
Sources of Fundamental Rights

By Tim Ward
29th January 2004

Monckton Chambers
4 Raymond Buildings
Gray's Inn
London WC1R 5BP

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

1. There are two, or perhaps three distinct sources of human rights protection in European law:
 - a. The European Convention on Human Rights (“the Convention”).
 - b. The General principles of EC law.
 - c. The Charter of Fundamental Rights of the European Union (?)

(1) The Convention

2. The Convention is not itself part of EC law:
 - a. Adopted by the Council of Europe in 1950.
 - b. Signatories from Iceland to the Ukraine.
 - c. Court of Human Rights in Strasbourg.
 - d. Not part of English law, but given effect by the Human Rights Act 1998 (“HRA”).
3. HRA applies across the whole scope of domestic law.
4. But: limited remedies:
 - a. No challenge to primary legislation – only a “declaration of incompatibility” by High Court or above: s 4.
 - b. Defence for a public authority where it was bound to act as it did by primary legislation: s 6(2).
 - c. Damages for breach of Convention rights, but only where necessary to afford “just satisfaction”: s 8(3). This is discretionary and has been restrictively interpreted by the courts: *Anufrijeva v Secretary of State* 16 October 2003.

(2) General principles of EC law

5. Fundamental rights are an integral part of the “general principles of EC law”:
 - a. They are given effect by the European Court of Justice at Luxembourg (ECJ) and national courts.
 - b. “For that purpose, the Court draws inspiration 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.”¹
 - c. In formulating these fundamental rights, the Convention has “special significance”².
 - d. In practice, the ECJ expressly applies the Convention rights, and the case law of the Strasbourg Court.

When do EC fundamental rights apply?

6. The doctrine of EC fundamental rights does not apply to all aspects of domestic law. There are difficult questions as to the boundaries of its application³ but its application to the following cases is well-established:

¹ Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759, para 33.

² Opinion 2/94, para 33.

³ See *R v MAFF, ex p First City Trading Ltd* [1997] 1 CMLR 250, doubted in *R v MAFF, ex p BPIISG*, 27 July 2000.

- a. Community measures, such as Commission decisions, Regulations and Directives. Eg: challenge to a provision of the 6th VAT Directive.
 - b. National measures which implement Community law; eg: measures taken to implement a directive: C-286/94 *Garage Molenheide* [1997] ECR I-7281.
 - c. National measures which derogate from Community law where permitted.
7. Community fundamental rights have no application in a “purely internal situation” with no Community dimension.⁴

Scope of EC fundamental rights

8. The fundamental rights recognised by EC law are not exactly the same as those contained in the Convention:
- a. Article 14 of the Convention prohibits discrimination only in the enjoyment of another Convention right. It is accordingly necessary to show that the discrimination complained of “falls within the ambit” of another Convention right.⁵ By contrast, EC law contains a general prohibition on discrimination.
 - b. The Court of Justice has at times interpreted the content of Convention rights differently to the Strasbourg Court, eg in C-159/90 *SPUC v Grogan*⁶ a prohibition against dissemination of information in Ireland about UK abortion services would not be a breach of the right to freedom of expression protected by Article 10 ECHR. In *Open Door Counselling v Ireland*⁷, the ECtHR reached the opposite conclusion.
 - c. The ECJ has recently demonstrated a willingness to follow the ECtHR’s lead on interpretation of the Convention: C-94/00 *Roquette Frères SA*⁸.
9. If a claim can be brought within the scope of EC fundamental rights, far more powerful remedies are available:
- a. Community law is “supreme”. Thus, primary or subordinate legislation may be disapplied, even by a tribunal.
 - b. There is a right to recover damages where three conditions are satisfied⁹:
 - i. the rule of law infringed must be intended to confer rights on individuals;
 - ii. the breach must be sufficiently serious;
 - iii. there must be a direct causal link between the breach of the obligation and the damage complained of.
 - c. Where, these criteria are satisfied, the reparation must be “commensurate with the loss or damage sustained so as to ensure effective protection for their rights”.¹⁰

⁴ C-132/93 *Volker Steam v Deutsche Bundespost (No 2)* [1994] I ECR 2715.

⁵ *Rasmussen v Denmark* (1985) 7 EHRR 371, para 29.

⁶ [1991] ECR I-4685, Opinion of Advocate General Van Gerven.

⁷ (1993) 15 ECHR 97.

⁸ 22 December 2002.

⁹ Cases C-46 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 51.

¹⁰ *Factortame*, para 82.

(3) The Charter of Fundamental Rights of the European Union.

10. "Proclaimed" at the European Council at Nice in December 2000. At that time it was not said to be binding.
11. In practice, the Court of First Instance¹¹ has already taken account of the Charter, as have various Advocates General¹².
12. Its scope of application is set out in Article 51:

"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

13. As to its substance, it is expressly stated to reaffirm:

"the rights as they result, in particular, from the constitutional obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council and the case law of the Court of Justice of the European Communities and the European Court of Human Rights."

14. To some extent, it replicates the rights contained in the ECHR, and accordingly, the fundamental principles of EC law. The language, is, however, different. Eg, instead of the complex provisions of Article 5 of the ECHR, Article 6 of the Charter provides:

"Everyone has the right to liberty and security of person."

15. The Charter nonetheless asserts that where the rights it contains correspond to those guaranteed by the ECHR "the meaning and scope of those rights shall be the same as those laid down by the said Convention."¹³
16. The Charter contains provisions which go beyond justiciable rights as previously recognised in English law. Eg:

"Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices..."¹⁴

"The arts and scientific research shall be free of constraint..."¹⁵

"Political parties at Union level contribute to expressing the political will of the citizens of the Union."¹⁶

¹¹ Eg: Case T-54/99 *Max-Mobil*, 30 January 2002.

¹² C-173/99 *BECTU* [2001] ECR I-4881, AG Tizzano.

¹³ Art 52(3).

¹⁴ Art 35.

¹⁵ Art 13.

¹⁶ Art 12(2).

Draft EU Constitution

17. Current draft Constitution contains the Charter in Part II. Apparently adopts all three systems of human rights protection:
 - a. The Union “shall recognise” the rights freedoms and principles set out in the Charter”: Art 7(1).
 - b. The Union will seek accession to the ECHR: Art 7(2).
 - c. Fundamental rights, as guaranteed by the ECHR and the constitutional traditions common to the Member States, are stated to be general principles of EC law: Art 7(3).

For more information on Tim Ward, please contact the Clerks on 020 7405 7211 or consult the ‘Find a Barrister’ Section on www.monckton.com.