

# EU Law and Human Rights: Evolution of Law, Policy and Practice

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# A judge-led journey...

- From a European Economic Community to a Union of values
- Judge-led from the 1960s until TEU 1992 - *Nold, Wachauf, Internationale Handelsgesellschaft, ERT...*
- Now: Sources of EU human rights law – Art 6 TEU
  - Charter – “*same legal value as the Treaties*”
    - Within the scope of EU law
    - Can't extend EU competences
    - UK, Czech Republic, Poland
  - General principles – Art 6(3) TEU
    - ECHR
    - National constitutional traditions

## ...with policy finally catching up

- Political approval of HR as part of general principles of EU law
  - Non-binding political declarations (1977, 1989)
  - Inclusion in EU Treaties (TEU 1992 onwards)
    - Condition of EU membership application (TOA 1997)
  - EU Fundamental Rights Agency 2007
  - Mainstreaming of HR in EU external relations (Art 3(5) TEU; Art 21(1) TEU – EU to contribute to HR protection globally)

# How does EU HR law relate to other HR standards?

- EU law and ECHR law – Art 52(3) Charter

*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. **This provision shall not prevent Union law providing more extensive protection.***

- Lawyer-client confidentiality – *AM&S, AKZO*
- Refugee rights – *Elgafaji*
- Data protection – *Commission v Bavarian Lager*
- Charter's social rights (Ch. II) and labour rights (Ch. IV) – BUT note Art 52(5) on non-justiciability of “principles”
- ECtHR: EU protection of HR generally equivalent to ECHR – *Bosphorus*

# How does EU HR law relate to other HR standards?

- EU law and national law
  - “*Common constitutional traditions*”? – eg *Mangold*, *AKZO*, *Omega*
  - National law can go further
  - Constitutional status of EU law in the Irish courts
  - Art 52(4) Charter

*In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*

# Relying on EU human rights law in practice

- **Why? Validity of all EU action/all MS action within the scope of EU law as conditional on HR compliance**
  - Challenging EU actions
    - Including if these actions flow from international obligations: *Kadi*
  - Challenging MS actions falling within the scope of EU law
    - Implementing or applying EU law (*Wachauf*), or restricting EU rights (*Carpenter*, *Zambrano* – Art 8 ECHR right to family life)
  - Justifying MS actions that might otherwise contravene EU law (eg *Omega*)
  - Asking that EU law should be interpreted in the light of HR
- **How?**
  - In national courts or tribunals
  - In EU courts (via preliminary reference OR direct action)

# Current practical tensions

- How to know where the scope of EU law ends?
  - *Carpenter, Zambrano*
  - Esp. in fast-moving field of EU citizenship (Arts 18, 20, 21 TFEU)
  - Even where outside scope of EU law, ECJ may underline MS ECHR obligations (*Metock*)
  - How to know whether a situation is wholly internal to a MS? (*Kremzow*)

# Current practical tensions

- Implications of EU ECHR accession – what practical difference will it make?
  - EU can be party in its own right to ECHR case (and has its own judge)
    - Currently: EU actions can only be indirectly challenged via MS (eg *Matthews*, *Emesa Sugar*...)
  - If challenging EU act: will need to get ECJ ruling first (exhaustion of domestic remedies)
    - If no preliminary reference made by national court: mechanism to ensure ECJ makes ruling before ECtHR
  - Multiple, or Co-, respondent possibility if EU and MS implicated
  - ECtHR oversight more implicit than concrete – major delays in actual ECtHR judgment due to workload a practical factor

# Current practical tensions

- MS efforts to retain control over certain HR areas
  - Art 51 Charter: no new task or power created by its adoption
  - Resistance to monitoring role for FRA – Art 7 TEU
  - Opt-outs to Charter (UK, Czech Republic, Poland – Protocol No 30 , Lisbon Treaty)
    - Practical effect limited