FUNDAMENTAL RIGHTS IN EU LAW – THE STATUS OF INTERNATIONAL HUMAN RIGHTS NORMS IN EU LAW – THE ROLE OF THE EU COURTS

Outline for Turku Advanced Course 2010/Judge Allan Rosas (European Court of Justice)

1. From the European Communities to the European Union

- The EU is neither a State in the meaning of the UN Charter nor an intergovernmental organisation; it is an economic and political union of States and peoples based on the objective of ‘deep’ integration, an ‘ever closer union among the peoples of Europe’ (Article 1 of the Treaty on European Union (hereinafter TEU))

- European Coal and Steel Community 1951 - 2002, European Economic Community (EEC) 1957; European Atomic Energy Community (Euratom) 1957

- Treaty of Maastricht 1992: European Union (EU) and Treaty on European Union (hereinafter TEU) and European Community (EC, ex EEC) and Treaty establishing the European Community (hereinafter TEC); subsequent Treaties of Amsterdam 1997 and Nice 2001 amending the TEU and the TEC

- Treaty of Lisbon (entered into force on 1 December 2009): amended the TEU and the TEC became the Treaty on the Functioning of the European Union (hereinafter TFEU); the former ‘pillar’ structure of the EU was abolished and the EU constitutional order streamlined with the EU as a single legal person (the EC disappears as a distinct entity); the TEU provides for the basic constitutional principles, institutions and procedures while more detailed rules on competences and procedures are to be found in the TFEU

- constitutional nature of the EU: supremacy, direct applicability, direct effect, internal hierarchy of norms: primary law, including general principles of Union law, including fundamental rights, international agreements concluded by the EU, secondary law consisting of legislative acts (notably in the form of regulations and directives), delegated legal acts and implementing legal acts

- The EU judicial system consists of the Union Court (European Court of Justice, hereinafter ECJ), the General Court (formerly Court of First Instance), the Civil Service Tribunal as a ‘specialised tribunal’ and the national courts in the 27 Member States; the Treaty of Lisbon extends the jurisdiction of the EU courts to cover fully the former Title VI TEU or ‘Third Pillar’ (Police and Judicial Cooperation in Criminal Matters), which has been integrated into the supranational structure, but extends the Court's jurisdiction only to a limited extent to the so-called Common Foreign and Security Policy (hereinafter CFSP – formerly the ‘Second Pillar’)

- the EU and public international law: customary law, international treaties or agreements; international responsibility and dispute settlement; according to the ECJ, the Union ‘must respect international law in the exercise of its powers’ (Case C-286/90 Poulsen [1992]; see also Case C-162/96 Racke [1998])

- treaty-making competence: 1) exclusive Union competence: the Community only is a contracting party; 2) shared and parallel competence: the agreement may be ‘mixed’ (both the EU and its Member States are contracting parties); 3) national competence: only the EU Member States are contracting parties - status in EU law
of international agreements to which the EU Member States but not the Union are parties? special status of human rights conventions in this regard

- agreements concluded by the EU: direct applicability (principle of monism) and direct effect (right of individuals to invoke certain agreements before courts and authorities); international agreements binding on the Community prevail over secondary law such as regulations and directives (Case C-334/04 International Air Transport Federation [2006])

2. Human Rights and Fundamental Rights in the EU: General Considerations

- no express human rights/fundamental rights provisions in the original Treaties of 1951 and 1957
- Case 1/58 Stork v. High Authority [1959]: ECJ not competent to examine whether Community decisions are in infringement of fundamental rights as recognized in the Constitutions of the Member States
- Cases 219/69 Stauder [1969], 11/70 Internationale Handelsgegesellschaft [1970], 4/73 Nold [1974]: fundamental rights are protected by the ECJ as general principles of Community law; inspiration is provided by the constitutional traditions common to the Member States (Internationale Handelsgegesellschaft) and guidelines by international treaties on which the Member States have collaborated or of which they are signatories (Nold)
- Cases C-5/88 Wachauf [1989] and C-260/89 ERT [1991]: fundamental rights (as general principles of Union law) are also binding on the Member States when they implement or apply Union law; Cases C-60-61/84 Cinéthèque [1985]; C-159/90 Grogan [1991]; C-299/95 Kremzow [1997]: ECJ not competent to examine national measures outside the domain of Union law; problem of scope of domain of Union law, see., e.g., Cases C-117/01 K.B. [2004], C-71/02 Karner [2004]
- Treaty provisions relating to human rights/fundamental rights as they existed prior to the Treaty of Lisbon:
  - Articles 6, 7, 46 and 49 TEU
  - Articles 13, 63 and 136 TEC
  - External relations: Articles 177 and 181a TEC; Article 11 TEU
- Treaty provisions as amended by the Treaty of Lisbon:
  - Articles 2, 6, 7 and 49 TEU
  - Articles 13, 15, 16, 19, 218(8) and 354 TFEU
  - External relations: Articles 3(5) and 21 TEU, Article 215 TFEU
  - preparatory work (a Convention, with representatives of national parliaments, national governments, the European Parliament and the Commission)
  - main contents (sources of inspiration, categories of rights)
  - the Charter was first cited as a formally non-binding document by the Advocates-General of the ECJ as well as by the then Court of First Instance; in Case C-540/03 Parliament v. Council [2006], the ECJ itself for the first time cited the Charter; references to the Charter are to be found in several subsequent judgments of the ECJ
  - legal status today:
the Charter of Fundamental Rights was included in a slightly amended form as Part II of the Treaty establishing a Constitution for Europe (which never entered into force); according to Article 6(1) TEU, as amended by the Treaty of Lisbon, the Charter, as adapted in December 2007 (JO C 83, 30.3.2010, p. 389), ‘shall have the same legal value as the Treaties’

- **internal** aspect: "fundamental rights" as general principles of Union law, in accordance with the case-law of the ECJ and Article 6 TEU, and further articulated in the Charter of Fundamental Rights / **external** aspect: "human rights" in EU external relations, notably in the contexts of bilateral agreements concluded by the EC with third countries, Union legislative policies and acts concerning development cooperation and technical assistance to third countries as well as the CFSP

3. The EU and the European Convention on Human Rights (ECHR)

- the EU or the EC not a Contracting Party: *Opinion 2/94* [1996] of the ECJ: as Community law stood in 1996, the EC lacked competence to adhere to the ECHR
- but five "stages" of reliance on the ECHR in ECJ case-law: 1) no reference 1969-1974; 2) reference to provisions of the ECHR (since 1974/75); 3) the ECHR has ‘special significance’ as a guideline in determining fundamental rights as general principles of Community law (since the 1980s, see also Article 6(3) TEU); 4) reference to individual judgments of the European Court of Human Rights (since the mid-1990s); 5) declared willingness to reconsider earlier ECJ case-law in the light of more recent Strasbourg case-law (*Case C-94/00 Roquette Frères* [2002])
- examples of explicit references to individual judgments of the Strasbourg Court: *Case C-117/01 K.B.*, [2004], para. 33; *Case C-71/02 Karner* [2004], para. 51); *Case 540/03 Parliament v. Council* [2006]
- divergences between the Strasbourg and Luxembourg courts? ECJ cases 46/87 and 227/88 *Hoechst* [1989], compare with ECHR case-law such as the judgment of the Eur.C.H.R. of 16 April 2002 in *Colas v. France*, and further ECJ case *C-94/00 Roquette Frères* [2002], para. 29
- the ECHR and the EU Charter of Fundamental Rights: the Preamble and Articles 52(3) and 53 of the Charter; according to Article 52(3), the meaning and scope of rights contained in the Charter ‘which correspond to rights guaranteed by the [ECHR] . . . shall be the same as those laid down by the said Convention’; this provision, on the other hand, ‘shall not prevent Union law providing more extensive protection’
- according to Article 6(2) TEU, as amended by the Treaty of Lisbon, the EU ‘shall accede’ to the ECHR; and according to Article 17 of Protocol No. 14 (2004) to the ECHR amending Article 59 of the ECHR (entered into force in June 2010), ‘the European Union may accede to this Convention’;
according to Protocol No. 8 relating to Article 6(2) TEU on the accession of the Union to the ECHR, the agreement relating to accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’, in particular with regard to: (a) the specific arrangements for the Union’s possible participation in the control bodies of the ECHR and (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

- in June 2010, the EU Council adopted negotiating directives for the negotiations to be conducted between the Commission and the Contracting Parties to the ECHR with a view to the conclusion of an accession agreement; on the part of the EU, any such agreement must be concluded by the EU Council, acting unanimously; its entering into force would require approval by all EU Member States in accordance with their respective constitutional requirements.

4. The EU and Other Human Rights Instruments

- the case-law of the ECJ, including Opinions of its Advocates-General: occasional references to the 1966 Covenants and other global conventions (including certain ILO Conventions) and the European Social Charter of 1961, and soft law instruments such as the Universal Declaration of Human Rights of 1948, conceived as ‘guidelines’ for the determination of fundamental rights as general principles of Community law; examples: Case 540/03 Parliament v. Council [2006] (citation of, besides the ECHR and the EU Charter, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the European Social Charter), Cases C-438/05 Viking Line [2007] and C-341/05 Laval an Partneri [2007] (European Social Charter and ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise) and Case C-244/06 Dynamic Medien [2008] (Convention on the Rights of the Child).

- European Social Charter of 1961: Article 151 TFEU, Preamble to the Charter of Fundamental Rights, secondary legislation such as family reunification directive 2003/86 dealt with in Case C-540/03 Parliament v. Council [2006].


- EU accession to other human rights conventions than the ECHR? According to Article 53 of the new Convention on the Rights of Persons with Disabilities, references in the Convention to State Parties shall apply to ‘regional integration organizations’ (meaning essentially the EU) within the limits of their competence; the EC signed this Convention in March 2007 and concluded it in November 2009 (JO L 23, 27.1.2010, p. 35).

- human rights clauses in cooperation agreements concluded by the EU with third countries: respect for democratic principles and fundamental human rights constitute an ‘essential element’ of the agreement; non-compliance (suspension) clause in case of breach; Case C- 268/94 Portugal v. Council [1996].

5. General International Law
- according to the ECJ, the EU ‘must respect international law in the exercise of its powers’ (see above)
- reference in the human rights clauses of bilateral cooperation agreements and in the case-law of the ECJ (see above) to the Universal Declaration of Human Rights of 1948, and implicitly, to general international law in the field of human rights (see also Article 53 of the Charter)
- the EU has stated that the human rights clause in bilateral agreements ‘does not seek to establish new standards in the international protection of human rights’ but ‘merely reaffirms existing commitments which, as general international law, already bind all States as well as the [EU] in its capacity as a subject of international law’ (European Union Annual Report on Human Rights 1998-1999, Council of the EU 1999, p. 22)

ASSIGNMENTS

Participants are requested to prepare themselves by reading the above annotated table of contents as well as:


Further assignments will be distributed during the Course in August 2010

FURTHER READING:

Alston, Philip (ed.), The EU and Human Rights (Oxford University Press, 1999).


