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An Ever Closer Social Union? - Constitutionalisation of the European Union Through Human Rights and Citizenship Law

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Outline

- A. Introduction: Human Rights “in Europe” – Debates and Challenges**
- B. Patchwork of Social Dimensions of the EU**
- C. Human Rights in the EU**
- D. Progressive Constitutionalisation**
 - I. Assertion of Human Rights
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A. Introduction: Human Rights “in Europe” – Debates and Challenges

3 levels – but inter-dependent

- **Domestic** level – European states
 - How are human rights protected in national law, ex. UK Human Rights Act 1998
 - How do national legal systems “domesticate” international human rights (esp. ECHR)
 - Influences and changes of domestic law by the ECHR
- **Supra-national** level (EC)
 - How does the EU protect human rights and how ought it to?
 - Positioning towards international level (ECHR)
- **International** level – Council of Europe/ECHR
 - Challenges from Member States
 - Development of human rights protection by content – liberal rights tradition



B. The Patchwork of Social Dimensions in the Economic Rules of the Common Market

- Points of departure
 - Question of competence: conferred powers
 - No genuine competences over social policy or human rights
- But not only negative integration: three Categories of **indirect** reflection of social dimensions
 1. Annex to market freedoms,
e.g. Social security and health and safety of migrant workers → Regulation 1408/71
 2. Reflex of market freedoms,
e.g. Application of market rules to health care expands rights and options of individual in receiving these services in another Member State
 3. Interpretation of the economic rules
(Scope, Justifications)



C. Human Rights in the EU

I. The Economic Bias of the EU

- Antithesis social/human rights – economic
- No human rights in initial legal framework
 - not necessary
 - not competent
- Correction, obstacle to market rules
- But: two opposing trends:
 1. completion of common market, deregulation, wide interpretation of market freedoms:
 2. Reinforcement of social dimensions culminating in European Charter on Fundamental Rights:
“Common Market ... not ... an end in itself”
(European Council of Rhodos 1988)
→ A form of constitutionalisation



II. Evolution of Human Rights Protection in the EU

- Traces from beginning: Art. 141 EC (equal pay for men and women) – but market-driven – “level playing field”
- Cynical interpretation: “survival” strategy, facing challenges to supremacy of EC law
 - Supremacy of EC law as a judge-made principle crucial for the success of the integration project
 - No EC human rights – Member States asserted that they review EC measures against their domestic human rights
 - Necessitated “introduction” of HR into EC law to uphold its supremacy
 - Wrestling with German Constitutional Court in particular
 - So-called “as long as” (“solange”) cases
 - Judgment of the ECJ, 17 December 1970 - Internationale Handelsgesellschaft (11/70)



III. How?

ECJ 1970: *Internationale Handelsgesellschaft*

- “Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an **adverse effect on the uniformity and efficacy of Community law**. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, **cannot because of its very nature be overridden by rules of national law**, however framed, without being deprived of its character as Community law **and without the legal basis of the Community itself being called into question...**
- However, an examination should be made as to whether or not any **analogous guarantee inherent in Community law** has been disregarded. In fact, respect for fundamental rights forms an **integral part** of the **general principles** of law protected by the European Court of Justice...”



IV. Today's Legal Framework

- Trias – general principles, as reflected in ECHR and common constitutional traditions of the Member States (Art. 6 EU)
- 2000 EU Charter on Fundamental Rights (not formally binding declaration)



V. Problems & Solutions

- Unclear content, too weak
- Biased towards economic contexts
- Gap in remedies
- Divergence with the ECHR
- √ Greater assertion by EC courts, codification
- Expanding action for annulment → DConst
- Competence to accede to ECHR → DConst



D. Progressive Constitutionalisation

- Human Rights gaining momentum
- Union Citizenship (since Maastricht Treaty 1992)
- Common goals
 - To promote visibility, legitimacy, identification and identity or at least engagement in the EU
 - Disengagement with the EC seen as one reason for a “democratic deficit”



I. Human Rights (1) – Hierarchy

ECJ - Deutsche Telekom v Schröder

(C-50/96, 10 February 2000)

- “twofold purpose of Art. [141] EC...both economic and social”
- social objectives of the Community, “which is not merely an economic union ...”
- “right not to be discriminated against on grounds of sex is **one of the fundamental human rights**”
- “**economic aim** pursued by Article [141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is **secondary to the social** aim pursued by the same provision, which constitutes the expression of a **fundamental human right.**”



I. Human Rights (2) – Structural Aspects

- 3 ways of interaction with the economic rules (2 indirect, 1 direct)
 - Interpretation of scope
 - Read into exceptions
 - “limitations justified on grounds of public policy, public security or public health”
 1. leeway left to Member States
 2. application of Community human rights standard
 - **Independent counterweight:** balancing of HR against economic rules



I. Human Rights (3) – Assertive Case Law

1. Leeway left to Member States

- ***Omega*** (2004) – human dignity, which the community respects (although precise content not clear, and therefore left to national law)

2. Community Human Rights Standard

- ***Schmidberger*** (2003) – balancing between free movement of goods and freedom of expression and assembly (Art. 10 ECHR), ALSO safeguarded at Community level



I. Human Rights (4) – Assertive Beyond Competence

- Art. 8 ECHR – right to family life in regard to third country nationals
- **Compound situation: initial admission (MS competence) v free movement situation (EC competence)**
- ***Carpenter*** (2002) – service provision, but no cross-border movement of persons – Art. 8 ECHR family life +
- ***Akrich*** (2003) – not legally resident in UK, move to Ireland as spouse to worker to gain residence right upon return to UK; no right from free movement, but from Art. 8 ECHR
- New assessment in follow-up case of ***Jia*** (2006)? – dependent parents try to rely on Art. 8 ECHR to gain residence in Sweden with son.
- ***Baumbast*** (2002), ***Chen*** (2004) – children had right to stay in the UK, derived right of carers, Art 8 ECHR.



I. Human Rights (5) – C-60/00 - *Carpenter*

- “The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 [ECHR] which is among the fundamental rights which, according to the Court's settled case-law,... are protected in Community law.”



I. Human Rights (6): Outlook

1. Codification + Binding Character

- Position of human rights in the EU: making Charter binding, relationship to ECHR, remedies (230 (4) EC – annulment)

2. Effects (Hierarchy)

- **Balancing I:** across-the-board application of *ALL* human rights – more accessible, moving from minimal to more balanced rights protection
- More **social rights**?
- **Balancing II:** hierarchy of social and economic dimensions shift from open market economy to social market economy
 - Systematic/formal – equal rank
 - inherent – higher rank? – cf. *Matthews* as precedent?

3. Competence:

- check on Community v. political identity & integration process
- inbuilt competence creep



II. Union Citizenship (1) – Basics and Rationale

- based on nationality of a Member State
 - Modelled on market freedoms but moving beyond → rights of **not** economically active persons
 - Political rights to vote (EP and municipal assemblies) Art. 17, 19 EC
 - Free movement rights – Art. 18
 - Right not to be discriminated – Art. 12
- rationale of (social) integration in a host society becomes important
- new solidarity model: *residents* of a state rather than citizens and solidarity between Member States (re social benefits)
- Conditions for entry, but not to terminate stay which was lawful initially
 - Examples (slide 19)



II. Union Citizenship (2) – Residence Rights

- Directive 2004/38 –
- up to 3 months stay: no conditions, only identity card or passport (Art. 6)
- More than three months, either as
 1. economically active + no further conditions
 2. sufficient resources “not to become a burden on the social assistance system of the host Member State” + sickness insurance cover
 3. family members



II. Union Citizenship (3) – Non-Discrimination

Martinez-Sala
Baumbast
Chen

Grzelczyk
Bidar
d'Hoop

Collins
Jia

- Similar situations: condition for residence met upon entry
- Consequences of running out of financial means – termination of residence? Access to benefits?
- ECJ: Art. 12, non-discrimination, disproportionate restriction of rights from EU citizenship
 - access to benefit where previously lawfully resident “and ... consequently established a **genuine link** with the society of that State.”
 - length of residency, presumed integration?



E. Conclusions

- Patchwork of social dimensions - European Social Union terminology?
- Constitutionalisation in the increasing consideration of non-economic values – example for national constitutions?
- Strongest input from human rights and EU citizenship
- Influence on balancing processes and methodology
- But: Accessory to a relevant competence – debate on *Finalité? Where the Union is going* linked to this – uniqueness of EC as supranational institution
- European vision? Community of values and identity generating effect? Certainly elements of solidarity (imposed by the Court?)