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The Human Rights Context within which the
European Union Functions

A Human Rights Policy for the European Community and Union: The Question of Competences

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I. PROLOGUE—DON'T DO WHAT I DO, DO WHAT I TELL YOU TO DO

The question of Community competences in the field of human rights came back into sharp focus with the publication of the Proposal for a Council Regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms, submitted by the Commission on 24 July 1997.¹ It was followed, in October of that same year, by an Opinion of the Legal Service of the Council on this proposal, a restricted document which, however, was widely leaked and circulated.² The exchange is by now obsolete. First, the Commission and Council reached a cosy, *don't ask don't tell*, compromise reflected in an amended set of Commission proposals.³ The Commission would get the sizeable funds it required to spread the good word of human rights; so long as the Commission formally accepted a legal regime which would expunge any official reference to a Community human rights policy relating to any activity in and by the Member States, the Council would not ask how exactly the Commission was spending the money and turn a blind eye even to funding instances which egregiously contravened that very policy.

The apple cart was famously overturned by the subsequent decision of the Court outlawing expenditures without firm legislative authorization.⁴ It should be emphasized, however, that this decision, contrary to the impression given in its immediate wake, eschewed the principal issue of competences. What exercised the plaintiffs and the Court were the respective institutional competences of Commission and Council. The case was based on the implicit assumption that, had only the Council given its legislative approval, all contested expenditures would be *intra vires*. Also implicit in the decision was the notion that, were the contested expenditures

¹ [1997] OJ C282/14, COM(97)357 final—97/0191(SYN).

² Brussels, 16 Oct. 1997; 11402/97 LIMITE; JUR 347; DEVGEN 72; COHOM 2; PESC 184.

³ Commission proposals of 1 July 1998, DEVGEN 43 and 44. See 'Working Document on the Proposal for a Council Regulation (EC) on the Development and Consolidation of Democracy and the Rule of Law and Respect for Human Rights and Fundamental Freedoms': *rapporteur*, Mr Galeote Quecedo, COM(97)357, 12 Feb. 1998.

⁴ Case C-106/96, *United Kingdom v. Commission*, judgment of 12 May 1998.

truly to fall in the 'non significant' pilot and exploratory category, they would be equally legitimate. The practical effect of the decision was not to limit the competences of the Community, but to limit somewhat the autonomy of the Commission and to strengthen that of the Council. The expenditures in that case concerned actions which were, arguably, firmly within the socio-economic aspects of the Single Market. They did not concern specifically the more controversial dimensions of human rights expenditures by the Commission.

Until recent years the debate about Community human rights competences mostly turned on the reach of the judicial writ of the European Court of Justice especially to certain classes of Member State acts⁵ and to that trusty perennial accession to the ECHR, which has been with us at least since 1978. With the publication of the 1997 and 1998 Commission proposals, the discussion shifts firmly from Court to political institutions.

On its face this seems to be a simple morality tale. The Commission, champion of human rights, proposes and the Council (Legal Service) seeks to place niggardly restrictions and constraints. The burden of the Council position turns on the following legal propositions. The Council first repeats the Court's affirmation in *Opinion 2/94*⁶ that:

No treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.

Following what it believes is the burden of *Opinion 2/94* the Council comes to the conclusion that Article 308 (*ex* Article 235) also could not be used to enact rules on human rights.

As regards the use of Article 179 (*ex* Article 130w) which refers to the objectives set out in Article 177 (*ex* Article 130u), the Council, purporting to follow the decision of the Court in *Portugal v. Council*⁷ argues that Article 179 cannot be a legal basis for measures the main object and purpose of which is democratization and human rights rather than co-operation development.⁸

The Council (Legal Service) then concludes that Articles 179 and 308 may only be used to support human rights and democratization measures which are part of, and

⁵ See, e.g. D. Binder, 'The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action', 4/95 *Harvard Jean Monnet Working Paper Series*, available at: <http://www.law.harvard.edu/Programs/JeanMonnet/> and sources cited therein.

⁶ *Opinion 2/94* [1996] ECR I-1759.

⁷ Case C-268/94, *Portuguese Republic v. EU Council* [1996] ECR I-6207.

⁸ We accept that this is a plausible reading of *Portugal v. Council* by the Legal Service. What may be questioned is the decision of the Court to read Art. 130u(2) (now Art. 177(2)) as necessarily an ancillary provision to a more generic co-operation development policy and not allow an autonomous Community measure or Community agreement (*ex* Art. 130y (now Art. 181)) to be directed entirely at democracy, rule of law and human rights. Why, one may ask, would the provisions of Art. 130u(1) (now Art. 177(1)) alone appropriately describe a co-operation development measure but Art. 130u(2) not? Art. 130u(1) provides: 'Community policy in the sphere of development cooperation . . . shall foster: the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; the smooth and gradual integration of the developing countries into the world economy; the campaign against poverty in the developing countries'. Art. 130u(2) provides: 'Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'. Why Art. 130u(1) should be privileged over Art. 130u(2) is not altogether clear.

ancillary to, general co-operation development instruments. It also would allow, following existing practice,⁹ the use of Article 308 as a basis for human rights and democratization measures in instruments of co-operation in relation to countries which are not, strictly speaking, developing countries, citing such famous programmes as Phare, Tacis, and Meda, provided that, where necessary, the enabling regulations are suitably amended.

Even then not all measures envisaged by the Commission proposal were to be allowed. According to the Council any measure outside a specific co-operation programme could only be based on Article 13 (*ex* Article J.3) TEU, which does not require a Commission proposal.¹⁰ This, of course, would split the operation and transfer some of the power away from the Commission services promoting the proposed regulation. The Council Legal Service even went so far as to suggest that the whole proposal could be put under Article 13 TEU. Of course, this would only apply to external human rights action for, as noted, the Council is emphatic that:

in any case, no measure in this area could be directed towards actions promoting the observance of human rights and democratic principles by and in the Member States.

We believe that, as this legal tale unfolds, there are no clear saints and villains. All Institutions seem to be playing a corporatist game, intent on promoting and preserving their own prerogatives under the guise of concern for human rights. They all seem to be giving a new meaning to the term '*chutzpah*' by preaching to others what they do not practise themselves—following faithfully the officers' maxim: don't do what I do, do what I tell you to do. In this they seem to be taking their cue from the Community as a whole, which is extremely apt to preach democracy to others when it, itself, continues to suffer from serious democratic deficiencies and to insist that all newcomers adhere to the ECHR when it, itself, refuses to do the same.

The Court has—laudably—found no difficulty over the years in asserting a comprehensive basis for the judicial protection of human rights covering the entire field of Community law, including, where appropriate, Member State acts. However the proposed accession to the ECHR would, in the Court's eyes, in a passage in *Opinion 2/94* noted for its opaqueness and cryptic nature as well as its self-serving nature:

entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 308. It could be brought about only by way of Treaty amendment.

⁹ See the excellent A. Rosas and B. Brandtner, 'Human Rights and the External Relations of the European Community' [1998] *EJIL* (forthcoming) for chapter and verse.

¹⁰ See Art. 18 (*ex* Art. J.8(3)) EU. Compared to the Commission's right to initiative in the EC Treaty this not only means that the Council can act without a proposal, but also that, if there is one, the voting requirements of Art. 250(1) (*ex* 189a(1)) EC do not apply.

Of course, given the political reality and voting requirements of Treaty amendment, this decision meant the end to accession.¹¹

We are left to wonder why accession to the Convention would be of constitutional significance greater than, say, membership of the new WTO with its new dispute resolution procedures, or of adherence by Member States most of which did not require a constitutional amendment to join the ECHR. Likewise, the alleged need to integrate all the provisions of the Convention which seems to trouble the Court, seems to us a colossal red herring. After all, some form of mixed agreement could be explored if the Court's concern stemmed from a fear that the Community would not be in a position to fulfil all provisions of the ECHR and, in any event, how could this be a concern without seeing the negotiated accession instruments? Clearly some provisions of the ECHR would have to be modified to permit EC membership.

The suspicion is, therefore, despite strenuous denials by certain members of the Court, that it was the 'institutional implications' that caused most trouble and that principal among these was the institutional implication which would submit the Court of Justice, like its constitutional brethren in the Member States, to scrutiny by the Strasbourg Court. There is, indeed, no small measure of *chutzpah* in a Court which has endless creative resources when it comes to interpretations which consolidate the legal order over which it presides, but discovers the virtues of hermeneutic prudence when its own position may be over-shadowed, or where the vaunted European order itself may be seen to be subjected to a higher law judicially enforced by others.

Be that as it may, we will argue contrary to the Council Legal Service, that it is possible to read *Opinion 2/94* as permitting a Community human rights policy, provided that certain conditions are maintained.

The position of the Council, as reflected in the opinion of its Legal Service, has no less *chutzpah* than the Court. This is evident when you consider that the same Council (and the same Legal Service) which, in relation to a human rights policy, gravely state that:

the observance and promotion of human rights as such are not included among the Community's actions or tasks as specifically listed in article 2 and 3 of the EC Treaty.

had just approved a common position, and subsequently a directive, on tobacco advertising—a measure masquerading as harmonizing obstacles to free movement in the internal market, but in fact conceived and conspicuously explained in its earlier life as having a principal public health objective (and thus requiring as its principal legal basis Article 152 (*ex* Article 129) which inconveniently precludes legislation).¹²

¹¹ Accession has been opposed by various Member States, mostly the UK, but also by other countries such as Portugal, Ireland, and France at different times. Still, this opposition was always carefully couched as stemming from a constitutional concern regarding competences—a position which could have been undermined had the Court opened the way at least to exploring accession without amending the Treaties.

¹² See Common Position of the Council of 12 Feb. in respect of an amended proposal for a Council Dir. on the approximation of Member States' laws, regs., and administrative provisions on advertising for tobacco products: COM(92)196 final—SYN 194 (submitted by the Commission pursuant to Art. 149(3) (now repealed) of the EEC Treaty on 30 Apr. 1991) [1991] OJ C167/3. Even in the European Parliament which has been very sympathetic to the social objectives of the proposed legislation the measure barely passed the scrutiny of the Legal Affairs Committee. The vote was 15–13: *Europe*, 1 Feb. 1992, at 10. In plenary session the measure was passed by 150–123–12 as regards the final resolution. 158–141–8

It is curious to note the shifting sensibility to an objective analysis of object and purpose of legislation as a condition for establishing legal basis.

Nonetheless, we do not disagree with the Council analysis of the limits of Article 177 (*ex* Article 130u)—we just marvel at the elasticity with which it uses the underlying methodology depending on the outcome it desires. We do by contrast strongly disagree with their overall conclusion that there is no legal basis for a Community human rights policy which would affect human rights within and by the Member States. We shall argue that, so long as such a policy is in the field of Community law, what is sauce for the judicial goose is also sauce for the legislative gander.

Finally the Commission. It is not our purpose or task in this essay to analyse or critique the Commission proposal. And giving money to worthy NGOs ('partners') is always a good thing—though the proposal would allow handouts to all manner of public bodies, including governments and 'private sector operators'. The Commission proposal in many respects is, however, a disappointing and ugly document which, at its worst, mocks the very values which it purports to promote. Pragmatically, most, if not all, of what the Commission proposed to support financially in the proposal had already been funded in recent years under various budget items, most of which are to be found in chapter B-7 (External Actions).¹³ Several of these budget items did not have any Council regulation as a legal basis. Instead Article 11 (*ex* Article J.1) TEU and Article 177 are quoted alongside Council and Parliament resolutions on human rights and democracy.¹⁴ In truth, the Commission proposal was not a new beginning, but an attempt to consolidate the hodge-podge of the past into a 'basic regulation' in the sense of Chapter IV, Point 3(c), of the 1982 Joint Declaration on various measures to improve the budgetary procedure¹⁵ so as to provide continuity instead of a year-to-year decision and greater flexibility as regards amounts, since without a basic regulation budget items, according to the Joint Declaration, cannot go beyond a 'significant' amount,¹⁶ as well, of course, as freeing their hands even further concerning who will enjoy Commission largesse.

as regards the Commission proposal as amended by the Parliament. The question of competence and legal basis was one of the central planks of the opposition to the measure.

¹³ Thus, e.g., in subchap. B7-7, under the heading 'European Initiative for Democracy and the Protection of Human Rights', which was introduced in 1994, the Community, under various titles, supports NGOs in democratization and human rights activities throughout the world, funds rehabilitation centres for torture victims and organizations offering help to victims of human rights abuses, spends money on the Hague and Rwanda war tribunals, and offers subsidies to certain activities of organizations pursuing human rights objectives. Not in chap. B7 of the budget would be fundings to NGOs which work on the establishment of an international criminal court (Art. 2(2) of the proposal) which are to be found in Part A 304 1 (administrative appropriations/Community subsidies) or support for migrants (B3-4110 in B3 Training, youth, culture, audiovisual media, information, and other social operations).

¹⁴ Council Resolution of 28 Nov. 1991 on human rights and democracy in the developing countries and follow-up Resolution of 18 Nov. 1992; EP Resolution of 14 May 1992 on a European Initiative for Democracy; EP Resolution of 13 July 1993 on human rights, democracy, and development.

¹⁵ [1982] OJ C194/1.

¹⁶ Needless to say, it is highly contested what a 'significant' amount would be. The Council locates it somewhere between 2 and 5 million ECU. See S. Strasser, *The Finances of Europe* (1997), 139ff. On the other hand: '[w]o kein Kläger, da kein Richter'. Although many of the abovementioned items offer 'significantly' more money than that, the Council does not seem to want to take the other institutions to Court for spending money on such good causes as human rights.

In its 1995 memorandum on human rights policy,¹⁷ the Commission had stated that, for the various financial instruments promoting respect for human rights to be used to best advantage:

they must be flexible to ensure their compatibility with the specific objectives pursued and guarantee in particular the availability of financial resources at a minimum of notice in case of urgent operations, and be adjustable to the specific requirements of human rights issues;

they must complement each other (technical assistance, development cooperation funds, specific 'human rights' headings, etc.) so as to avoid duplication and ensure continuity of the desired impact;

amounts must be made available as an incentive and granted in respect of progress achieved by way of reward, particularly in such areas as institutional reform, establishing the rule of law and democratization;

there must be transparency of information relating to the various sources of funding and their use.¹⁸

The Commission may be right about all of this. But in this field, too, the Commission has relied on its constitutional right to expend insignificant sums of money on pilot projects and exploratory action designed to enable it to exercise its proposal role in the legislative procedure.¹⁹ Even a cursory examination of Commission activity in this field raises doubts whether many of its activities would truly fall within the definition of 'insignificant', 'pilot', or 'exploratory' and did not fall into a scheme against which the Court warned about, namely 'to circumvent application of the principle that a basic act must first be adopted'.²⁰ And even as regards those items which did come under the legal definition of Commission authorized autonomous action or were authorized in some manner by the Council, we would respectfully submit that many could not be considered as coming within the field of application of Community law, however widely defined.²¹

The document borrows canonical language:

of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

In the legal order, respect for the jurisdictional limits of the Community is an important dimension of the rule of law and of democracy. A Community and Union which transgress such limits not only breach an important constitutional principle but also contribute to a continuous aggregation of power in the centre compromising an important aspect of democracy.

It is difficult to read the proposal as drafted, with its loose language, such as Article 2(d) which would apparently allow unrestricted support to operations:

supporting local, national, regional or international institutions involved in the protection or promotion of human rights

¹⁷ 'The European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond': Communication from the Commission to the Council and the European Parliament, COM(95)567 final.

¹⁸ *Bull. EU Suppl.* 1995. See also the homepage of DG IA at <http://www.europa.eu.int>.

¹⁹ Case 106/96, *UK v. Commission* [1998] ECR I-2729, para. 29.

²⁰ *Ibid.*, para. 36.

²¹ See some of the examples in note 24 below.

as if the Commission really believes that the Community and Union truly have no limits on such activities or that, because of the important aims, others will be shamed into not contesting the proposals.

This may well have been the case in the past. Under title B7-7040 ('subsidies for certain activities of organizations pursuing human rights objectives'), you find funding for operations both inside and outside the Community.²² Thus, the European Human Rights Foundation, an NGO that was founded in 1980 on the Commission's initiative,²³ through its European Human Rights Fund hands out subsidies from this budget line (which is 7 million ECU total) to support other NGOs, 55 per cent of which are Western European, with 15 per cent of activities targeted in Western Europe.²⁴

The words 'rule of law' appear again and again, but nowhere will you find material restrictions limiting such support to those fields in which the Community may act appropriately. Respect for constitutional divisions of powers in the federal structures that have been set up in many of the countries to which this instrument is aimed would be part of the rule of law that one tried to instill and encourage. What an exquisite irony that it is done by an instrument which shows no sensitivity to that very issue.

The same is true of another word which appears, again and again, in the Commission proposal: democracy. But are the democratic controls which the Commission proposes for itself in this field adequate?

An Advisory Committee of Member State nominated mandarins? An annual report to the European Parliament with a *summary of activities* but no continuous Parliamentary oversight? The notoriously non-transparent and undifferentiated (all-or-nothing) controls through the budgetary procedure? The conspicuous absence of transparency as regards financial order of magnitude envisaged?

There are two other elements which cannot but strike the reader of this proposal: the almost exclusive reliance on financial handouts to others as the method of vindicating the objectives of the proposal and, more egregiously, the total absence of any notion that the Community and Union themselves (and their institutions) might

²² See description of this budget item in 'Digest of Community Resources Available for Financing the Activities of NGOs and Other Governmental and/or Decentralized Bodies Representing Civil Society in the Fields of Development Co-operation and Humanitarian Aid', VIII/207/97EN, at 78 (document is on the homepage of DG IA, see note 18 above).

²³ EHRF claims to be independent from the EU. On the other hand it moved to Brussels in 1991 to be closer to the Commission. It works very closely with the Commission, carries out various research projects on human rights issues relevant to EU policy and helps the Commission manage Phare and Tacis.

²⁴ See e.g. European Human Rights Foundation, 'The First Fifteen Years', Report 1995, at 16ff:

- seed grants: to Britain and Ireland Human Rights Project or to Prisoners Legal Services Foundation;
- reports and studies on sectarianism in Northern Ireland, gypsies in Europe, child labour in Portugal, bans on political activity in Scotland, procedures of inquest in the UK;
- general grants to 'Article 19' (UK), to the British Institute on Human Rights, the Committee of Concerned Forensic Scientists (Denmark), Index on Censorship (UK), the International Lesbian and Gay Association (Belgium), JUSTICE (UK), Parity Foundation (Netherlands),
- legal aid and legal services to costs of the ECHR *Cabales* case (discriminatory immigration laws in the UK), costs of the ECHR *Wilden* case (Swedish child care), specialized legal service for women in the UK, legal aid for prisoners in England and Wales, legal advice for prisoners in the UK, advice centre on European and international human rights laws in the UK, legal proceedings in Greece to obtain recognition of the right to conscientious objection. See generally Case C-106/96, *United Kingdom v. Commission*, judgment of 12 May 1998.

have room for improving the situation of their own human rights record, other than through support of other bodies which typically deal with Member State abuses and not with the Community as such.

Some of the NGOs—especially those operating in third countries—can sigh with relief, since the legal opinion of the Council provides the way through skilful amendment and word-smithery here and there to make the necessary pay-outs. But one cannot but lament this document as a poor substitute for a fully fledged human rights policy which the Commission could have and should have presented. Such a policy—*Leading by Example*—has now been proposed.²⁵ Maybe the invitation of Article 13 (*ex* Article 6a) TEC will provide an incentive for the Commission and Council to take that proposal seriously—to lead by example.

What we propose to do is to explain our contention that a legal basis for a comprehensive human rights policy of the Community does exist on the basis of the current Treaty and jurisprudence.

II. TOWARDS A GENERAL PRINCIPLE OF HUMAN RIGHTS COMPETENCES

What, then, are the competences of the Community in the field of human rights? It is, of course, possible to try and formulate an overarching statement of positive Community law defining such competences. Such an exercise could, we believe, be of some utility in establishing some general principles and ways of thinking about the issue. But it is not enough. The proverbial ‘no vehicles in the park’ gives us a general orientation as to what may and may not be allowed in the park, but will not answer specifically the question whether skateboards or perambulators are allowed in.

Thus, one would have, in due course, to apply these principles to any comprehensive human rights policy which may be proposed.

For decades the European Court of Justice has held, in slightly differing formulae, that ‘respect for human rights is a condition of the lawfulness of Community acts’.²⁶ The source and material definition of such rights has likewise become canonical: Community human rights are rooted in, and derive from, ‘the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories’.²⁷ These fundamental rights form ‘an integral part of the general principles of [Community] law’ and their autonomy from their national source has been regularly emphasized: ‘the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself’.²⁸

²⁵ See Academy of European Law, *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000—Agenda of the Comité des Sages and Final Project Report* (1998), available at <http://www.iue.it/AEL/>.

²⁶ Recently, *Opinion 2/94* [1996] ECR I-1759, para. 34.

²⁷ *Ibid.*, at para. 33.

²⁸ Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, paras. 14 and 15.

Somewhat less noticed in this field is a classical move which is one of the hermeneutic hallmarks of the Court: the move from norms to institutional duty, from substance to procedure, from *ius* to *remedium*. We are mostly familiar with this move in the constitutional area which defines the relationship between the Community legal order and that of the Member States. Norm-oriented doctrines such as direct effect or supremacy are regularly, and without fuss, turned into institutional duties on Member State courts. The high tide of this move in that area is the *Francovich*²⁹ jurisprudence. Another remarkable example of the Court's norm-duty jurisprudence is its decision which found France in violation of its obligations under the Treaty for failure to prevent the obstruction of the free movement of goods by private individuals.³⁰

In *Commission v. France* the Court, *inter alia*, held:

The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as a positive act.

Article 30 [now Article 28] therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 [now Article 10] of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.

...
It should be added, by virtue of the combined provisions of Articles 38 to 46 [now Articles 32 to 38] and Article 7(7) [now repealed] of the EC Treaty, the foregoing considerations apply also to Council regulations on the common organization of the markets...³¹

We are, of course, aware of the difference between the fundamental freedom when it concerns free movement and the fundamental freedom of human rights. The former is an object of the Treaty in the sense of Article 3; the latter, in say, Article 7 (*ex* Article F(2)) is a duty of the Union as a whole which, under Amsterdam, will become justiciable. But even if we take a minimalist view, the transverse notion of human rights means that in any measure adopted by the Community following its Article 3-type objectives, respect for human rights is mandated. And in this respect, at least, abstaining from taking action is, as the Court reasons in *Commission v. France*, just as likely to cause an obstruction to fundamental human rights as would a positive violative act.

Thus, in *T. Port v. Bundesanstalt für Landwirtschaft und Ernährung*³² the Court addressed various aspects of the duty of the Community legislator to act in the context of the transition from a national regime to a Community common organization which require certain transitional measures and where the possibility of an Article 232 (*ex* Article 175) action exists.

²⁹ Joined Cases 6 and 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

³⁰ Case C-265/95, *Commission v. France*, judgment of 9 Dec. 1997.

³¹ *Ibid.*, at paras. 31, 32, 36.

³² Case 68/95, [1996] ECR 6065.

The Court's words are suggestive:

Those transitional measures must address difficulties encountered after establishment of the common organization of the market . . . [Recital 36]

...

When assessing whether transitional measures are necessary, the Commission has broad discretion . . . As the Court held in its order in Case 280/93R *Germany v. Council* . . . the Commission, or the Council . . . are, however, obliged to take action if the difficulties associated with the transition from national arrangements to the common organization of the market so require. [Recital 38]

It is for the Court of Justice to review the lawfulness of the Community Institutions' action or failure to act. [Recital 39]

The *Community Institutions are required to act in particular when the transition to the common organization of the market infringes certain traders' fundamental rights protected by Community law, such as the right to property and the right to pursue a professional or trade activity*. [Recital 40, emphasis added].

It seems that the Court is moving beyond the prohibition on measures which, in and of themselves, violate human rights, and is setting up a positive duty to take measures to ensure that certain rights should not be compromised.

We submit that such legislative competence is inherent in each and every field of legislative competence of the Community.

Put differently, in the first instance, from the negative prohibition on obstacles to free movement was derived a positive institutional duty (the contours and reach of which should not be exaggerated) effectively to ensure such freedom, and from the second instance of the common organization was established a duty to act so as to ensure that human rights are respected even when, arguably, the Community measure itself does not create a violation.

The Court has made a similar move in the area of human rights: In *Cinéthèque* (and elsewhere) it expressed the normative statement about human rights (respect for human rights as a condition for lawfulness) as an institutional, nay, Institutional duty: 'it is the duty of this Court to ensure the observance of fundamental rights in the field of Community law'.³³ In *ERT* it imposed, somewhat controversially, a similar duty on Member State courts as regards a certain class of Member State acts.

Cinéthèque is important because it belongs to the pre-Single European Act (SEA) and pre-TEU era, namely to an era in which fundamental human rights were not explicitly mentioned or even alluded to in the Treaties—the Constitutional Charter of the Community. This absence did not prevent the Court from articulating the norm—human rights as part of Community general principles of law, nor of a redefinition³⁴ of its institutional role, right, and duty to ensure that human rights are not violated. This duty which the Court imposed on itself did not relate to an explicit objective laid down in the Treaty, but was, it is presumed, considered necessary to

³³ Joined Cases 60 and 61/84, *Cinéthèque SA v. Fédération Nationale des Cinémas Français* [1985] ECR 2605, para. 26.

³⁴ Cf Case 1/58, *Stork* [1958–9] ECR 41: '[s]imilarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law . . . '.

enable the Community to carry out its functions. Respect for and protection of human rights were, thus, conceived as an integral, inherent, transverse principle forming part of all objectives, functions, and powers of the Community. Otherwise, whence came the jurisdiction of the Court to ensure, in the entire field of Community law, the observance of fundamental rights?

In articulating a general principle of Community competences in the field of human rights it seems to us as following from the Court's overall jurisprudence to suggest that it is not only the Court, as one of the institutions of the Community, that has a duty to ensure the observance of fundamental rights in the field of Community law, but that such a duty rests, inherently, on all Institutions of the Community exercising their competences *within the field of Community law*. Why would such a duty fall on the Court, in some instances on Member State courts, in some instances on the executive or legislative agencies of the Member States but not on the political Institutions of the Community—primarily Commission, Council, and Parliament?

Of course the political Institutions enjoy wide discretion in exercising their powers to attain the functions of the Community. Thus, their duty to ensure the observance of human rights within the field of Community law could not, under normal circumstances, be the subject of, say, an Article 232 (*ex* Article 175) action.³⁵ But equally, should Commission, Council, and Parliament decide to discharge their inherent duty to ensure the observance of fundamental rights in the field of Community law by legislating to do just that, and provided such legislation did not stray from the field of Community law, it is hard to see on what ground their overall competences could be challenged. Would the Commission and Council not, for example, have the competences simply to codify what the Court has done in its jurisprudence so that its jurisprudence can have a greater impact on all public authorities?³⁶

We now have to address as a matter of principle two issues: what would or could be the content of legislative and administrative action by the political institutions in this field; and what could be the legal basis of such action?

The first question we will answer briefly since it is dealt with extensively elsewhere.³⁷ If we are to take seriously the notion of ensuring respect for human rights, long gone are the days in which the mere provision of formal judicial remedies would be considered a sufficient and effective guarantee. The great movement in the 1970s and 1980s of access-to-justice has taught us that formal rights are often just that; that making rights effective often requires positive action, such as the provision of legal services, the dissemination of information, the education of people about their rights, the provision of new forms of legal actions such as the class action, and a whole variety of procedural, financial, and institutional measures. Justice without 'access' is justice denied. To take human rights seriously would require broad action by the political institutions.

What would be the specific legal basis on which such action may be contemplated?

In particular since the entry into force of the SEA, the question of the legal basis for Community legislation has become critical, given the different political

³⁵ Cf Case 22/70, *Commission v. Council (ERTA)* and Case 8/73, *Hauptzollamt Bremerhaven v. Massey-Ferguson* [1973] ECR 897.

³⁶ But cf *Vedder in Europarecht 1996*, at 309ff.

³⁷ See Chap. 1 above.

consequences of differing legal bases in terms of voting procedures and involvement of the European Parliament. What legal basis, then, could and should be used by the political institutions when exercising their duty to ensure the observance of fundamental rights in the field of Community law?

There seem to be three categories of legal basis. The first is the legal basis governing action in a specific field. The Community 'legislative branch' (Commission, Council, Parliament) could (and arguably should) attach to any legislation it passes 'human rights' concerning, say, transparency, information to interested parties, right to appeal, legal aid, and the like. There are few areas of Community activity which cannot, negatively or positively, affect the fundamental rights of individuals and groups. It cannot be stated often enough: the simple fact that individuals have, under certain circumstances, the right to challenge Community acts before the Court or through Article 234(b) (*ex* Article 177(b)) is not in many circumstances in and of itself sufficient to ensure the observance of fundamental human rights.

In some fields, the Community legislation coincides with a classic fundamental right, such as Article 141 (*ex* Article 119) EC. Even here one notes the interplay between norm and affirmative duty.³⁸

In other fields concern for fundamental rights is specifically mentioned—such as co-operation and development (Article 177 (*ex* Article 130u) EC), and, under Amsterdam, Article 13 (*ex* Article 6(a)).³⁹ This is significant since the duty and right of non-discrimination and equality are at the core of all other human rights and can provide a broad platform for a human right policy.

The second legal basis would be a broader use of Article 95 (*ex* Article 100a). Member State measures designed to protect fundamental human rights could constitute an obstacle to one of the fundamental freedoms. Subject, perhaps, to the principle of subsidiarity,⁴⁰ there could be a Community harmonization measure designed to protect fundamental human rights in the field of application of Community law, just as there is a Community harmonization measure designed to protect the physical life or safety of individuals in this field of free movement.

It may, however, be considered necessary, to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty, to have a measure which is not directly connected to any specific policy or is not a legitimate harmonization measure. Imagine the aforementioned notion of codifying the Court's jurisprudence in the interest of transparency and efficiency. Imagine the setting up of information bureaux to advise Community citizens of their rights, including their human rights, under the Treaty. Imagine the creation of a mechanism to monitor and report on the status within the field of Community law of those very

³⁸ Art. 119(1) (now Art. 141(1)): '[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

³⁹ Art. 6a (now Art. 13): 'without prejudice to the other provisions of the Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission . . . may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

⁴⁰ The Commission view is that Art. 100a (now Art. 95) is an exclusive competence and, thus, may be understood as not subject to subsidiarity: see Commission Document SEK(92)1990. We can only accept this view if it means that after Art. 95 legislation, the field is pre-empted. Surely, before exercising its Art. 95 jurisdiction, the subsidiarity considerations should apply.

human rights the observance of which it is the duty of the Court, and other institutions, to ensure, such as the annual report on human rights in the European Union presented by the Internal Affairs and Civil Liberties Committee of the European Parliament.

Surely ensuring such observance would be enhanced by, and in some cases depend on, such monitoring. And surely some institutional arrangement would be necessary for such monitoring to be effective. But what would be the legal basis? And if, more audaciously, the Commission wished to bring under one *chapeau* all threads of the Community's human rights activities within the field of Community law? What if the Community wanted to have a general policy and institutional set-up designed, in an integral and co-ordinated way, to ensure the protection of human rights within the field of Community law?

As the Court in *Opinion 2/94* reminds us in paragraph 27:

No Treaty provision confers on the Community institutions any general power to enact rules on human rights . . .

We have already argued that where there is a specific legislative competence, one can imply a competence to enact provisions designed to ensure that in the specific field human rights are respected. But what if there is not even an implied power? Again the Court in *Opinion 2/94*, paragraph 28, provides guidance:

In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 [now Article 308] of the Treaty may constitute a legal basis . . .

In paragraph 29 of *Opinion 2/94* the Court defines the function of Article 308 (*ex Article 235*) as follows:

Article 235 [now Article 308] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

The Court added in paragraph 30:

That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 [now Article 308] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.

In the *Opinion* the Court had to decide about accession to the ECHR. It reached a negative conclusion. But its reasoning should be read strictly. In paragraphs 34 and 35 the Court came to the following conclusions:

Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 [now Article 308]. It could be brought about only by way of Treaty amendment.

What, then, does a strict reading yield? We think it is more than permissible to conclude that the Court would have allowed, and in the light of its earlier jurisprudence on Article 235 (now Article 308)⁴¹ would have had to allow, reliance on Article 235 in the field of human rights, if the measure in question:

- did not entail a substantial change in the present Community system for the protection of human rights;
- did not entail the entry of the Community into a distinct international institutional system;
- did not modify the material content of human rights within the Community legal order;⁴²
- did not have fundamental institutional implications (especially to the hallowed position of the Court);

and more generally

- would not and could not be considered of ‘constitutional significance’.

Put differently, a Community human rights policy which respected the current institutional balance, which avoided formal accession to the ECHR, which left intact the definition of the material contents of rights and their Community autonomy and which, critically, scrupulously remained within the field of Community law, would not and could not be considered of ‘constitutional significance’ in the sense used by the Court in *Opinion 2/94*, and, thus, could be based, where necessary (i.e. where other provisions did not exist⁴³) on Article 308 (*ex* Article 235) EC.

How then should one define the field of Community law for the purposes of human rights jurisdiction?

One possible definition would equate human rights legislative competence to judicial supervisory competence. With one possible exception, in all those areas and within the domain in which the Court regards itself entitled to pronounce on the lawfulness of measures—Community and Member State—the political institutions may exercise their legislative and administrative competences.

The equation between the Court and the legislator can go only so far. The Court’s human rights primary jurisdiction addresses Community acts which, additionally, may be subject to competences jurisdiction. A Community act may not violate human rights and may, additionally, not transgress the legislative limits of the Community. None the less, the inseparability of human rights concern from all aspects of

⁴¹ See e.g. Case 242/87, *Commission v. Council (Erasmus)* [1989] ECR 1425.

⁴² This is our current formula for attending to the Court’s (misconceived) concern about integration of all the provisions of the Convention into the Community legal order.

⁴³ See e.g. Case 45/86, *Commission v. Council (Tariff Preferences)* [1987] ECR 1493.

public policy must mean that ‘the field of Community law’ must include a large area of Community regulatory competence.

It seems to us, thus, uncontrovertible that the political institutions may adopt measures of human rights in all those fields which are controlled materially by Community law, either under exclusive or concurrent jurisdiction, and in which the object of the human rights legislation would be either Community institutions or complementary to Community laws and policies. If Community law controls, say, the conditions of access of migrant workers to the labour market in the Community, then in those fields human rights enhancement action would be permitted.

This does not mean, to continue with this example, that all those life situations where one can find migrant workers would or could be subject to Community human rights legislation. What of the example of an intra-Community migrant worker condemned to have his arm chopped off as punishment for stealing a loaf of bread?⁴⁴ Would such a Member State act be justiciable before the Court? The Court’s answer seems to have been no. It would not, any more than would an alleged violation by other aspects of the penal code, the law of contracts, or delicts, or property in any of the Member States in which a migrant happened to live or work. Provided the migrant was not discriminated against, provided the occurrence did not happen in an area already governed by Community law—such as conditions of permanence—the jurisdiction of the Court would be barred and, by extension, so would any human rights jurisdiction by the political institutions. To hold otherwise, i.e. to hold that the Community had jurisdiction in any situation involving a migrant worker, would give the Community practically limitless jurisdiction.⁴⁵

The Court has extended the exercise of its human rights jurisdiction to Member State measures in two types of situation: (a) the agency situation—when the Member State is acting for and/or on behalf of the Community and implementing a Community policy (*Klensch*⁴⁶ and *Wachauf*⁴⁷); and (b) when the State relies on a derogation to fundamental market freedoms (*ERT*⁴⁸) and most recently developed in *Bauer*.⁴⁹

The rationale for agency review is simple and, in our eyes, compelling. All of us often fall into the trap of thinking of the Community as an entity wholly distinct from the Member States. But of course, like some well-known theological concepts, the Community is, in some senses, its Member States; in other senses separate from them. This, as 2,000 years of Christian theology attest, can at times be hard to grasp. But in one area of Community life it is easy. In the EC system of governance, to an extent far greater than any federal state, the Member States often act as, indeed are, the executive branch of the Community. When, to give an example, a British

⁴⁴ Cf Jacobs AG in Case C-168/91, *Konstantinidis v. Stadt Altensteig, Standesamt and Landesamt Calw, Ordnungsamt* [1993] ECR I-1191; see generally Binder, note 5 above.

⁴⁵ See Case 299/95, *Kremzow v. Austria* [1997] ECR 2629, especially La Pergola AG, para. 7 and Judgment, paras. 15–18.

⁴⁶ Joined Cases 201 and 202/85, *Klensch v. Secrétaire d’Etat à l’Agriculture et à la Viticulture* [1986] ECR 3477.

⁴⁷ Case 5/88, *Wachauf v. Germany* [1989] ECR 2609.

⁴⁸ Case C-260/89, *ERT v. DEP* [1991] ECR I-2925.

⁴⁹ Case 368/95, *Vereinigte Familienpress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR 3689.

customs official collects a Community-imposed tariff from an importer of non-Community goods, he or she is organically part of the British customs service, but is functionally wearing a Community hat. If the Court's human rights jurisdiction covers, as it clearly does, not merely the formal legislative Community normative source, but its *mise-en-œuvre*, is it not really self-evident, as Advocate-General Jacobs puts it in *Wachauf*, even on a narrow construction of the Court's human rights jurisdiction, that it should review these 'Member State' measures for violation of human rights. In this case the very nomenclature which distinguished Member State and Community acts fails to capture the reality of Community governance and the Community legal order. Not to review these acts would be legally inconsistent with the consistent human rights jurisprudence and, from the human rights policy perspective, arbitrary: if the Commission is responsible for the *mise-en-œuvre*, review will take place, but if it is a Member State, it will not?

It appears to us that the political institutions should also have human rights competence in this area, even if it means that they would be directly imposing human rights obligations in and by the Member States. On what grounds could one fault the Community legislator if in its enabling legislation under the *Klensch* or *Wachauf* situations it explicitly, rather than implicitly, instructed the Member States in question on their human rights obligations in administering milk quotas?

More problematic is the *ERT* line of jurisprudence. This would be the exception to our principle of equation between Court jurisdiction and institutional competence.

Let us first review the jurisprudence of the Court and draw the judicial jurisdictional line and rationale. The development in *ERT*, foreshadowed by the Opinion of the Advocate General in *Grogan*⁵⁰ is more delicate.

The Treaty enjoins Member State measures which interfere with the fundamental free movement provisions of the Treaty. This injunction applies to any Member State measure, regardless of its source. The mere fact that the interference may emanate from a constitutional norm is, in and of itself, irrelevant. Likewise, the fact that the constitutional measures may be an expression of a deeply held national societal value is, in and of itself, irrelevant. If, say, a Member State, even under widespread popular conviction and support, were to adopt a constitutional amendment which, 'in the interest of preserving national identity and the inalienable fundamental rights of our citizens', prohibited an undertaking from employing foreigners, including Community nationals, ahead of Member State citizens or from purchasing foreign goods ahead of national products, such a constitutional provision would be in violation of Community law.

Community law itself defines two situations which may exculpate such a national measure from the Treaty injunction. First, the national measure itself must be considered as constituting an illegal interference with market freedom. The Treaty is very vague on this, and the Court has developed a rich case law in this regard. Not every measure which on its face seems to interfere will necessarily be construed as a violation of one of the market freedoms. Secondly, even a national measure which on its face constitutes a violation of the interdiction may, under Community law, be

⁵⁰ Case C-151/90, *SPUC v. Grogan* [1991] ECR I-4685.

exculpated if it can be shown to fall under derogation clauses to be found in the Treaty. Article 30 (*ex* Article 36), for example, speaks of measures ‘justified’ on grounds of public morality, health etc.

The crucial point is that defining what constitutes a violation of the basic market freedoms is, substantively and jurisdictionally, a matter of Community law and for the Court to decide, as is the exculpatory regime. Substantively the Court will interpret the language of the Treaty—often opaquely: what, for example, does (or should) ‘justified’ mean? or ‘public order’ etc.? Jurisdictionally, the Court (in tandem with national jurisdictions) will supervise that the Member States are in fact fulfilling their obligations under the Treaty.

One way of explaining the ‘extension’ of human rights jurisdiction to Member State measures in the *ERT* situation is simple enough. Once a Member State measure is found to be in violation of the market freedoms, *but for* the derogation it would be illegal. The scope of the derogation and the conditions for its employment are all ‘creatures’ of Community law, Treaty- and judge-made. Now it could be argued in opposition, and we would not consider this a specious argument, that one should look at the derogations as defining the limit of Community law reach. We are not persuaded. Even from a formalist perspective, the very structure of, say, Articles 28–30 (*ex* Articles 30–36) indicates the acceptance by the Member States that the legality or otherwise of a measure constituting a *prima facie* violation of the prohibition on measures having an effect equivalent to quantitative restrictions becomes a matter for Community law. From a policy perspective it could hardly be otherwise. Imagine the state of the common market if each Member State could determine by reference to its own laws and values, without any reference to Community law, what was or was not covered by the prohibition and its derogation. Surely how wide or narrow the derogation is should be controlled by Community law. The concomitant consequence of this is that once it is found that a Member State measure contravenes the market freedom interdictions such as Article 28 (*ex* Article 30), even if it is exculpated by a derogation clause in the Treaty, the Community’s legislative competence is triggered and it may become susceptible to harmonization.

Let us illustrate this by taking the most telling instance: the rule of reason doctrine developed principally in *Cassis de Dijon*,⁵¹ of which *Cinéthèque* is an example. Here the Court has carved out new circumstances, not explicitly mentioned in the Treaty derogation clause, which would allow the Member States to adopt measures which otherwise would be a violation of Article 28 (*ex* Article 30). I do not recall any protest by Member States complaining about the Court’s rather audacious construction of Articles 28–30 (*ex* Article 30–36) in this regard. But, obviously the Member States are not given a free hand. The Court will have to be persuaded that the Member State measures seeking to benefit from the rule of reason are, for example, as a matter of Community law, in the general interest and of sufficient importance to override the interest in the free movement of goods, that they are proportionate to the objective pursued, that they are adopted in good faith, and are not a disguised restriction on trade. So the ability of the Member States to move within the derogations to the free

⁵¹ Case 120/78, *Cassis de Dijon* [1979] ECR 649.

movement provisions is subject to a series of limitations, some explicitly to be found in the Treaty, others the result of judicial construction of the Treaty.

In construing the various Community-law limitations on the Member States' ability to derogate from the Treaty and in administering these limitations in cases that come before it, should the Court insist on all these other limitations and yet adopt a 'hands off' attitude towards violation of human rights? Is it so revolutionary to insist that when the Member States avail themselves of a Community law-created derogation they also respect fundamental human rights, deriving from the constitutional traditions of the Member States, even if the European Community construction of this or that right differs from its construction in this or that Member State? After all, *but for* the judicially constructed rule of reason in *Cassis*, France would not be able to justify at all its video-cassette policy designed to protect French cinematographic culture. To respect the Community notion of human rights in this scenario appears to us wholly consistent with the earlier case law and the policy behind it.

It could be argued that in supervising the derogation the Court should not enter into the policy merits of the Member State measure other than to check that it is proportionate and not a disguised restriction on trade. Human Rights review, on this reading, is an interference with the merits. Again, we are not persuaded. First it must be understood that the doctrine of proportionality also involves a Community-imposed value choice by the Court on a Member State. Each time the Court says, for example, that a label informing the consumer will serve a policy adequately compared to an outright prohibition, it is clear that at least some consumers will, despite the label, be misled. There are ample studies to demonstrate the limited effectiveness of labels. Thus, in the most banal proportionality test 'lurks' a judicial decision by the ECJ on the level of risk society may be permitted to take with its consumers.

Secondly, even if human rights review may be more intrusive in some cases than in others, it need not always interfere with the actual merits of the policy pursued and could still leave considerable latitude to the States to pursue their own devices. Provided they do not violate human rights, the Court will not interfere with the content of the policy. Admittedly this may sometimes thwart their wills, but that, after all, would also be the case under the ECHR. That on some occasions it might give teeth to the European Convention in those countries which have, decades later, still not incorporated it into national law must, we assume, be welcomed by those who profess to take rights seriously.

One conclusion from this analysis is that the standard of review in this situation should not be the normal Community standard, but the standard that would be applied by the ECHR.⁵² Unlike the *Wachauf* situation where the Member State is

⁵² President Due and Judge Gulman introduce a note of caution into this debate which we fully share: '[n]ot surprisingly, when laying down the necessary criteria for the definition of the area of application of Community fundamental rights in the national legal orders, there is one essential requirement which the Court will have to fulfill, i.e. the need to give a convincing explanation, based on the specific requirements of the Community legal order, why it is necessary, for national authorities to respect the same fundamental rights as those respected by the Community institutions. In cases concerning the relationship between Community law and national law and, in particular, where delicate problems of fundamental rights are at stake, the authority of the Court depends on its ability to convince': O. Due and C. Gulman, 'Community Fundamental Rights as Part of National Law', in C. Gulman (ed.), *Scritti in Onore di F. G. Mancini* (1998), 422. We cannot judge if the rationale we have provided is convincing. But we respectfully disagree with

merely the agent of the Community and the Member State measure is in truth a Community measure, here we are dealing with a Member State measure in application of a Member State policy. The interest of the Court and the Community should be to prevent a violation of core human rights, but to allow beyond that maximum leeway to national policy.

For the same reason we do not believe that the Community would have legislative competences in this area other than in a situation, discussed above, where the Member State human rights measure itself constituted an obstacle to free movement and could, thus, be subject to an Article 95 (*ex* Article 100a) harmonization measure.

III. EPILOGUE

How then do these considerations affect a would-be Community human rights policy?

1. Though the Council Legal Service seems to have drawn the correct implications from *Portugal v. Council*, one may question, as we have, the reasoning of the Court. If an agreement *ex* Article 181 (*ex* Article 130y) or a programme *ex* Article 179 (*ex* Article 130m) would be legitimate instruments of co-operation development if fostering—exclusively—the objectives referred to in Article 177(1) (*ex* Article 130u) there is no clear reason to exclude agreements or programmes which would, exclusively, contribute to the objectives mentioned in Article 177(2).

2. Even absent such an interpretation the Community may adopt a general human rights policy the purpose of which would be to ensure that, in the field of Community law, the fundamental human rights recognized by the Court are effectively ensured. Given the transverse nature of human rights, such a policy may have as its legal basis the entire gamut of legislative competence with, where appropriate, Article 308 (*ex* Article 235). Such a programme should be scrupulous in restricting its operation, including contributions to ‘operators’ and ‘partners’, to those whose activities fall within the field of Community law.

the learned judges on one point: in *ERT*-type review, we do not believe that the ECJ should hold the Member States to the same rights as Community institutions but only to the ECHR standard which may differ. In *Bauer* the Court affirmed its doctrine of *ERT* explicitly as regards mandatory requirements. Significantly, it then made exclusive reference to the ECHR (Art. 10) and not to Community standards as such. Also significant was its reference to a judgment of the European Court of Human Rights—as if shoring up the legitimacy of its jurisprudence by reminding the national courts and national authorities that it is holding them only to a standard that they have already accepted: paras. 24–6 of the judgment.