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The Right of Access to Court in European Law, with Special Reference to Article 6(1) of the European Convention on Human Rights and to European Community Law*

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The right of access to a court can usefully be studied both under the European Convention on Human Rights and under European Community law. Each of these two systems of law can be regarded as providing, within its field of operation, certain "supra-national" guarantees of that right. The Convention, drawn up within the Council of Europe, guarantees fundamental rights which the Member States (now numbering 40) are required to observe; that observance is supervised by the European Commission and Court of Human Rights, established by the Convention and having their seat in Strasbourg.

While the Council of Europe was established to achieve closer relations between the countries of Europe, the European Communities go further in the direction of European integration. The Treaties establishing the European Communities (now supplemented by the Maastricht Treaty on European Union) provided for a common market, for the free movement of persons and for common action, often by way of Community legislation, in many fields. The Court of Justice of the European Communities is responsible for interpreting Community law, which constitutes an independent legal system having the force of law in all 15 Member States. Within the field of Community law the European Court of Justice has also to ensure the observance of human rights. There is, however, little overlap in practice between the Strasbourg Court and the European Court of Justice in Luxembourg.

This paper will consider in turn:

- Under the European Convention on Human Rights, the right of access to a court in civil proceedings;
- Under the Convention, the right of access to a court for judicial review of administrative decisions;

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- Access to judicial remedies in European Community law; and
- The developing emphasis within Europe on judicial review of constitutionality of legislation.

Access to a court in civil proceedings

The preamble to the European Convention on Human Rights states that the European countries "have a common heritage of political traditions, freedom and the rule of law". Throughout the Convention runs an emphasis on the ability of the individual to challenge arbitrary action by government. Convention rights are framed in the context of law and legal protection, the assumption throughout being that national courts must be able to make decisions on these matters in the event of a dispute between the individual and the state.

It may be that in exceptional circumstances other kinds of redress might be acceptable - such as recourse through a committee of the legislature or with the assistance of an ombudsman. Article 13 of the Convention, which guarantees the right to "an effective remedy before a national authority", has been held not to require a judicial remedy.[1] But in general, the Convention's emphasis is on the role of courts and tribunals.

This was reflected in the judgment in *Golder v United Kingdom*,[2] which was the first decision made by the Strasbourg Court in a case against the United Kingdom. The Court held that Article 6(1) of the Convention, which guarantees the individual's right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, did not merely apply to an individual who was in fact involved in a case before the courts. It included the right of access to the courts. Interference with this right of a prisoner occurred when he was refused permission to consult a solicitor to find out whether he had a right of action in defamation against a prison officer.

In interpreting Article 6(1) as guaranteeing the right to take legal proceedings, the Court had regard to the principle of the rule of law contained in the Statute of the Council of Europe and in the Preamble to the Convention.

The Court considered that the rule of law is scarcely conceivable without the possibility of access to the courts. If the application of Article 6(1) to civil litigation arose only when someone was actually engaged in a dispute over which the courts had jurisdiction, governments could be tempted to remove from that jurisdiction any disputes which it would suit them to have decided in a non-judicial forum.

Access to a court for judicial review of administrative decisions

Article 6(1) applies to the determination of civil rights and obligations. But what are civil rights and obligations? It is evident that "determination of civil rights and obligations"

1 But *see* recent cases such as the judgment of the European Court of Human Rights in *Chahal v United Kingdom*, Judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V; (1997) 23 EHRR 413. Article 13 is not examined further in this paper.

2 (1979-80) 1 EHRR 524.

covers ordinary civil litigation between private individuals. The basic problem in defining this phrase is to know whether it is intended to cover also certain rights which, under some systems of law, fall under administrative law rather than under private law. If, for example, a public authority expropriates my land, do I have the right to a court hearing? Does the term cover only private rights to the exclusion of public law matters?[3]

From the earliest applications, the Commission has consistently stated that the question cannot be answered by reference to the categories of domestic law; it is immaterial whether the claim in issue is characterized by that law as falling under civil law or not. Thus, it has frequently said that the term "civil rights and obligations" employed in Article 6(1) cannot be construed as a mere reference to law, although the general principles of the domestic law of the Contracting Parties must necessarily be taken into consideration in any such interpretation.[4]

The Court considered the interpretation of the term in the *Ringeisen* case.[5] The case concerned the fairness of both criminal proceedings and civil proceedings. The Commission and the Court had to consider whether "civil rights" were involved in an application by Ringeisen for approval of the transfer to him, from a private person, of certain plots of land in Austria. He alleged that the Regional Real Property Transactions Commission, which had heard his appeal against the decision of the District Commission, was biased, and consequently that it was not an impartial tribunal as required by Article 6(1).

The majority of the Commission concluded that the provision should be construed restrictively as including only those proceedings which are typical of relations between private individuals and as excluding those proceedings in which the citizen is confronted by those who exercise public authority. The majority considered that Article 6 did not apply to the proceedings in question. A minority of the Commission did not wish to restrict the term to private law transactions and believed it should apply to interferences by public authorities with the rights and obligations flowing from domestic law.

Both the majority and the minority view were further developed in the hearings before the Court, which examined in detail the English and French texts of the Article.[6] The Court held that Article 6(1) was applicable, although it had not been violated in the present case because, in so far as Ringeisen had alleged bias, that charge had not been made out. As to the interpretation of Article 6(1) it held as follows:[7]

> "For Article 6, paragraph (1), to be applicable to a case ('contestation') it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, paragraph (1), is far wider; the French expression 'contestations sur (des) droits et obligations de caractère civil' covers all

3 This section is based on Francis G. Jacobs and Robin C.A. White, *The European Convention on Human Rights* (Oxford: Clarendon Press, 2nd ed, 1996); *see also* A.W. Bradley, "Administrative Justice: a developing human right?", *European Public Law* 1995, p 347.

4 *X* v *Austria* (Application No 1931/63), 2 October 1964, (1964) 7 Yb 212, at 222.

5 *Ringeisen v Austria*, Judgment of 16 July 1971, Series A No 13; (1979-80) 1 EHRR 455.

6 For a detailed consideration of the legislative history of the provision, see Van Dijk, "The interpretation of 'civil rights and obligations' by the European Court of Human Rights - One more Step to Take", in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension: Studies in Honour of Gérard J. Wiarda* (Köln: Carl Heymanns Verlag, 1990), pp 131-43.

7 *Ringeisen v Austria, supra*, n 5, para 94.

> proceedings the result of which is decisive for private rights and obligations. The English text, 'determination of ... civil rights and obligations', confirms this interpretation.
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> The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc) are therefore of little consequence.
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> In the present case, when Ringeisen purchased property from the Roth couple, he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in the Act. Although it was applying rules of administrative law, the Regional Commission's decision was to be decisive for the relations in civil law ('de caractère civil') between Ringeisen and the Roth couple. This is enough to make it necessary for the Court to decide whether or not the proceedings in the case complied with the requirements of Article 6, paragraph (1), of the Convention."

It does not, of course, follow from the Court's decision, however, that all decisions of public authorities which affect a person's legal situation are subject to the guarantees of Article 6(1) and require the availability of judicial review. Such an interpretation would be far too sweeping and totally out of line with the administrative law of many Convention states. It was a special feature of the *Ringeisen* Case that there was a pre-existing relationship under civil law between private individuals, which was directly "determined" by the acts of the public authorities. Seen in this light, the Court's judgment does not have the dire consequences for public administration which have sometimes been attributed to it.

Since its decision in the *Ringeisen* case, the Court has continued to adopt a liberal interpretation of the concept of civil rights and obligations, and many of the earlier Commission decisions concluding that certain types of proceedings are outside the scope of Article 6 probably do not represent good current law.

The key distinction is perhaps that where a decision of an essentially administrative character affects a legal relationship between private individuals, civil rights and obligations are at issue and Article 6(1) will apply, but where it does not, the matter will fall outside the scope of Article 6(1).

This proposition is supported by the decision of the Court, in the *König* case,[8] that proceedings which involved the withdrawal of an authority to run a medical clinic and an authorization to practise medicine were within the scope of Article 6(1). This was so, even though the objective of the bodies which had taken the decisions was to act in the interests of public health and to exercise responsibilities borne by the medical profession towards society at large. Notwithstanding this conclusion, the Court expressly stated that it was not necessary in the case to determine whether the term "civil rights and obligations" went

8 *König v Germany*, Judgment of 28 June 1978, Series A No 27; (1979-80) 2 EHRR 170. *See also Kraska v Switzerland*, Judgment of 19 April 1993, Series A No 254-B; (1994) 18 EHRR 188.

beyond rights of a private nature.

The *Benthem* case[9] concerned the refusal of the Dutch municipal authorities to grant the applicant a licence to operate an installation for delivering liquid petroleum gas. The Court stressed that the crucial factor in determining whether the dispute concerned civil rights and obligations was the character of the right at issue. The necessity for the licence was closely associated with the right to use possessions in accordance with the law and had a proprietary character. In this case, the particular circumstances meant that civil rights and obligations were in issue. The Court again expressly stated that it was not necessary to provide any abstract definition of the concept.

The implications of this approach are well illustrated in the *Pudas* case.[10] Pudas held a licence to operate a taxi on specified routes. As part of a programme of rationalization which would have involved the replacement of one of the applicant's taxi routes by a bus service, his licence was revoked. Various administrative appeals against the revocation of the licence failed, and Pudas applied to the Commission alleging a violation of Article 6(1).

The Swedish Government argued that the matter did not involve the determination of civil rights and obligations, since the revocation of the licence depended essentially on an assessment of policy issues not capable of, or suited to, judicial control. Furthermore, the whole question of the issue and revocation of licences carried the "predominant stamp of public law activity". The Court disagreed. The public law features of the case did not alone exclude the matter from the scope of Article 6(1). The revocation of the licence affected the applicant's business activities. The Court was unanimous in holding that Article 6(1) applied. The case also makes clear that Article 6(1) is not concerned only with what goes on in a court or tribunal, but is concerned with any decision-making process determining an individual's civil rights and obligations.

The following have been held to come within the scope of the term "civil rights and obligations": disputes concerning the grant of expropriation permits;[11] the withdrawal of a licence to serve alcoholic beverages;[12] renewals of building prohibitions;[13] refusal of a permit to retain an agricultural estate bought at a compulsory auction;[14] objection to amendments to the building plan for an area;[15] challenge to the grant of a refuse-dumping permit;[16] withdrawal of a permit to work a gravel pit;[17] disciplinary proceedings resulting in suspension from medical practice,[18] and proceedings by which an *avocat* was struck off the roll.[19] However, proceedings relating to a request for a permanent discharge by a person

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9 *Benthem v the Netherlands*, Judgment of 23 October 1985, Series A No 97; (1986) 8 EHRR 1.

10 *Pudas v Sweden*, Judgment of 27 October 1987, Series A No 125; (1988) 10 EHRR 380.

11 *Sporrong and Lönnroth v Sweden*, Judgment of 23 September 1982, Series A No 52; (1983) 5 EHRR 35; and *Bodén v Sweden*, Judgment of 27 October 1987, Series A No 125; (1988) 10 EHRR 367.

12 *Tre Traktörer AB v Sweden*, Judgment of 7 July 1989, Series A No 159; (1991) 13 EHRR 309.

13 *Allan Jacobsson v Sweden*, Judgment of 25 October 1989, Series A No 163; (1990) 12 EHRR 56.

14 *Håkansson and Sturesson v Sweden*, Judgment of 21 February 1990, Series A No 171; (1991) 13 EHRR 1.

15 *Mats Jacobsson v Sweden*, Judgment of 28 June 1990, Series A No 180-A; (1991) 13 EHRR 79.

16 *Zander v Sweden*, Judgment of 25 November 1993, Series A No 279-B; (1994) 18 EHRR 175.

17 *Fredin v Sweden*, Judgment of 18 February 1991, Series A No 192; (1991) 13 EHRR 784.

18 *Le Compte, Van Leuven and De Meyere v Belgium*, Judgment of 23 June 1981, Series A No 43; (1982) 4 EHRR 1.

19 *H v Belgium*, Judgment of 30 November 1987, Series A No 127; (1988) 10 EHRR 339. *See also De Moor v Germany*, Judgment of 23 June 1994, Series A No 292-A; (1994) 18 EHRR 372, on decisions on admission to the profession.

already provisionally discharged from a psychiatric hospital have been held by the Commission not to concern a determination of civil rights and obligations.[20] Nor do investigations into a company's affairs under a regulatory system.[21]

It might be thought that social security is *par excellence* an example of a matter governed by public law. Two cases have considered whether social security proceedings are capable of falling within the ambit of civil rights and obligations. In the *Feldbrugge* case,[22] Mrs Feldbrugge had been receiving sickness benefits but was found to be fit to resume work and so the benefits had ceased. Rights to benefits were considered to be public law rights in the Netherlands. Mrs Feldbrugge appealed the withdrawal of the benefits through the relevant appeals procedures in the Netherlands, but was unsuccessful. She then complained to the Commission alleging a breach of Article 6. The Court again declined to give an abstract definition of the concept of "civil rights and obligations", and noted that the Dutch system displayed features of both public law and private law. The character of the legislation, the compulsory nature of insurance against certain risks, and the assumption by public bodies of responsibility for ensuring social protection were public law characteristics. On the other hand, the personal and economic nature of the right asserted by Mrs Feldbrugge, the connection with a contract of employment, and the similarities with insurance under ordinary law were of a private character. The Court concluded by a majority of ten to seven that the features of private law predominated over those of public law. While none alone was sufficient to be determinative of the question, when taken together and cumulatively, they produced a civil right for the purposes of Article 6(1).

The *Deumeland* case[23] concerned the grant of a widow's supplementary pension following the death of her husband allegedly as a consequence of an industrial accident. The Court by nine votes to eight followed its decision in *Feldbrugge*, which was given on the same day, and concluded that the private law features predominated over the public law features of the claim.[24]

The balancing of private and public law features in such cases is not easy. Though it has not been argued before the Court, it may be that the European Community distinction between social assistance (which is frequently exempt from the social policy rules of the Community) and benefits in respect of identifiable risks of a working life will assist. This analysis could be used to explain why sickness benefits and industrial injury and death benefits are considered to have features in which private law features predominate, while income support, as a form of social assistance, might not. It is certainly difficult in the case of this safety net benefit to see the necessary links with private law. The result is, however, unsatisfactory, since in Great Britain, appeals concerning both types of benefit are heard by social security appeal tribunals. It seems invidious to allow the protection of Article 6 to apply when such tribunals are considering certain benefits, but to deny them when considering others.[25]

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20 *L v Sweden* (Application No 10801/84), Report of the Commission, 3 October 1988, (1989) 61 DR 62.

21 *Fayed v United Kingdom*, Judgment of 21 September 1994, Series A No 294-B; (1994) 18 EHRR 393.

22 *Feldbrugge v the Netherlands*, Judgment of 29 May 1986, Series A No 99; (1986) 8 EHRR 425.

23 *Deumeland v Germany*, Judgment of 29 May 1986, Series A No 100; (1986) 8 EHRR 448. *See also Schouten and Meldrum v the Netherlands*, Judgment of 9 December 1994, Series A No 304; (1995) 19 EHRR 432.

24 *See also*, similarly, *Schuler-Zgraggen v Switzerland*, Judgment of 24 June 1993 Series A No 263; (1993) 16 EHRR 405, relating to invalidity pension.

25 This lack of certainty is one of the reasons Van Dijk argues for the Court to lift its restriction in interpreting the term "civil rights and obligations" to cases involving the private rights and obligations of citizens. *See* Van Dijk, *supra*, n 6.

In the *Rasmussen* case,[26] the Court was called on to consider whether the purpose of a paternity suit was the determination of civil rights and obligations. Such actions concerned a matter of family law and clearly concerned the applicant's private life which was protected by Article 8. Hence Article 6(1) applied. Decisions concerning placement of children for adoption also concern civil rights and obligations.[27]

The Court has held that the outcome of proceedings brought in the ordinary courts to have an arbitration award set aside is decisive for civil rights and so within the scope of Article 6(1).[28]

In summary, the current position adopted by the Court appears to be that the term "civil rights and obligations" is to be viewed widely. No abstract definition of the concept has been offered, but the concept is to be determined under the Convention and not according to the national classification of matters. Public law matters are not excluded where they are directly decisive for the exercise of private law rights. This would seem to exclude only questions arising in connection with entitlement to social assistance, fiscal decisions,[29] and immigration decisions,[30] though in all these cases, it is certainly possible to construct hypothetical situations in which the public law matter can be decisive for the exercise of private rights. The question is only how strong or close the causation has to be.

The need for a dispute

Article 6(1) requires not only that the matter concern civil rights or obligations, but that there be a dispute (*contestation*) concerning the particular rights or obligations. Whether there is a dispute will be determined by the Convention organs. The Court reviewed the case law on this requirement in the *Benthem* case[31] and summarized its content. The notion of a dispute should be given a substantive rather than a formal content. The dispute might relate not only to the existence of the right pursued, but also to its scope or the manner of its exercise, and might involve both questions of fact and law. The dispute must, however, be genuine and of a serious nature. Finally, there must be a direct link between the dispute and the right in question.

The issue in the *Van Marle* case[32] was whether there was a dispute. Germen van Marle and his fellow applicants had sought to be registered as certified accountants, but the Board of Admission had refused their applications on grounds of lack of competence. Their appeals to the Board of Appeal were dismissed. This body's task was to review decisions of the Board of Admission to determine that they had acted within their competence and to reconsider whether the applicants met the legal requirements for registration. No matters falling within the grounds of appeal were alleged by the applicants, who merely questioned the assessment of their competence by the Board of Admission. In such circumstances, the Court concluded that there was no dispute within the meaning of Article 6.

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26 *Rasmussen v Denmark*, Judgment of 28 November 1984, Series A No 87; (1985) 7 EHRR 371.

27 *Keegan v Ireland*, Judgment of 26 May 1994, Series A No 290; (1994) 18 EHRR 342.

28 *Stran Greek Refineries and Stratis Andreadis v Greece*, Judgment of 9 December 1994, Series A No 301-B; (1995) 19 EHRR 293.

29 *See X v France* (Application No 9908/82), 4 May 1983, (1983) 32 DR 266, at 272.

30 At least where no question of respect for family life under Article 8 arises. See, for example, *X, Y and Z v United Kingdom* (Application No 9285/81), 6 July 1982, (1982) 29 DR 205, at 212.

31 *Benthem v the Netherlands*, *supra*, n 9, para 32.

32 *Van Marle v the Netherlands*, Judgment of 26 June 1986, Series A No 101; (1986) 8 EHRR 483.

Access to judicial remedies in European Community law

Under the Community Treaties, and in particular under Article 173 of the EC Treaty, the European Court of Justice has jurisdiction to review all Community measures - whether general normative measures or individual decisions. Thus the Court's jurisdiction embraces the review of Community legislation.

Under Article 177 of the EC Treaty the Court may rule, in a reference from a national court, on the validity of any Community act. In addition, a reference on the interpretation of the Treaty - or of Community legislation - may put in issue the legality of national measures, whether legislation or decisions. Under Article 177 the Court cannot rule directly on the legality of national measures - that jurisdiction exists only under Articles 169 and 170, in a direct action brought before the Court by the Commission or by another Member State. In practice, however, challenges to national measures in the national courts, as being contrary to Community law, often have to be resolved by the European Court of Justice in references under Article 177.

Access to the European Court of Justice

The European Court of Justice has been ready to fill gaps in the system of judicial remedies established by the Treaties in order to fulfil its task of ensuring that "the law is observed".[33] In *Les Verts v European Parliament*[34] the Court emphasized that the Community "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". The Court argued that the EEC (now the EC) Treaty established "a complete system of legal remedies and procedures designed to permit the Court ... to review the legality of measures adopted by the institutions".[35] Faced, in an action brought against the European Parliament, with the fact that the Treaty did not at that time provide for such an action (Article 173 then being limited to review of the legality of acts of the Council and the Commission) the Court held nonetheless that an action for annulment did lie against measures adopted by the European Parliament intended to have effect *vis-à-vis* third parties.[36]

Similarly, the Court accepted that proceedings for judicial review could be brought by the European Parliament, notwithstanding the contrary indication in the text, but only for the purpose of protecting the Parliament's prerogatives.[37] Although, on both points, the solutions adopted by the Court were subsequently incorporated into the EC Treaty by the Treaty on European Union, it is arguable that the Court's concern to ensure effective judicial review has led it to exercise a form of inherent jurisdiction.[38] However, the somewhat strict requirements of standing for individuals to bring a direct action before the Court under Article 173 of the EC Treaty are not affected by these developments: they have

33 Article 164 of the EC Treaty.

34 Case 294/83, [1986] ECR 1339, para 23.

35 Ibid.

36 Ibid, paras 24-5.

37 Case 70/88, *European Parliament v Council* ("*Chernobyl*") [1990] ECR I-2041.

38 *See* Arnull, "Does the European Court of Justice have inherent jurisdiction?" (1990) CMLRev 683.

the possibility of action before the national courts which may seek a preliminary ruling from the European Court on the validity of the measure.[39]

Implications for national law

(i) All measures (including Acts of Parliament) must be subject to review

In the domain of Community law it is a fundamental requirement of the rule of law, according to the case law of the European Court of Justice, that all measures whether Community or national having legal effect are subject to judicial review,[40] to ensure their conformity with Community law.

The Court has made it clear that the principle of effective judicial protection may require national courts to review all legislative measures and to grant interim relief, even where they would be unable to do so under national law. The point was decided in *R v Secretary of State for Transport, Ex parte Factortame and Others.*[41] The statutory system governing the registration of British fishing vessels had been radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988. The purpose was to stop the practice known as "quota hopping" whereby, according to the United Kingdom, its fishing quotas were "plundered" by vessels flying the British flag but lacking any genuine link with the United Kingdom. Factortame and other companies owned or operated 95 fishing vessels which failed to satisfy the conditions for registration under Section 14(1) of the 1988 Act. Since those vessels were to be deprived of the right to engage in fishing as from 1 April 1989, the companies in question, by means of an application for judicial review, challenged the compatibility of the relevant provisions of the 1988 Act with Community law. They also applied for the grant of interim relief pending final judgment.

The High Court decided to request a preliminary ruling on the issues of Community law raised in the proceedings and ordered that, by way of interim relief, the application of the legislation should be suspended as regards the applicants. On the Secretary of State's appeal against the order granting interim relief, the Court of Appeal held that under national law the court had no power to suspend, by way of interim relief, the application of Acts of Parliament. On further appeal, the House of Lords held that under national law the court had no power to grant interim relief in a case such as the one before it. More specifically, it held that the grant of such relief was precluded by the common law rule that an injunction, and hence an interim injunction, could not be granted against the Crown, and also by the presumption that an Act of Parliament was in conformity with Community law until such time as a decision on its compatibility with that law had been given. The House of Lords sought a preliminary ruling on, *inter alia*, whether Community law obliged or empowered the national court to grant interim protection in circumstances where a request for a preliminary ruling on a point of Community law had been made.

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39 *Les Verts, supra*, n 34, para 23 (at end).

40 Case 22/70, *Commission v Council [ERTA]*, [1971] ECR 263.

41 Case C-213/89, [1990] ECR I-2433.

Replying in the affirmative, the Court stated:

> "... it is for national courts, in application of the principle of co-operation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law .... [A]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law .... [T]he full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule. That interpretation is reinforced by the system established by Article 177 of the EC Treaty whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice."[42]

(ii) The requirements of effective judicial review before the national courts

The European Court of Justice has laid down certain requirements concerning the scope of judicial review for the protection of Community rights in national courts. Following its ruling in *Les Verts* that Member States cannot avoid review of the question whether national measures are in conformity with the Treaty, the Court went on, in *Johnston v Royal Ulster Constabulary*,[43] to spell out the requirements of effective judicial review under Community law.

In *Johnston*, the reference to the Court raised the question whether, in the field of national security, the issue of a certificate by the executive purporting to be definitive and so to exclude the jurisdiction of the courts could preclude reliance on directly effective rights under Community law. Because a number of police officers had been assassinated, the Chief Constable decided that, while male members of the Royal Ulster Constabulary (RUC) would carry firearms, female members of the RUC Reserve would not be issued with firearms or receive firearms training. On this basis he refused to renew the contracts of female members of the RUC full-time Reserve, except when the duties could only be undertaken by a woman. Alleging unlawful sex discrimination, Mrs Johnston challenged the refusal to renew her full-time contract and her exclusion from firearms training. The Sex

42 Ibid, paras 19-22.

43 Case 222/84, [1986] ECR 1651.

Discrimination (Northern Ireland) Order 1976 made it unlawful for an employer to discriminate against a woman by refusing either to offer her employment or in any way to afford her access to opportunities for training, except where being a man was a genuine occupational qualification for the job. However, Article 53(1) of the Order provided that none of its provisions rendered unlawful an act done for the purpose of safeguarding national security or protecting public safety or public order. Article 53(1) stated that a certificate signed by the Secretary of State, certifying that an act was done for these purposes, was conclusive evidence that those conditions were fulfilled. Before the hearing of the case, the Secretary of State issued a certificate, as provided for, stating that the refusal to offer full-time employment to Mrs Johnston in the RUC Reserve was for the purpose of safeguarding national security and protecting public safety and public order. Mrs Johnston conceded that the issue of the certificate deprived her of a remedy under that Order. Instead she relied on the equal treatment directive,[44] Article 6 of which provides:

> "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

On a reference from the Industrial Tribunal, the Court ruled that the principle of effective judicial review laid down in Article 6 of the directive reflected a general principle of law which underlay the constitutional traditions common to the Member States and was also laid down in Articles 6 and 13 of the European Convention on Human Rights. The European Court of Justice thus held that the statutory rule could not be upheld so as to exclude judicial review of the matter, since this would be to deprive the national court of effective judicial control of the decision to issue the certificate. Notwithstanding the certificate, the national court must examine whether the rule had been made for the purpose of safeguarding national security and protecting public safety. As mentioned, the requirements of judicial control reflected a general principle of law which underlay the constitutional traditions common to the Member States.

To similar effect, there is the European Court's decision in *UNECTEF v Heylens*[45] holding that the French Minister for Sport must give the reasons for refusing to register in France a coach qualified under Belgian law to be a football trainer. Freedom of movement and free access to employment are guaranteed by the Treaty of Rome to nationals of Member States. The existence of a judicial remedy against the decision of a national authority refusing the benefit of those Community rights was essential. Effective judicial review, which must extend to the legality of reasons for a contested decision, presupposes that the individual may require the competent authority to notify the reasons for refusing him the benefit of his Community rights. There was therefore a duty on the French minister to tell Heylens why he had been refused permission to work in France.

In relation to the entry and expulsion of nationals of Member States, Articles 8 and 9 of

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44 Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39, at 40.

45 Case 222/86, [1987] ECR 4097.

Directive 64/221 lay down the requirements for remedies before national authorities and national courts. As interpreted by the Court, this means that Member States must ensure that Community nationals can challenge administrative decisions before a judicial authority by means of an effective remedy which enables the entire decision, including its substantive grounds, to be subjected to judicial scrutiny.[46]

The Court has adopted a similar position in relation to the free movement of goods. Where for example a public telecommunications undertaking has the power to grant type-approval to telephone equipment before it can be connected to the public telecommunications network, traders must be able to challenge before the courts decisions refusing to grant type-approval.[47]

Review related to the application of international human rights norms

For the present study, which is concerned with the domestic application of international human rights norms, it is of particular interest to note that the European Court of Justice exercises its powers of review by taking account where appropriate of international human rights norms, even though those norms do not formally bind the Community or formally form part of Community law. That is so whether the measure reviewed is a Community measure or a measure adopted by a Member State which comes within the Court's jurisdiction.

Thus in a relatively early case, *Nold*, where the applicant invoked certain fundamental rights before the Court, the Court stated:

> "fundamental rights form an integral part of the general principles of law, the observance of which it ensures.
>
> In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."[48]

In a 1996 case, *Bosphorus*,[49] the Turkish air charter company Bosphorus Airways challenged in the Irish courts a decision of the Irish authorities to impound at Dublin Airport an aircraft owned by Yugoslav Airlines but leased for a four-year period by Bosphorus. The decision in issue was taken under United Nations Security Council Resolutions providing for sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro), which were given effect within the European Union by a regulation of the Council of the

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46 *See*, for example, the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-65/95 and C-111/95, *Shingara and Radiom* [1997] ECR I-3343, at 3345.

47 Case C-18/88, *GB-Inno-BM* [1991] ECR I-5941; *see also* Joined Cases C-46/90 and C-93/91, *Lagauche* [1993] ECR I-5267.

48 Case 4/73, *Nold v Commission* [1974] ECR 491, para 13.

49 Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland and Attorney General* [1996] ECR I-3953.

European Union. On a reference from the Irish Supreme Court to the European Court of Justice, Bosphorus relied *inter alia* on a right to the peaceful enjoyment of possessions guaranteed by Article 1 of the First Protocol to the European Convention on Human Rights.

According to the Opinion of the Advocate General:

> "It is well established that respect for fundamental rights forms part of the general principles of Community law, and that in ensuring respect for such rights the Court takes account of the constitutional traditions of the Member States and of international agreements, notably the Convention for the Protection of Human Rights and Fundamental Freedoms, generally known as the European Convention on Human Rights, which has special significance in that respect.
>
> Article F(2) of the Treaty on European Union, which provides that the Union shall respect fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law, gives Treaty expression to the Court's case law. Article F(2) appears in Title I of the Treaty, and therefore does not fall within the jurisdiction of the Court in so far as it extends to the Union Treaty as a whole. In relation to the EC Treaty, it confirms and consolidates the Court's case law, underlining the paramount importance of respect for fundamental rights.
>
> Respect for fundamental rights is thus a condition of the lawfulness of Community acts - in this case, the Regulation. Fundamental rights must also, of course, be respected by Member States when they implement Community measures. All Member States are in any event parties to the European Convention on Human Rights, even though it does not have the status of domestic law in all of them. Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of the Treaty, and although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts where Community law is in issue. That is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release Member States from their obligations under the Convention."[50]

On the substance, however, the claim by Bosphorus failed. The case nevertheless illustrates how, via Community law, international human rights norms may receive domestic application in the courts of the Member States - and could do so even if the norms themselves had not been directly incorporated into domestic law.

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50 Ibid, Opinion of the Advocate General, paras 51-3 (citations omitted).

Developing emphasis within Europe on judicial review of constitutionality of legislation

Various factors in European legal systems have contributed to a new trend: the principle of access to judicial remedies even where that requires judicial review of primary legislation.[51]

Within the European Community, since it is based on a division of powers between the Community and its Member States, a measure of judicial review of legislation is as necessary as it would be in a federal system to resolve conflicts between Community law and Member State legislation. Thus the European Court of Justice has jurisdiction to review both Community and Member State legislation, as already discussed, within the field of Community law; and national courts may be required not to apply national legislation which conflicts with Community law.

Within the Council of Europe, a similar result may arise, although only on the international plane, where an indirect consequence of a ruling of the European Court of Human Rights is to put in issue the compatibility with the Convention of national legislation. The state concerned may then have an obligation to repeal or amend the offending legislation.

Within the national legal systems of European countries, the judicial review of constitutionality has developed in recent years, with such judicial review entrusted either to the ordinary courts or the Supreme Court or, increasingly, to a specialized Constitutional Court - the last solution being preferred notably in the new constitutions of the Central and Eastern European countries emerging from Communist rule.

In the United Kingdom, with its tradition of Parliamentary sovereignty, the acceptance of the European Convention and of Community law represent departures from constitutional orthodoxy, and it is conceivable that further inroads may follow from proposals to recognize, for example, a degree of autonomy for Scotland, which might require new forms of constitutional adjudication.

One of the live issues today is the extent to which courts - both in judging the exercise of administrative power and the substance of primary legislation - are required to acquiesce in the view that the rule of law must fail in that competition and give way to parliamentary supremacy. The apparent inconsistency between the rule of law and parliamentary supremacy may be resolved by the courts making the presumption that Parliament intended its legislation to conform to the rule of law as a constitutional principle. This presumption is powerful and is not easily rebutted; only express words or possibly necessary implication will suffice. If it is alleged that the courts' jurisdiction is entirely excluded, even this may not suffice. If officials refuse an individual reasonable access to the courts, or discriminate against a class of individuals, the courts will usually intervene to correct such breaches of the rule of law unless the language of the statute clearly and unambiguously prohibits this.[52] In conclusion, it should however always be borne in mind that though courts, in challenging by way of judicial review the constitutionality of legislation, are

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51 Terminologically, "judicial review" has been traditionally used, especially in the US, to refer to review of legislation; its current use in England for "judicial review of administrative action" probably owes much to de Smith's pioneering book under that title (first published in 1959) (*infra*, n 53).

52 *See*, for example, *R v Secretary of State for the Home Department, Ex parte Leech (No 2)*, [1994] QB 198, where regulations prohibiting a prisoner's unimpeded access to a solicitor were held unlawful. Steyn LJ referred to the right of access to a solicitor as being part of the right of access to the courts themselves. This he called a "constitutional right" which could not be taken away except by express words or necessary implication.

increasingly able, and indeed obliged, to require the observance of those principles that govern lawful public decision-making, nevertheless "in so doing they seek to reinforce representative government, not to oppose it - and to promote, not to undermine, the inherent features of a democracy."[53]

53 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (London: Sweet and Maxwell, 5th ed, 1995), p 18.