate mainly on the limits states must respect in all circumstances in their legitimate fight against terrorism. Thus, Article 2 (prohibition of arbitrariness) states that “[a]ll measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness.” Article 3 provides additional guidelines for the lawfulness of anti-terrorist measures:

- (1) All measures taken by States to combat terrorism must be lawful.
- (2) When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

In *Rotaru v. Romania*, a case concerning the collection and processing of personal data, the court interpreted the legitimate aim of national security, noting that “although section 2 of the law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision.”<sup>165</sup> Although disputes do not often arise over a recognized aim for limitations, they are often analyzed in close proximity with the test of what is “necessary in a democratic society.”

c. “Necessary in a democratic society”

The third prerequisite is that the limiting measure be “necessary in a democratic society.” In *Silver v. United Kingdom*,<sup>166</sup> the court summarized its jurisprudence regarding this requirement:

- (a) the adjective ‘necessary’ is not synonymous with ‘indispensable,’ neither has it the flexibility of such expressions as ‘admissible,’ ‘ordinary,’ ‘reasonable,’ or ‘desirable’;

161. *Id.*

162. *Id.* at 237 (footnote omitted); see also *Brogan v. United Kingdom*, (A/145-B), 11 Eur. H.R. Rep. 117, 129 (1989).

163. Guidelines on Human Rights and the Fight Against Terrorism, adopted by the Committee of Ministers of the Council of Europe, on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, Council of Europe, Sept. 2002, available at [http://www.coe.int/T/E/Human\\_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf).

164. See *Incal v. Turkey*, 29 Eur. H.R. Rep. 448, 483 (1998); *Ireland v. U.K.*, (A/25), 2 Eur. H.R. Rep. 25 at paras. 11 et seq (1978); *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 at paras. 70 and 84 (1996); *Zana v. Turkey*, 27 Eur. H.R. Rep. 667 at paras. 59 and 60 (1997); and *United Communist Party of Turkey v. Turkey*, 26 Eur. H.R. Rep. 121 at para. 59 (1998).

165. *Rotaru v. Romania*, 2000 Eur. Ct. H.R. 191, available at <http://www.worldlii.org/eu/cases/ECHR/2000/191.html>.

166. (A/61), 5 Eur. H.R. Rep. 347, 376 (1983) (citing *Handyside v. United Kingdom*, (A/24), 1 E.H.R.R. 737, 754-55 (1979-80)); see also ROBERTSON & MERRILLS, *supra* note 150, at 199.



(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;

(c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued';

(d) those paragraphs of . . . the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted.<sup>167</sup>

When judging the validity of restrictions, there is room for flexibility, especially in the doctrine of "margin of appreciation," or level of discretion, which varies a great deal from case to case depending on different rights, claims, justifications, and times. The *Handyside v. United Kingdom* case, which dealt with freedom of expression, is probably the most cited case exploring the meaning of the term "necessary in a democratic society."<sup>168</sup> According to the court, the adjective "necessary," within the meaning of Article 10, paragraph 2, implies the existence of a "pressing social need."<sup>169</sup> The Contracting States retain a certain margin of appreciation in assessing whether such a need exists, but this freedom/flexibility "goes hand in hand with a European supervision" of both the legislation and the decisions applying it.<sup>170</sup> In exercising its supervisory jurisdiction, the court is not to "take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation."<sup>171</sup>

The court further explained that it must not only ascertain whether the respondent state exercised its discretion reasonably, carefully, and in good faith, but must also determine whether it was "proportionate to the legitimate aim pursued" and whether the state's justifications were "relevant and sufficient."<sup>172</sup>

The concept of a "democratic society" has been understood to refer to both the member states of the Council of Europe as well as to other democratic states. When considering the objectives of a "democratic society" in *Handyside*, the court reasoned:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'<sup>173</sup>

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167. *Silver v. United Kingdom*, *supra* note 166 at para. 97.

168. 1 Eur. H.R. Rep. at 737.

169. *Id.* at 754.

170. *Id.* For more details on the application of the doctrine of "margin of appreciation," see HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996). See also Christian Bonat, *The European Court of Human Rights*, The Federalist Society for Law and Public Policy Studies 25-26 (2000), at <http://www.fed-soc.org/IntlLaw&%20AmerSov/eurocourthr.pdf>.

171. *Handyside*, *supra* note 168, at 755.

172. *Id.* at 754, 755.

173. *Id.* at 754.

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In *Handyside*, the court mentioned the criteria of duties described in Article 10(2) by stating, “whoever exercises his freedom of expression undertakes ‘duties and responsibilities’ the scope of which depends on his situation and the technical means he uses.”<sup>174</sup> The court developed this view further in *Müller v. Switzerland*, which considered whether artistic freedom is protected under Article 10 (freedom of expression).<sup>175</sup> The court held that it had to review the duties and responsibilities of individuals in order to answer the question of whether or not the conviction was necessary in a democratic society.<sup>176</sup> The court was criticized for infringing upon the creativity of artists; it was considered to be a heavy burden for an artist to think of duties while creating art. Also, in *Müller*, the court mentioned the impossibility of finding a common view of morals among the diverse Contracting States to the ECHR.<sup>177</sup>

In the *Sunday Times* case,<sup>178</sup> the court confirmed the same approach to the protection of morals: “The view taken by the Contracting States of the ‘requirements of morals’ . . . ‘varies from time to time and from place to place,’ and ‘State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements.’” However, the majority found the appropriate margin of appreciation to be narrower than in *Handyside* because parties to the Convention agreed that judicial authority should be subject to a “far more objective notion” than should the protection of morals.<sup>179</sup> In other words, when it comes to legitimate purposes other than morals, more extensive European supervision might lead to a less discretionary power of appreciation. In the *Sunday Times* case, the court concluded that interference could not be justified under Article 10(2) because the social need was not “sufficiently pressing to outweigh the public interest in freedom of expression,” the restraint was not “proportionate to the legitimate aim pursued,” and it was “not necessary in a democratic society for maintaining the authority of the judiciary.”<sup>180</sup>

The *Observer and Guardian v. United Kingdom* case deals with another legitimate aim—national security.<sup>181</sup> The court held that the injunction sought to restrict publication was not necessary in a democratic society because it “prevented the newspapers from exercising their right and duty to convey information already available on a matter of legitimate concern.”<sup>182</sup>

Freedom of speech and its limitations based on the rights of others is another area that requires flexible application of the necessity test. Generally, the court has held that the limits of acceptable criticism could be wider if directed

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174. *Id.* at 755.

175. (A/133), 13 Eur. H.R. Rep. 212 (1991).

176. *Id.* at 228.

177. 13 Eur. H.R. Rep. at 228-29.

178. 2. Eur. H. R. Rep. at 276 (quoting *Handyside*, 1 Eur. H.R. Rep. at 753) (alterations in original).

179. *Id.*

180. *Id.* at 282.

181. 14 Eur. H.R. Rep. at 153.

182. *Id.* at 196.

against a politician than a private individual,<sup>183</sup> and such limits are wider with regard to the government than to a private citizen or even a politician.<sup>184</sup>

The principle of proportionality, an important criterion for assessing whether an interference with a right is “necessary in a democratic society,” has long been used by many constitutional courts in various legal systems, as well as by the European Court of Justice. The court has used the proportionality test as a key means of control, applying it concretely and meticulously to balance the legitimate purpose of safeguarding individual rights.<sup>185</sup> The European Court of Human Rights first adopted the principle in 1968 in the *Belgian Linguistic Case* (No. 2),<sup>186</sup> which dealt with Article 14—the prohibition of discrimination. The Court held that “Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aims sought to be realized.”<sup>187</sup>

In *Dudgeon v. United Kingdom*, which addressed Article 8(2) (respect for private life), the court concluded that the government failed to justify its legislation criminalizing “buggery,” which it compared to legislation regarding homosexual conduct in other European states.<sup>188</sup> The court held that whatever benefits flowed from the law, they did not outweigh its disadvantages, as required by the principle of proportionality.<sup>189</sup> The court emphasized the fact that the legislation targeted the “most intimate aspect of private life.”<sup>190</sup> In the realm of Article 8, in *DP v. United Kingdom*, it is interesting to note that the court stated that “Article 8 may impose positive obligations to protect the physical and moral integrity of an individual from other persons.”<sup>191</sup>

Another pertinent decision is the *Sporrong-Loennroth* case,<sup>192</sup> which examined interferences with the right to property addressed by Article 1 of First Protocol. Although there is no requirement of objective necessity in the limitation clause of this provision, the court stated that it:

must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the individual’s fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of Protocol 1.]

Restrictions on the rights of certain persons can be stricter than limits on others, as exemplified by Article 11(2).<sup>193</sup> Article 16 limits the political activity

183. See *Lingens* (1986), D.R., Vol. 26, p.171, at 181, para. 10(c) (“a politician must be prepared to accept even harsh criticism of his public activities and statements.”).

184. See *Castells v. Spain*, (A/103), 14 Eur. H.R. Rep. 445, 463-64 (1992).

185. LOUCAIDES, *supra* note 142, at 198.

186. (A/6), 1 Eur. H.R. Rep. 252 (1968).

187. *Id.* at 284.

188. (A/45), 4 Eur. H.R. Rep. 149, 168 (1982).

189. *Id.*

190. *Id.* at 165.

191. 36 Eur. H.R. Rep. 14, at para. 116 (2003).

192. 1982 Eur. Ct. H.R. 5, at 24-28.

193. Article 11(2) states: “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the

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of aliens.<sup>194</sup> As for the cases mentioned above (addressing politicians, etc.), it cannot be said that the jurisprudence of the court has established any restrictions *ratione personae*, but it has held that such restrictions might justifiably affect certain classes of individuals more than others.<sup>195</sup> Conflicting claims might arise in cases of concurrent exercise of several rights or the same right by several people. The margin of appreciation would again come to the fore in these situations to clarify decisions on the legality or the objective of the restrictive measure on a case-by-case basis. The maxim *in dubio pro libertate*, so useful in relations between individuals and their governments, dictates favoring the freedom of the individual, which is not useful in conflicts among individuals: interpreting rights broadly for one would in many cases narrow the scope of the rights of others.

## 2. Limitations on Certain Activities

The second category of limitations, found within Article 16 through 18, refers to specific activities.<sup>196</sup> Article 16, which contains restrictions on the political rights of aliens, provides that “[n]othing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens.”<sup>197</sup> This article seems to run counter to Article 1, which states that rights in the Convention are to be enjoyed by “everyone within [the state’s] jurisdiction.”<sup>198</sup> Potentially, Article 16 permits a wide range of state interference with the political rights of aliens. Unfortunately, the jurisprudence regarding this article is not well-developed. In *Piermont v. France*, the Commission indicated that the provision expressed an outdated view of the rights of aliens.<sup>199</sup> The article applies expressly to political activities that might be interpreted narrowly to include matters of political process, such as organizing and setting up political parties and relations with the parties’ programs and campaigns.<sup>200</sup>

Article 17 safeguards the free operation of democratic institutions but imposes narrow restrictions on activities subversive of Convention rights.<sup>201</sup> It can

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imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

194. ECHR, *supra* note 148, at art. 16.

195. See *Engel v. Netherlands*, (A/22), 1 Eur. H.R. Rep. 647, 669 (1979-80) (stating that the existence of “a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians” does not in itself run counter to their obligations).

196. Compare JUKKA VILJANEN, *THE EUROPEAN COURT OF HUMAN RIGHTS AS A DEVELOPER OF THE GENERAL DOCTRINES OF HUMAN RIGHTS LAW: A STUDY OF LIMITATION CLAUSES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2003).

197. ECHR, *supra* note 148, art. 16.

198. *Id.* at art. 1.

199. 314 Eur. Ct. H.R. (ser. A) 14 (1995); Application 15773/89 1995 Eur. Ct. H.R. 14 (27 April 1995). Series A. No. 314.

200. DAVID HARRIS, MICHAEL O’BOYLE, & CHRIS WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 510 (1995).

201. “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights

be invoked both by an individual against the State and by a State to justify interference with individual rights. In *Parti Communiste v. Federal Republic of Germany*, the Commission applied Article 17, rejecting the complaint by the German Communist Party against its prohibition as incompatible with the provisions of the Convention, since the party aimed to establish a dictatorship that would suppress a number of rights and freedoms enshrined in the Convention.<sup>202</sup> In *Kühnen v. Federal Republic of Germany*, the Commission again invoked Article 17, stating that this article covered those rights that might facilitate an attempt to derive from them a right to engage in activities aimed at the destruction of any of the protected rights and freedoms.<sup>203</sup> The Commission found that the freedom of expression enshrined in Article 10 may not be invoked in a sense contrary to Article 17.<sup>204</sup>

Regarding the court's case law, *Lawless v. Ireland* (No. 3),<sup>205</sup> one of its earliest decisions, represents a much stricter view<sup>206</sup> of the application of Article 17: "no person may be able to take advantage of the provisions of the Convention to perform any act aimed at destroying the aforesaid rights and freedoms."<sup>207</sup> Hence, Article 17 cannot be used to deprive an individual of his political freedom simply on the ground that he has supported a totalitarian government in the past."<sup>208</sup> In *Lehideux v. France*,<sup>209</sup> the court found a breach of Article 10 and decided that it was not appropriate to apply Article 17, contrary to the French Government's approach.<sup>210</sup> In a concurring opinion, Judge Jambrek stated, "In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others. . . . Therefore, the requirements of Article 17 are strictly scrutinized, and rightly so."<sup>211</sup>

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and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." ECHR, *supra* note 148.

202. Application No. 250/57, 1955-57 Y.B. Eur. Conv. on H.R. 222, 224 (Eur. Ct.).

203. Application 12194/86, 56 D.R. 205 (1988); *see also* Glimmerveen and Hagenbeek v. Netherlands, Applications 8348/78 and 8406/78, 18 D.R. 187, 195-96 (1979).

204. 56 D.R. at 209.

205. (A/1), 1 Eur. H.R. Rep. 15 (1979-80).

206. CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 363 (3d ed., 2002); *see also* HARRIS, O'BOYLE, & WARBRICK, *supra* note 200, at 510-13.

207. 1 Eur. H.R. Rep. at 22.

208. OVEY & WHITE, *supra* note 206, at 363 (citing De Becker, Report of the Commission, 8 Jan. 1960, Ser. B, No. 2, at 137-38). *See also* Vogt v. Germany, (A/323), 21 Eur. H.R. Rep. 205, 239 (1996) (holding that the dismissal from civil service of a member of the German Community Party was not, in this case, "necessary in a democratic society").

209. 30 Eur. H.R. Rep. 665 (2000).

210. *Id.* at 705.

211. *Id.* at 707, para. 2.

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Article 18 allows for the inference that there cannot be inherent or implied restrictions on guaranteed rights.<sup>212</sup> It does not have a character independent of other articles, and can only be invoked in conjunction with an article that contains a limitation when that limitation is used for a purpose other than the one for which it is authorized. Thus, Article 18 gives protection against misuse of powers or breaches of good faith. Yet, because the Court rarely invokes Article 18, the relevant jurisprudence is undeveloped.

*a. Derogation in War and Other Emergencies*

The third category, codified in Article 15, includes limitations on rights during public emergencies threatening the life of a nation (for example, wars, earthquakes, and so on).<sup>213</sup> This article incorporates the principle of necessity common to all legal systems. Various constitutions and domestic statutes empower states to take otherwise unlawful measures that interfere with individual rights during emergency situations. Because European states have not often relied on Article 15, the jurisprudence of the Strasbourg institutions is not as developed as it is under other international instruments.

Several cases have expanded the definition of “public emergency” beyond war-like situations.<sup>214</sup> The definition includes incidents of serious violence, civil war, and insurrection as main categories, but also low-intensity, irregular violence. Although the cases before the court have all dealt with threats to internal security, the concept of public emergency arguably also covers other types of crises such as grave economic dislocations or natural disasters.<sup>215</sup>

The requirement of “threatening the life of the nation” refers “to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed.”<sup>216</sup> To address the crisis, States can take “measures . . . to the extent strictly required” by the exigencies of the situation. These measures will probably involve derogations from Articles 5 and 6. In such situations, emergency legislation tends to extend the powers of the executive to arrest and detain the

212. “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.” ECHR, *supra* note 148.

213. “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.” ECHR, *supra* note 148. For a chart of limitations on rights, including derogation in times of emergencies, that are included in several constitutions and international instruments, see Human Rights and Constitutional Rights, Limitations on Rights, at [http://www.hrcr.org/chart/limitations/tuties/limits\\_general.html](http://www.hrcr.org/chart/limitations/tuties/limits_general.html).

214. *Greece v. United Kingdom*, No.176/56, 12 Y.B. Eur. Conv. on H.R. 71, 71-76 (1958); *Lawless*, 1 Eur. H.R. Rep. 15, at para. 28; *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, 33-50 (1978); *Brannigan v. United Kingdom* (A 258-B), 17 Eur. H.R. Rep. 539, 557 (1993).

215. HARRIS, O’BOYLE, & WARBRICK, *supra* note 200, at 493. For a thorough analysis of the states of emergency, see JOAN FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING HUMAN RIGHTS DURING STATES OF EMERGENCY* (1994); Oren Gross, *Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825 (2000).

216. *Lawless*, 1 Eur. H.R. Rep. at 31, para. 28.

individuals suspected to be involved in forbidden activities. In *Brannigan*, the court accepted the position of the government and the Commission on this matter and concluded that the 1988 derogation was a genuine response to a persistent emergency situation.<sup>217</sup> It decided that in so far as the "strictly required" question was concerned, it could not say that the government had overstepped its margin of appreciation<sup>218</sup> in its decision that judicial control should not be made part of the process of extending detention.<sup>219</sup>

"Other international obligations" are to be observed by the state when introducing measures of derogation. The obvious sources of international law in this case would be the ICCPR and the Geneva Conventions and its Protocols, though Article 15(1) does not preclude obligation under customary international law. In *Brannigan*, the court argued that the more stringent provisions of Article 4 of the ICCPR had been satisfied in "officially proclaiming" the emergency.<sup>220</sup>

Article 15(2) also contains certain non-derogable rights.<sup>221</sup> In no circumstances may a state depart from its obligation under Articles 2, 3, 4(1), and 7 of the ECHR, and Article 3 of the Sixth Protocol. The rights enshrined in these articles cannot be abrogated or derogated from even in times of war and other emergencies.<sup>222</sup> Three of these rights, the right to life, freedom from torture, and freedom from slavery and servitude constitute *jus cogens* norms.<sup>223</sup> The only limitations on the scope of non-derogable rights are intrinsic to each right, which is protected within its own definition and its internal range of application. The range of non-derogable rights differs from one instrument to another. The ECHR, which is the oldest of the conventions, contains the shortest list of non-derogable rights. The enumeration of the four common non-derogable rights in the ECHR reflects existing conventional and customary international law.<sup>224</sup>

217. *Brannigan*, 17 Eur. H.R. Rep. at 576.

218. For more on this issue, see Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

219. 17 Eur. H.R. Rep. at 575-76, para. 60. The Court noted: "[I]n the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the government attaches great importance." *Id.* para. 59. See also *Brogan v. U.K.*, (A 145-B) 11 Eur. H.R. Rep. 117, 131-36, paras. 55-62 (1988).

220. 17 Eur. H.R. Rep. at 577, para. 75; see also Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976-1977).

221. For a detailed analysis of the nature of non-derogable rights and the reasons for their inclusion in this section, see FITZPATRICK, *supra* note 215; see also Science and Technique of Democracy No.17, HUMAN RIGHTS AND THE FUNCTIONING OF THE DEMOCRATIC INSTITUTIONS IN EMERGENCY SITUATIONS, Wrocław, Proceedings of European Commission for Democracy Through Law, Council of Europe (Oct. 3-5, 1996).

222. For a critical analysis of the jurisprudence of Strasbourg institutions, see Oren Gross, "Once More unto the Breach": *The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437 (1998).

223. Daphna Shrager, *Human Rights in Emergency Situations under the European Convention on Human Rights*, 16 ISR. Y.B. HUM. RTS. 217, 232-234 (1986); see also Ronald St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANS-NAT'L L. 225, 230-231 (1997).

224. See Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 2 (1981).

## V.

FUNDAMENTAL RIGHTS IN EUROPEAN UNION LAW AND THE  
JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

The Constitution for Europe and its integration of the Charter of Fundamental Rights constitute major breakthroughs in the protection of human rights and the development of human rights as a structural principle of the European Union. The European Union's accession to the European Convention on Human Rights is the logical final step in the ongoing convergence of fundamental rights standards throughout Europe. This process was also fueled by the main judicial organ of the European Community—the European Court of Justice—which accelerated the transformation of the originally economic unit into a political community, and moved from the guarantee of trade-related “freedoms” to broader-based “fundamental rights” of Union citizens.

Initially, the 1957 Rome Treaty established four basic Community freedoms: the free movement of goods, labor, services, and capital. Structurally, those freedoms resemble traditional basic rights, as contained in the Member States' written constitutions. The Community's law prohibits interferences with trade. First, these Treaty provisions define a particular scope of protection, such as the free movement of goods.<sup>225</sup> Second, the Treaty allows limitations on these rights for certain defined purposes. For example, the free movement of goods may be limited on grounds of “public morality, public policy, or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures . . . ; or the protection of industrial and commercial property.”<sup>226</sup> Third, these limitations are restricted, either expressly or through judicial interpretation, in order to avoid abuse. The most important limiting principle (“*Schrankenschränke*”) is the proportionality principle, which is derived from the legal systems of the Member States and structurally embodies many elements of national constitutional law. It states that the restricting provisions must serve a purpose compatible with the principles of the Community and be suitable for achieving that purpose (suitability). It further states that the restrictions must be necessary, meaning that there must not be any other less restrictive means of achieving the same purpose.<sup>227</sup>

Gradually, human rights guarantees were developed in Community legislation. In particular, the Single European Act of 1987 was an important document in Community human rights law and is frequently cited in case law.<sup>228</sup> The involvement of the European Court of Justice in human rights matters—an area not directly within the realm of its main or natural competencies—was also significant.

225. Treaty Establishing the European Community, Mar. 25 1957, art. 28, 298 U.N.T.S. 11 [hereinafter Rome Treaty]. (“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”).

226. Rome Treaty, *supra* note 225, at art. 30(1).

227. See Christoph U. Schmid, *Pattern of Legislative and Adjudicative Integration of Private Law*, 8 Colum. J. Eur. L. 415, 446 (2002); NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW* 191 (1996).

228. Single European Act, Feb. 17, 1986, 25 I.L.M. 506 (entered into force July 1, 1987).



The question of human rights within the ambit of Community law arose when the national constitutional courts of Germany and Italy challenged the validity of secondary Community legislation before the European Court of Justice, on the grounds that such legislation infringed upon the fundamental rights enshrined in their national constitutions. As mentioned above, the ECJ stressed the supremacy of Community law and its direct application within national jurisdictions. Nevertheless, the debate continued, focusing on the premise that the Community law should not fall behind the national constitutions with regard to the protection of fundamental rights.<sup>229</sup> The ECJ's eventual innovation was the enunciation and application of a Europe-wide fundamental rights infrastructure beyond the expressly defined economic freedoms.<sup>230</sup>

Recognizing these "fundamental rights" as part of Community law in order to fill its perceived *lacunae*, the ECJ emphasized that they were part of the general principles of law<sup>231</sup> that the Court was required to apply pursuant to Article 164 of the Treaty of Rome. Community institutions thus had to act in accordance with these rights whenever they exercised their competences under the Treaty.

In *Stauder v. City of Ulm*, the ECJ reviewed the validity of Article 4 of Decision No.69/71 and held that this provision "contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court."<sup>232</sup> While this judgment contained only a vague introduction to the concept, the ECJ affirmed this position in *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*:

[R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.<sup>233</sup>

In 1974, the ECJ conveyed the same message in *Nold v. Commission*<sup>234</sup> and even made reference to international treaties:

[I]nternational 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.

A year later in *Rutili*, the court specifically referred to the European Convention on Human Rights and its Fourth Protocol.<sup>235</sup> In that decision, it did not

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229. Alain Van Hamme, *Human Rights and the Treaty of Rome*, in HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 70-81 (Liz Heffernan ed., 1994).

230. Vincent J.G. Power, *Human Rights and the EEC*, in HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 81-99 (Liz Heffernan ed., 1994).

231. Van Hamme, *supra* note 229, at 72-73.

232. Case 29/69, 1969 E.C.R. 419, 425.

233. Case 11/70, 1970 E.C.R. 1125, 1134.

234. Case 4/73, 1974 E.C.R. 491, 507.

235. Case 36/75, 1975 E.C.R. 1219.

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apply the provisions of the Convention *per se*, but rather construed them with specific reference to the relevant context of Community Law.<sup>236</sup>

The ECJ's later jurisprudence addressed the provisions of the European Convention more directly.<sup>237</sup> In *Commission v. Germany*,<sup>238</sup> the Court held that:

Regulation No. 1612/68 must also be interpreted in the light of the requirement of respect for family set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That requirement is one of the fundamental rights which, according to the Court's settled case law, restated in the preamble to the Single European Act,<sup>239</sup> are recognized by Community law.

In *National Panasonic*, the court directly applied the limitations contained in Article 8(2) ECHR to justify the investigatory power of the Commission under Regulation 17.<sup>240</sup> In *Dow Benelux*, the Court limited the applicability of Article 8, as under the Convention, to "private dwellings of natural persons," rather than the premises of "undertakings."<sup>241</sup> Still, it held that the investigative powers of the Commission in this case could not be "arbitrary or disproportionate."<sup>242</sup> Similarly, in *Wachauf*, the ECJ, while supporting the applicability of fundamental rights in the Community system, held that these rights are nevertheless subject to proportionate restrictions:

The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.<sup>243</sup>

Other fundamental rights enunciated by the court include the right to property and the right to exercise an economic activity<sup>244</sup>—two key concepts of a market-based system. In *Baustahlgewerbe GmbH v. Commission*, referring to Article 6(1) ECHR as interpreted in particular decisions of the ECtHR, the Court

236. *Id.* at 1232; see also Vaughne Miller, *Human Rights in the EU: The Charter of Fundamental Rights*, Research paper 00/32 at 11 (March 20, 2000), at <http://www.parliament.uk/commons/lib/research/rp2000/rp00-032.pdf>.

237. See ANTHONY ARNULL ET AL., WYATT & DASHWOOD'S EUROPEAN UNION LAW 146-49 (4th ed. 2000); see also *The EU and Human Rights* (Philip Alston ed., 1999).

238. Case 249/86, 1989 E.C.R. 1290.

239. The Preamble of the Single European Act (1987), *supra* note 228, states that the Member States adopted the Act, "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."

240. Case 136/79, 1980 E.C.R. 2033, 2057.

241. Case 85/87, 1989 E.C.R. 3137, at paras. 28-29.

242. *Id.* at para. 30.

243. Case 5/88, 1989 E.C.R. 2609, at para. 18.

244. This right may be limited by "the general objectives pursued by the Community, on condition that the substance of the right is left untouched." Case 234/85, *Keller*, 1986 E.C.R. 2897 at para. 8, [1987] 1 C.M.L.R. 875; Case C-370/88, *Marshall*, 1990 E.C.R. I-4071 at para. 27, [1991] 1 C.M.L.R. 419; Case T-521/93, *Atlanta AG*, 1996 E.C.R. II-1707 at para. 62.

also proclaimed a fundamental right to a fair legal process within a reasonable time.<sup>245</sup>

One other interesting case is that of *Bosman*.<sup>246</sup> It addressed, and declared illegal under European law, the transfer system of FIFA and UEFA—the leading world and European football associations—which allowed transfers of professional soccer players to other clubs only if their new club paid the old club a transfer fee based, *inter alia*, on the player's age and earnings. The ECJ discussed the conflict between free movement of labor and freedom of association and the consequent associational autonomy protected as a fundamental right under the ECHR and Community law. Balancing both of those rights, the court gave primacy to the free movement of labor noting that “the associations’ rules at issue were neither necessary to the realization of associational freedom nor a binding consequence of it.”<sup>247</sup> With regard to the admissible restrictions on free movement, the court followed the *Cassis*<sup>248</sup> formula, holding that the limitations must serve a legitimate objective compatible with the treaties and must be necessitated by public policy concerns. The court found that none of the arguments put forward to justify such an obstacle to the freedom of movement could be upheld.<sup>249</sup> In particular, the transfer rules did not maintain financial and competitive balance in the world of football since they did not prevent the richest clubs from securing the services of the best players on the market;<sup>250</sup> nor were the rules in question an adequate means of encouraging and financing clubs that provide training for young players, in particular the smaller clubs, since the prospect of receiving fees was uncertain and the amount of any fee was unrelated to the actual costs.<sup>251</sup> The associations’ rules thus had to bow to this version of the proportionality principle.<sup>252</sup>

The dual obligation arising from Member States’ compliance with both Community law and the European Convention may endanger uniform application and interpretation of human rights guarantees if cases are decided by the

245. Case C-185/95P, 1998 E.C.R. I-8417, [1995] 5 C.M.L.R. 239 at para. 29 (stating that the reasonableness of the duration of the proceedings “must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, by analogy, the judgments of the European Court of Human Rights in the cases of *Erkner and Hofauer* of 23 April 1987, Series A No 117, § 66; *Kemmache* of 27 November 1991, Series A No 218, § 60; *Phocas v France* of 23 April 1996, *Recueil des arrêts et décisions* 1996-II, p. 546, § 71, and *Garyfallou AEBE v Greece* of 27 September 1997, *Recueil des arrêts et décisions* 1997-V, p. 1821, § 39)). In Case 63/83, *R. v. Kent Kirk*, 1984 E.C.R. 2689, 2718, the Court also affirmed the fundamental right not be subjected to *ex post facto* criminal legislation.

246. Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Bosman*, 1995 E.C.R. I-4921. For a good discussion of this case, see Schmid, *supra* note 227, at 473-475, and Amikam Omer Kranz, *The Bosman Case: The Relationship between European Union Law and the Transfer System in European Football*, 5 COLUM. J. EUR. L. 431 (1999).

247. Case C-415/93, 1995 E.C.R. I-4921, *supra* note 246, at para. 80.

248. Case 120/78, 1979 E.C.R. I-6097. The formula concerns the mandatory requirements of general interest, protection of public health, fair trading, and consumer protection (compelling requirements of general welfare).

249. *Bosman*, *supra* note 246, at paras. 105-114.

250. *Id.* at para. 107.

251. *Id.* at para. 109.

252. *Id.* at para. 110.

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ECJ on one hand, and by the ECtHR on the other. Some of this concern has been addressed by the ECJ in its case law. For example, in *Cinéthèque SA v. Fédération Nationale des Cinémas Françaises*, the ECJ refused to review French legislation under Article 10 (freedom of expression) of the European Convention on Human Rights, stating that:

Although it is true that it is the duty of this 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.<sup>253</sup>

In *Meryem Demirel v. Town of Schwäbisch Gmünd*, the court reiterated that it “has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law.”<sup>254</sup> Still, with the scope of Community power increasing, the need to limit that power through an express catalog of rights became more urgent. Community legislation to provide a systematic and comprehensive protection of fundamental rights became necessary to achieve legal certainty or predictability. Consequently, there were a number of resolutions, declarations, and memoranda attaching prime importance to the protection of fundamental human rights. Accession to the European Convention on Human Rights and a proposal to draft an autonomous charter of fundamental human rights had been suggested since 1974; these calls were renewed in 1990.<sup>255</sup> Those attempts initially failed; but ultimately the European Parliament, the Council, and the Commission responded in December 2000 with their solemn proclamation of the “Charter of Fundamental Rights of the European Union.”<sup>256</sup>

## VI.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE CONSTITUTION  
FOR EUROPE: ITS RIGHTS AND LIMITATIONS

Under a mandate given by the Cologne European Council, Roman Herzog, former President of Germany and a distinguished professor of constitutional law, presided over the convention that established the Charter of Fundamental Rights. The Charter “brought together in a single instrument the rights hitherto scattered over a range of national and international instruments . . . enshrin[ing] the very essence of the European *acquis* regarding fundamental rights.”<sup>257</sup> The legal nature and effects of this Charter have sparked intense controversy; however, it was ultimately integrated into the new Constitution for Europe, becom-

253. Case 60/84, 1985 E.C.R. 2605, at para. 26.

254. Case 12/86, 1987 E.C.R. 3719.

255. Power, *supra* note 230, at 83; Van Hamme, *supra* note 229, at 75.

256. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 40 I.L.M. 266, available at [http://europa.eu.int/comm/justice\\_home/unit/charte/en/links.html](http://europa.eu.int/comm/justice_home/unit/charte/en/links.html). For recent commentary, see THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS (Steve Peer & Angela Ward eds., 2004).

257. Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM (2000) 644, O.J. C 364/1 (Oct. 10, 2000), para. 1, available at [http://europa.eu.int/comm/justice\\_home/unit/charte/en/links.html](http://europa.eu.int/comm/justice_home/unit/charte/en/links.html)

ing one of the main elements of the constitutionalization of the continent.<sup>258</sup> For the EU, this inclusion was of utmost importance in changing the paradigm of the EU from an institution of markets, supporting of the interests of economic forces, into a new institution upholding a broader concept of fundamental rights.

#### A. Rights under the Charter

Though not yet legally binding *per se*, the Charter of Fundamental Rights has become part of the *acquis communautaire*, not just politically, but legally.<sup>259</sup> It has already acquired the status of “soft law,” as the judiciaries on the European and national levels become ever more comfortable invoking the Charter in the interpretation of the European law. Although the ECJ itself has not yet based a decision on the Charter as such, the Court of First Instance, the Commission, the European Parliament, and the Court’s Advocates General have all started to routinely refer to it.<sup>260</sup> While Advocate General Léger noted that “[t]he Charter was intended to constitute a privileged instrument for identifying fundamental rights,” and stated that “[i]t is a source of guidance as to the true nature of the Community rules of positive law,”<sup>261</sup> the ECJ itself has failed to refer to it in some successful fundamental rights cases.<sup>262</sup> However, the European Court of Human Rights, in a decision reversing its own jurisprudence with regard to the Convention’s Article 12 right to marry, relied, in part, on Article 9 of the Charter. As the court noted, Article 9 “departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.”<sup>263</sup> Thus, as the Commission<sup>264</sup> predicted at the time of the proclamation, the Charter has increasingly been used as a legal reference point.

258. Klein, *supra* note 2; see also Volker Roeben, *Constitutionalism of Inverse Hierarchy: The Case of the European Union*, Jean Monnet Working Paper 8/03, N.Y.U. School of Law (2003) (stating that individual rights are one of the three institutions of constitutionalism, the other two being democracy and the rule of law), available at <http://www.jeanmonnetprogram.org/papers/03/030801.pdf>.

259. Erich Vranes, *The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention*, European Integration, online Papers (EIoP), vol. 7, no. 7, at 1 (2003) (stating that the Charter “arguably should have the same legal status as the general principles”), at <http://eiop.or.at/eiop/texte/2003-007a.htm>.

260. A LEXIS search of February 2, 2004 revealed nine references to the Charter in the database of the European Court of Justice.

261. Case C-353/99P, Council of Europe v. Hautala, 2001 E.C.R. I-9565, at para. 83.

262. See, e.g., Case C-60/00, Carpenter v. Secretary of State for the Home Department, 2000 E.C.R. I-6279; Case C-112/00, Schmidberger, Internationale Transporte und Planzüge v. Austria, [2003] 2 C.M.L.R. 34.

263. Goodwin, *supra* note 144, at 5. Other cases have made reference to the Charter, including I v. United Kingdom, 36 Eur. H.R. Rep. 53 (2003) (regarding Article 9 of the Charter); Hatton v. United Kingdom, 37 Eur. H.R. Rep. 28 (2003) (regarding Article 37 on environmental protection); and Fretté v. France, 38 Eur. H.R. Rep. 21 (2004) (regarding Article 21 on discrimination based on sexual orientation).

264. As far as the legal nature of the Charter is concerned, the Commission stated that “[i]t can reasonably be expected that the Charter will become mandatory through the Court’s interpretation of it as belonging to the general principles of Community law.” Communication, *supra* note 257, at para. 10. It considered it, however, “preferable, for the sake of visibility and certainty as to the law, for the Charter to be made mandatory in its own right and not just through its judicial interpretation.” *Id.* at para. 11. This goal has been reached through the Treaty Establishing a Constitution for Europe.

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The Charter's inclusion in the Constitution for Europe reinforced, at least prospectively, its legally binding character.

The Charter is now an integral part of the Constitutional Treaty, which lists the Charter itself, the European Convention on Human Rights, and the constitutional traditions of the Member States as the sources of individual rights against the Union. This is stipulated in Article I-9, which (1) recognizes the rights, freedoms, and principles set out in the Charter, (2) mandates accession of the Union to the European Convention on Human Rights,<sup>265</sup> and (3) confirms that the fundamental rights guaranteed in the ECHR and rooted in the constitutional traditions common to Member States shall constitute general principles of EU law. While a substantial body of fundamental rights jurisprudence has already been developed by the ECJ, the Preamble states that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."<sup>266</sup>

The Charter of Fundamental Rights, as now contained in the Constitution, is divided into seven parts: Title I: Dignity (Articles II-61 to II-65); Title II: Freedoms (Articles II-66 to II-79); Title III: Equality (Articles II-80 to II-86); Title IV: Solidarity (Articles II-87 to II-98); Title V: Citizens' Rights (Articles II-99 to II-106); Title VI: Justice (Articles II-107 to II-110); and Title VII: Final Dispositions (Articles II-111 to II-114). It includes not only restatements of traditional rights, but also innovations.

While a detailed analysis of these rights would go beyond the scope of this article, two aspects of the rights enumerated in the Charter are significant. First, a number of socioeconomic rights are included side-by-side with civil and political rights. The decision to do so confirms, in a way, the indivisibility of human rights. The justiciability of economic, social, and cultural rights remains a contentious issue, and their inclusion in the constitution suggests that important policy decisions in this field will be disputed in the courts. The drafters apparently were attempting to reassure the states, which view these rights as requiring positive government action; but this mitigation effort may have brought other con-

265. The changes in the final draft of Article I-9, using the words "shall accede" instead of the phrase "seeking accession" used in the previous draft, show that there must have been some understanding between the Council of Europe and the EU regarding the modalities of such accession. The Parliamentary Assembly of the Council of Europe explicitly invited the Union to negotiate accession to the Convention. See Council of Europe Resolution 1228 (2000), Sept. 29, 2000, Charte 4500/00 (Apr. 10, 2000). The ECJ argued against such a step in its Opinion 2/94 of March 28, 1996, Accession of the European Community to the European Convention of Human Rights and Fundamental Freedoms, 1996 ECR I-1763. The ECJ said that the treaty, neither on its face nor under Article 308, conferred competence on the Community to accede to the ECHR since such accession would entail a fundamental reordering of the Community's judicial system. On the other hand, the European Court of Human Rights, in the case of *Matthews v. United Kingdom*, Case 40302/98, 2002 Eur. Ct. H.R. 592 (July 15, 2002), stated that "States Parties to the Convention may not dispense themselves from their obligations under the Convention by transferring powers on an international organization." The ECtHR upheld the same reasoning in *Waite & Kennedy v. Germany* (26083/94) 1999 Eur. Ct. H.R. 13 (February 18, 1999). Accession of the Union to the ECHR would appear to submit acts of organs of the Union, not only those of the member states, to review by the ECtHR.

266. Charter, Preamble, *supra* note 256, at para. 4.

cerns and difficulties to the application and interpretation of the Charter.<sup>267</sup> Nevertheless, the inclusion of economic, social, and cultural rights is encouraging and potentially significant.<sup>268</sup>

Second, the wording of a certain number of rights has been changed in the Charter, contrasting with their existing codifications in international law and in the ECHR. The new language aims to extend the scope of these rights and adapt to contemporary changes and to the characteristics of the Community. For example, Article II-67—the right to respect of private and family life—now applies to “communications,” instead of “correspondence,” which is the term used in the corresponding article of the ECHR, in order to adapt to changes in technology. Similarly, the wording of Article II-69—which includes the right to marry and found a family—now arguably recognizes unconventional families as well as traditional marriage. Other examples include Article II-72, the freedom of assembly and of association, which now includes the recognition and guarantee of exercising this right at the European level, and Article II-74, the right to education, which is formulated more broadly and includes the right to vocational and continuing training.

### B. *Limitations on the Rights of the Charter*

As previously discussed, limitations on rights are a *sine qua non*, a necessary feature of any human rights system. The Charter is no exception. This section will discuss the manner in which these limitations manifest themselves in the Charter and evaluate whether they are appropriate or whether we can learn from other regimes with regard to their content and meaning.

The Preamble of the Charter reads: “Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.”<sup>269</sup> This explicitly introduces the policy foundation for restrictions on rights, which are then provided in Title VII, Final Dispositions. This chapter establishes a complex system of formal and substantive limitations on the Charter’s fundamental rights. Article II-111(1), in determining the field of application of the Charter, distinguishes between “rights” and “principles.” An analysis of the limiting “principles” reveals that they are mostly socioeconomic in nature and leave room for a narrow interpretation of their

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267. For an analysis of the Charter’s content and justiciability, its potential federalizing force, and its impact on Member States’ actions through the European Court of Justice, see Sionaidh Douglas-Scott, *The Charter of Fundamental Rights as a Constitutional Document*, E.H.R.L.R. 2004, 1, 37-50.

268. However, others would argue that the Charter provisions pertaining to social and economic rights do not introduce any new “legal instruments to foster social solidarity in the Union.” Rather, they are seen as a mere summary of existing legal positions. See Matthias Mahlmann, *1789 Renewed? Prospects of the Protection of Human Rights in Europe*, 11 CARDOZO J. INT’L & COMP. L. 903, 923 (2004). But see Aileen McColgan, *The EU Charter of Fundamental Rights*, E.H.R.L.R. 2004, 1, 2-5 (arguing that though there is an overall greater weight accorded to civil and political rights than to economic and social ones, in light of the records of states’ non-compliance with the terms of Social Charters, their inclusion in the Charter, and consequently in the EU Constitution, is promising).

269. Charter, Preamble, *supra* note 256, at para. 6.

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scope. In particular, Paragraph 2 of Article II-111 states that it “does not extend the field of application of Union Law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in other Parts of the Constitution.”<sup>270</sup> Thus, the fundamental rights guaranteed in the Union “do not have any effect other than in the context of the power determined by the Treaty.”<sup>271</sup> This would somewhat minimize the impact of certain articles. For example, the effect of the guarantees of Article II-98 (“The Union shall ensure a high level of consumer protection”) is difficult to predict.<sup>272</sup> Though some critics say that Paragraph 2 is legally superfluous,<sup>273</sup> it significantly reduces the potential of overbroad interpretation of Union powers.<sup>274</sup> On the other hand, in contrast to the ECHR, the Charter has no derogation clause for states of emergency.

### 1. *The General Limitation Clause: Article II-112(1)*

Article II-112 addresses the scope and interpretation of rights and principles. It contains a general, “horizontal” clause, which sets out the accepted limits on, and the conditions for the exercise of, the rights and freedoms protected by the Charter. Paragraph 1 reads:

Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The requirements of this provision will be analyzed *seriatim*.

#### a. *Guarantee of the Essence of the Rights Protected by the Charter*

Article II-112(1) gives the essence of all rights and freedoms absolute protection.<sup>275</sup> This reflects the guarantee of the core of rights inspired by German

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270. *Id.* at Art. II-111(2).

271. Council of the European Union, *Charter of Fundamental Rights of European Union: Explanations relating to the complete text of the Charter*, at 73 (December 2000).

272. McColgan, *supra* note 268, at 3.

273. Nevertheless, they find it politically important in overcoming the fear that “the Charter provides a secret path to widening the legal competencies of the Union.” See Mahlmann, *supra* note 268, at 931.

274. *But see* Heathcoat-Amory, *supra* note 21, at 18 (expressing doubts that the language of Article 51(1) [now Art. II-111(1)] would safeguard domestic laws against interference and stating that “[t]he European Court of Justice is never a neutral observer and has consistently decided in favor of more centralization, being an EU institution itself.”).

275. Christoph Engel, *The European Charter of Fundamental Rights. A Changed Political Opportunity Structure and its Dogmatic Consequences*, 7 EUR. L.J. 151-170 (2001), available at [http://www.mpp-rdg.mpg.de/e\\_75.html](http://www.mpp-rdg.mpg.de/e_75.html).



constitutional doctrine, as formulated in Article 19 of the German Basic Law<sup>276</sup> and confirmed in the jurisprudence of the ECJ.<sup>277</sup>

b. "Provided for by Law"

In general terms, as provided for in other texts on the protection of fundamental rights, and as established by ECtHR and ECJ jurisprudence, any limits placed on the exercise of these rights must be subject to the guarantees of legal security. In effect, it must be provided for by law and subjected to the principle of proportionality. The formal limitation "provided for by law" has been developed by ECtHR jurisprudence to mean that the law not only has to be foreseeable and accessible but also have a "qualitative" dimension conforming to the ideals of the rule of law.<sup>278</sup>

On the other hand, as demonstrated in a number of cases, the Strasbourg organs have been careful to avoid the danger of being transformed into an additional appellate court for the Member States, since not all limitation laws produce a significant abuse of rights. Still, the Union stands to gain additional legitimacy when citizens challenge Union acts before the ECJ. As Engel explains: "This way the formal limitations of the fundamental rights become the dogmatic instrument to transform the principle of jurisdiction limited to specific issues and the principle of subsidiarity into standards against which individuals can have the European Court of Justice check Community acts affecting them."<sup>279</sup>

c. Proportionality

With regard to substantive limitations on fundamental rights, the principle of proportionality, as a restriction on these limitations, is critical. In Article II-112, Paragraph 1, proportionality is defined as requiring that limitations must be "necessary" and pursue a legitimate aim, such as the "objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others."<sup>280</sup> The ECJ has been criticized for not sufficiently scrutinizing Community acts under the proportionality principle,<sup>281</sup> despite the fact that the Court did introduce this principle in *Internationale Handelsgesellschaft*,<sup>282</sup> and later in *Schröder v. Hauptzollamt Gronau*.<sup>283</sup> This criticism is based on the premise that the ECJ has failed to develop a sophisticated legal theory of human rights, and has dealt with the concept rather vaguely. The ECtHR has established cer-

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276. Mahlmann, *supra* note 268, at 913 (explaining that the doctrine of limitations developed by the ECJ, especially as dictated by Community interests, have been criticized as "undetermined and nebulous."). The Court has developed its doctrine of limitations applicable uniformly to all rights, different from the systems of limitations of German Constitutional Law or European Convention of Human Rights that go specifically to individual rights.

277. Case 4/73, 1974 E.C.R. at 507, para. 14; Case 11/70, 1970 E.C.R. at 1134, para. 4.

278. (A/250), 17 Eur. H.R. Rep. at 162.

279. Engel, *supra* note 275.

280. Charter, *supra* note 256, at Art. 52(1).

281. Vranes, *supra* note 259, at 5.

282. Case 11/70, 1970 E.C.R. at 1134, para. 4.

283. Schröder v. Hauptzollamt Gronau, 1989 E.C.R. 2237, 2269, at para. 21.

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tain standards regarding the principle of proportionality—even though the jurisprudence fails to define coherent and consistent categories of “necessities,” “general interest recognized by the Union,” and infringements upon “others’ rights”—making decisions in this area difficult to predict.

i. “Necessary”

As noted above, the case law on the substantive criteria for permissible limitations more closely resembles a collage than a well-structured subtitled series of decisions. Further judicial review and interpretative refinement could help elaborate more detailed substantive standards to which EU institutions could more easily conform. On the other hand, overly rigid categorizing of legitimate “necessities” would not allow for changes over time that a Constitution and a Charter of Fundamental Rights must be ready to accommodate.<sup>284</sup> Thus, a dynamic definition, developed through case-by-case adjudication, might ultimately be preferable to determine the presence or absence of a necessity.

ii. “Genuinely meeting objectives of general interest recognized by the Union”

When determining the legitimate goals of a system of multilevel governance, the particularities of fundamental rights should of course be considered. The Union’s economic origin and focus make the discussion of potential conflict between institutions in terms of fundamental rights all the more complex. The work of the ECJ will be difficult, especially taking into account the three sources of existing standards in the field of fundamental rights, and those provided for in the Charter. The phrase “objectives of general interest recognized by the Union” is so vague and over-inclusive that the prior jurisprudence will not be of much help. This phrase should have been defined more strictly, because otherwise rights may be restricted for any given “objective.” The other norms of Union law could also form part of the legitimate aims. The doctrine of “margin of appreciation,” introduced and extensively implemented by the ECtHR and the ECJ, will need to be invoked to allow for differentiation in the level of protection provided by the regulatory scheme of Article II-112. Moreover, it might help if, over time, the organs of the Union truly consider and dogmatically integrate the jurisprudence of fundamental rights—particularly now that the Charter is rapidly becoming of ever greater legal relevancy.<sup>285</sup> However, changing this mindset is not going to be an easy job for institutions that for years have consciously omitted human rights from their legal vocabulary. While it may be seen as a way to ensure effectiveness of Community regulations, including the particular rights of “easy freedoms”—free movement of labor, services, capital,

284. Conceptions of permissible social conduct are changing over time. A dynamic concept of limitations thus appears to be more appropriate than a static one, as a Constitution should be written to last for the ages. Compare Chief Justice Marshall’s famous dictum in *McCulloch v. Maryland*, that, after, all, “we must never forget that it is a constitution we are expounding.” 17 U.S. 316, 407 (1819).

285. Engel, *supra* note 275, at 14-15.

and free foundations of enterprise—the drafters of the Community treaties clearly saw the danger of human rights being used by Member States as a pretext to thwart the goals and purposes of the Community.<sup>286</sup>

iii. “Need to protect the rights and freedoms of others”

As analyzed in the previous sections, the Federal Constitutional Court of Germany and the European Court of Human Rights have derived from their respective instruments the duty of the state to protect fundamental human rights. Article II-112(1) lists the “need to protect the rights and freedoms of others” as a permissible limitation. Beyond simply allowing the government to protect the rights of others, the Court of Justice, in accordance with the *acquis*, may have to develop a duty to affirmatively protect those rights. The duty to protect is, however, more difficult to realize and allocate in a multilevel system of governance, such as the European Union. The Charter of Fundamental Rights imposes the duty to legislate on organs of the Union, whereas a duty to protect deriving from Union law, but addressing the Member States, could be derived from Charter law in appropriate cases. The complete protection of the fundamental rights of the individual is thus provided by Union law as well as by the national constitutions, dividing the protection into two procedural mechanisms.<sup>287</sup> Still, the Charter does not expand the powers of the Union, which may limit any attempt by the ECJ to aggressively impose a duty to act.<sup>288</sup>

2. Article II-112(2)

Paragraph 2 of Article II-112 reads:

Rights recognized by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within limits defined by these relevant Parts.

This paragraph emphasizes respect for Union law, since the Charter rights constitute a standard of review only for authoritative actions attributed to the Union or Member States. It imposes the Union’s legal framework for the exercise of the rights set out in the Treaties. Where the rights established in the Charter are based on the Treaties, the conditions for and limits to their exercise are the same as those defined by the Treaties; they are not modified by the Charter. This paragraph particularly concerns the rights guaranteed to citizens of the Union, but also the articles providing for the protection of personal data (Article II-68); the respect for the freedom and pluralism of the media (Article II-71 (2)); the recognition of political parties at Union level in the context of the freedom of assembly and of association (Article II-72 (2)); the freedom to choose an occupation and the right to engage in work (Article II-75); the free-

286. Mahlmann, *supra* note 268, at 905 (citing Manfred Zuleeg, *Fundamental Rights and the Law of the European Communities*, 8 COMMON MKT. L. REV. 446, 447 (1971)).

287. For a detailed analysis of the duty to protect in the case of the European Union, see Engel, *supra* note 275, at 15-16.

288. “This Charter does not extend the scope of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.” Charter, *supra* note 256, at Art. II-112(1).

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dom to conduct a business (Article II-76); the protection of intellectual property in the context of the right to property (Article II-77 (2)); and the right to asylum (Article II-78).

The principle of conformity, set forth in this paragraph, is rather complex. It has been argued that this clause might not be applicable to those fundamental rights which have been established as general principles of Community law through the jurisprudence of the European Court of Justice.<sup>289</sup> Such an application would compromise the main function of the Charter itself as stated in the Preamble (that is, the enhancement of the visibility of the fundamental rights). The other issue in the context of Paragraph 2 concerns the fact that even secondary law may function as a barrier to the scope of fundamental rights of the Charter.<sup>290</sup>

The wording of the Charter seems to delimit the exact content of these rights, compromising the more concrete definitions of previous documents or allowing deviations from established jurisprudence, without increasing the transparency of the human rights regime.<sup>291</sup> This problem, however, seems to have been solved by the guarantee provided in Article II-113, Level of Protection, which provides that:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized in their respective fields of application by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.<sup>292</sup>

Ultimately, the Court must determine this issue.

### 3. *Article II-112(3)*

Paragraph 3 reads:

Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of these rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

This section establishes the framework for the legal relationship between the Charter and the European Convention on Human Rights to ensure legal coherence and security. As a result, where a right established by the Charter corresponds to a right guaranteed by the ECHR, its meaning and scope, as well as

289. Vranes, *supra* note 259, at 5 (citing e.g., Stefan Griller, *Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten*, in GRUNDRECHTE FÜR EUROPA. DIE EUROPÄISCHE UNION NACH NIZZA 131, 145 (A. Duschaneck & S. Griller eds., 2002)).

290. *Id.* ("[T]he right to free movement embodied in Article 45(1) [now Art. II-105] of the Charter is limited by the EC Treaty as well as pertinent secondary law. The definitive barriers for limitations contained in secondary law ("*Schrankschranken*") are to be derived in this view, from the EC Treaty and, pursuant to Article 6 EU Treaty, from the ECHR.") (citation omitted).

291. Mahlmann, *supra* note 268, at 931-32.

292. Charter, *supra* note 256, at Art. 53.

authorized limitations, are the same as those laid down by the ECHR. In the context of the Charter, these rights receive at least the same level of protection as they would under the ECHR. The ECHR thus serves as a minimum standard of protection, and the limits placed on its rights must not go beyond the standards established by its provisions. This is further confirmed in Article II-113. Although not explicitly mentioned in the text of Article II-112, the authoritative commentary to the Charter specifies that references to the ECHR mean the European Convention itself, its protocols, and the jurisprudence of the ECtHR and the ECJ.<sup>293</sup> Also, it states that “the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR without thereby adversely affecting the autonomy of Community law and of that of the Court of Justice of the European Communities.”<sup>294</sup>

To define the principle articulated in Article II-112 (3), the authors of the Charter made an inventory of the rights prescribed in the articles of the Charter whose meaning and scope are the same as the corresponding rights enshrined in the ECHR. This inventory constituted a total of twelve articles,<sup>295</sup> including the right to liberty and security; respect for private and family life; freedom of thought, conscience, and religion; freedom of expression and information; freedom of assembly and of association; freedom of the arts and sciences; the right to property; and protection in the event of removal, expulsion, or extradition. All of the above have the same meaning and scope as the corresponding rights established by the ECHR. The limitations on these parallel rights, as accepted and listed by the ECHR, are thus considered to be included in the Charter. This also applies, in principle, to those rights whose meaning is the same as the corresponding articles of the ECHR, but whose scope is wider. This group includes a total of five articles.<sup>296</sup> The due process guarantees of Article II-107(2) and (3) of the Charter correspond to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply with regard to Union law and its implementation.<sup>297</sup> Also, since the Charter’s prohibition of any discrimination on grounds of nationality (Article II-81(2)) enables citizens of the Union not to be considered foreigners in the sense of Article 16 of the ECHR, the limitations provided for by Article 16 of ECHR do not apply to them in this context.<sup>298</sup> In general terms, the coherence of the Charter’s legal relationship with the ECHR must be ensured without compromising the autonomy of Union law or of the Court of Justice.

#### 4. *Article II-112(4)*

Paragraph 4 provides:

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293. Council of the EU, *supra* note 271, at 74-75.

294. *Id.* at 74.

295. *Id.* at 75-76.

296. *Id.* at 76.

297. *Id.*

298. *Id.*

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Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

This clause can be interpreted as an attempt to prevent a discrepancy between the standard of protection offered on the Union level and that offered on the national levels. It also mitigates the already perceived threat of supremacy of Union law by ensuring that the Charter does not encroach upon the legal domain of Member States.<sup>299</sup> Faced with the diversity of the fundamental rights protected by Member States, the Court of Justice might not be in the best position to set common standards; their setting will still remain, in the aggregate, the domain of the respective national laws and legal systems. The court, faced with the interpretation of multi-faceted and heterogeneous catalogues of rights and systems of limitations on national, supra-national, and regional levels, must, above all, achieve consistency in this potentially powerful system of judicial review.

In this respect, no innovative solutions have been advanced. On the contrary, problems may arise because the method to determine the relevant level of protection will continue to be a comparison between the laws of the Member States and the Charter, in addition to taking into account the jurisprudence of the European Court of Human Rights. The result of such a comparison would not necessarily coincide with the standards of any individual Member State.<sup>300</sup> Discrepancies may result because the Court of Justice must take the "objective of general interest recognized by the Union" into account, or that the number and content of the fundamental rights recognized on the European level and in the Member States may vary, and, in cases of conflict, may not be given the same weight. This confusion does not seem to solve the problem of divergence of standards or the problem of conflicting claims between the Court of Justice and the national courts where there are divergent levels of protection.

##### 5. *Article II-112(5)*

Paragraph 5 provides:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.

The problématique of this provision derives from the distinction between rights and principles as stated in the Charter. This paragraph returns to the issue of justiciability of social and economic rights, most of them called "principles" in the Charter. They will be open for judicial review in national law only if they have been implemented by legislative or executive acts of the EU, or in the interpretation of the legislative measures of the Member States that give effect to

299. Mahlmann, *supra* note 268, at 932.

300. Vranes, *supra* note 259, at 7; see also Mahlmann, *supra* note 268, at 910 n.32 (citing IRMGARD WETTER, *DIE GRUNDRECHTSCHARTA DES EUROPÄISCHEN GERICHTSHOFES* 42 (1998)).

these principles.<sup>301</sup> It is believed that the policy underlying this distinction is the desire to prevent the development of an aggressive fundamental rights jurisprudence by the ECJ, especially in the fields of economic and social rights, which are traditionally regarded as non-self-executing.<sup>302</sup> However, this goal is hindered by the formulation of traditional civil rights, such as the prohibition of *ex post facto* laws in Article II-109 of the Charter,<sup>303</sup> as “principles” of legality. What, then, is the difference in the Charter between a right and a principle that requires legislation?<sup>304</sup> It is obvious that the “principle” set forth in Article II-109 would not need executing legislation in order to take effect, while access to preventive health care, traditionally defined as non-self-executing, is protected in Article II-95 as a “right.” Thus, this distinction is somewhat misleading and further clarification of the meaning of Paragraph 5 may be needed. Alternately, the ECJ might very well decide to take another approach towards “principles,” create its own interpretation despite this limiting clause, and “transform some of these principles into directly effective rights.”<sup>305</sup>

#### 6. Article II-112(6)

Paragraph 6 provides:

Full account shall be taken of national laws and practices as specified in this Charter.

This paragraph is another manifestation of the principle of subsidiarity, which is already stated in Article II-111(1) as well as in a number of other articles referring to “national laws and practices.” In general, this provision adds nothing new and thus can be considered superfluous.

#### 7. Article II-112(7)

Paragraph 7 provides:

The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.

Paragraph 7 appears in the Charter as a product of the final negotiations completed on June 18, 2004. It is a departure from the original disclaimer to the legislative commentary, which explicitly stated that “they [the explanations relating to the complete text of the Charter] have no legal value,” but were intended to clarify the provisions. These explanations are now given full legal status as *travaux préparatoires*, or legislative history. It was believed that the

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301. Sionaidh Douglas-Scott, *Memorandum of Sionaidh Douglas-Scott, King's College London*, at para. 7, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ld-select/ldconst/168/16808.html>.

302. Vranes, *supra* note 259, at 8.

303. “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed.”

304. Douglas-Scott, *supra* note 267, at 44-45.

305. Douglas-Scott, *supra* note 301, at para. 7.

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explanations accompanying the Charter might temper potentially expansive interpretations.<sup>306</sup>

### 8. *Specific Limitations*

In addition to Article II-112, certain restrictive qualifications on the content of rights or specific limitations can also be found in other articles throughout the Charter. Some of them closely resemble the limitations attached to certain rights in other constitutional or international texts. One such qualification requiring that rights be “laid down by law/ provided by law/ regulated by law/ in accordance with the Union law” accompanies, among others, the rights guaranteed in Article II-68 (protection of personal data); Article II-77 (right to property); Article II-87 (workers’ right to information and consultation within the undertaking); Article II-88 (right of collective bargaining and action); and Article II-90 (protection in the event of unjustified dismissal). Obviously, this seems to be most common in the provisions enshrining social and economic rights.<sup>307</sup> The reference to “national laws and practices” is another qualification found in a number of articles, such as Article II-70 (freedom of thought, conscience, and religion); Article II-74 (right to education); Article II-90 (protection in the event of unjustified dismissal); and Article II-94 (social security and social assistance). Specifically, Article II-74(3), the right to education, adds the qualification “with due respect for democratic principles and the right of parents” to the freedom to found educational establishments.

The right to property, contained in Article II-77(1), permits deprivations “in the public interest . . . under conditions provided for by law, subject to fair compensation being paid in good time for their loss.” This is slightly weaker than the classical Hull formula of “adequate, prompt and effective compensation,” which has been, by and large, reaffirmed by the U.S.-Iran Claims Tribunal, but stronger than the “appropriate compensation” standard created in 1963 by UN General Assembly Resolution 1803.<sup>308</sup> In addition, Article II-77(1) provides that the “use of property may be regulated by law in so far as is necessary for the general interest.”

As well as with other rights,<sup>309</sup> these limits have been carefully tailored to the context of individual vulnerability and countervailing interests.

306. The British government had asked that the explanations accompanying the Charter become legally binding, under the assumption that they moderate the text as it stands. See Heathcoat-Amory, *supra* note 21.

307. For a critique of the EU Charter of Fundamental Rights, especially the “unequal respect” accorded to economic, social, and cultural rights as compared to the civil and political rights, see McColgan, *supra* note 268.

308. See 1 OPPENHEIM’S INTERNATIONAL LAW 920-927 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

309. Article II-78, the right to asylum, as well as Article II-105, the freedom of movement and of residence grant those rights “in accordance with the constitution.” Article II-84, the rights of the child, recognizes the right to protection and care “as is necessary for their well-being” and freedom of expression “in accordance with their age and maturity,” as well as the right to a personal relationship with their parent(s) “unless that is contrary to his or her interests.” Article II-101, the right to good administration, refers to handling of affairs “within a reasonable time.” Also, it grants access to one’s file “while respecting the legitimate interests of confidentiality and of professional and



C. *The Role of the European Court of Justice*

The inclusion of the Charter in the Constitution for Europe will unquestionably give the Charter a high profile in the jurisprudence of the European Court of Justice. From a dogmatic point of view, it is obvious that the Court's task in interpreting the provisions of the Charter, the legitimacy of Union acts, and the Constitutionality of Union laws in light of fundamental rights is not an easy one, especially given the open-ended and somewhat ill-defined principle of subsidiarity.<sup>310</sup> It is imperative that the court apply consistent standards in all its decisions. Given its own jurisprudence, the introduction of new rights, the complicated system of limitations, and the multiple sources of the rights it must consider, the court might move to restrict the scope of its "margin of discretion" doctrine, gradually leading to a more precise doctrine of the content of rights and their limitations. Also, the abstract nature of human rights norms in general, and specifically a number of provisions of the Charter, leaves substantially more room for judicial interpretation on the part of the court than most other provisions in the Constitution.<sup>311</sup>

This might give rise to the question whether the Charter and the ECJ's power over its interpretation will, in the long run, render obsolete the other two sources mentioned in Article I-9. The danger of this happening, however, is distant, given the vigorous jurisprudence of the domestic constitutional courts intent on maintaining their powers of review.<sup>312</sup>

The ECJ has, over time, grappled with four interrelated issues: the autonomy of its fundamental rights law, the scope of its application, the coherence of its interpretation, and its application to acts of the Community and of the Member States. Before the Charter, there was no written bill of rights. Thus, the ECJ developed those rights jurisprudentially, ultimately resorting to the ECHR as *de facto* binding on Member States when implementing Union law.<sup>313</sup> But the ECJ has never addressed the issue of using the ECHR as a common standard, meaning that more issues have arisen now that the new constitution mandates accession to the ECHR. For example, many Member States have stated reservations to the ECHR and its Additional Protocols, raising the issue of whether the Convention will be acceded to as a whole, including its entire network of reservations. In addition, the ECJ has frequently avoided deciding contentious fundamental rights issues involving social choices because they were beyond the specific scope of Community competences.<sup>314</sup> As a result, the decisions of national constitutional courts have often influenced the ECJ's own jurispru-

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business secrecy." Article II-107, the right to an effective remedy and to a fair trial, guarantees legal aid "in so far as such aid is necessary to ensure effective access to justice."

310. Charter, *supra* note 256, at Art. 51(1), Art. 52(6), now Art. II-111(1) and II-112(6).

311. Mahlmann, *supra* note 268, at 910.

312. Compare the Federal Constitution Court of Germany's decision in Maastricht, 89 BVerfGE 155, and the ECtHR's decision in Matthews, Judgment of 18 February 1999, Case 24833/94, R 32.

313. See Case C-7/98, Krombach v. Bamberski, 2000 ECR I-1935, para.31.

314. See Case C-159/90, Society for the Protection of Unborn Children Ireland v. Grogan, 1991 E.C.R. 1991, I-4685.

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dence.<sup>315</sup> Given the number and the “competition of interpreters,” successfully imposing a uniform interpretation of the Charter of Fundamental Rights seems unlikely. Competing interpretations are essentially unavoidable because the law of the Union is generally enforced by the Member States, and anyone could file suit before a national court, claiming a violation of the fundamental rights as enshrined in the Charter. Although the exclusive jurisdiction of the Court of Justice precludes a national court from rendering invalid a secondary law of the Union, “the national courts gain at least an autonomous competence of examination.”<sup>316</sup>

Besides the possible competition with domestic courts, the ECJ might also face competition from the European Court of Human Rights, especially with the European Union acceding to the European Convention. However, this conflict could be minimized if the ECtHR applies its wise doctrine of “margin of appreciation” to the acts of European Community organs, including the interpretation of new Charter rights by the ECJ. Conversely, the ECJ might do well to adhere to the Charter by following the ECtHR’s interpretation of Charter rights that dovetail ECHR guarantees. Therefore, the complex issue of who may properly and authoritatively interpret the Charter, and thus become the ultimate arbiter of human rights, may be delimited substantively by deferring to the legal system (that is, Charter, ECHR, national constitutional traditions<sup>317</sup>) from which the right at issue stems.

## VII.

### CONCLUSION

The limitations on rights in the Charter of Fundamental Rights of the Constitution for Europe are an amalgam of standards developed in prescription and application of national constitutional laws, the European Convention on Human Rights, and other international instruments. Their general formulation in Article II-112 may not do justice to the problématique of limits,<sup>318</sup> but it reflects a civil-law concern for limiting governmental power in a formal and substantive, as well as general and abstract, way. The courts, in particular the European Court of Justice, are called upon to bestow content upon the rather rarefied concepts of formal limitations as “provided by law,” and substantive limits such as the principle of proportionality, which is a tool to strengthen the courts. Specific limitations, or content restrictions, are applied to particular guarantees throughout the

315. See the Bananas cases, Case C-466/93, *Atlanta Fruchthandelsgesellschaft v. Bundesamt für Ernährung und Forstwirtschaft*, 1995 E.C.R. I-3799, and Case C-280/93, *Germany/Council*, 1994 E.C.R. I-4973, in which the ECJ first ruled that no fundamental rights were raised by the Community regulation abolishing an import contingent of so-called “dollar-zone” bananas to German importers. Afterwards, when the Federal Constitutional Court of Germany found a retroactivity problem with the regulation, the ECJ reversed itself.

316. Engel, *supra* note 275, at 20.

317. In a Union of twenty-five nations, with different languages, legal traditions, attitudes towards rights and their origin, and moral values, the Court will have to struggle to find some common standards regarding the scope of rights and their limitations. For more on this issue, see Mahlmann, *supra* note 268, at 910 n.32.

318. Klein, *supra* note 2.

document, reflecting unique historical threats and the fine-tuned balancing of rights with the interest of the community and the needs of others.

A rich body of domestic and international jurisprudence is available to give meaning to both the content and limits of the new Charter, since many of the terms chosen in defining and limiting its rights are familiar concepts. In addition, the multi-level nature of government in Europe is countered by multi-level rights catalogs, which counsel humility in the exercise of aggressive reinterpretation of the content and limits of rights. The Charter is an essential new element in the Constitution for Europe. It is built on the wisdom of the ages, reaching far beyond its geographic confines and drawing, *inter alia*, from the rich and deep fount of the American Bill of Rights. Its interpretation should take that valuable stock of inherited prescription and interpretation into proper account.