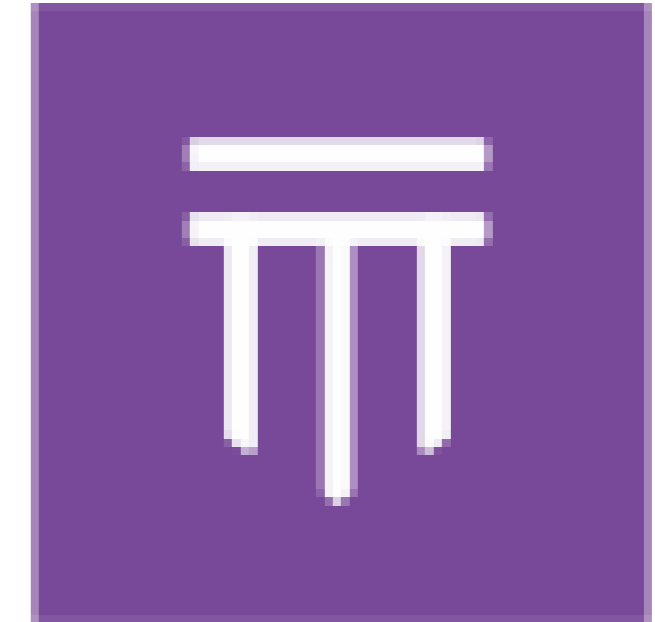


Brno, 13 October 2021

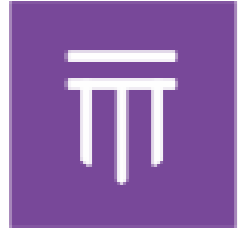
ECJ and Human Rights



JUSTIN
Judicial Studies Institute
Masaryk University

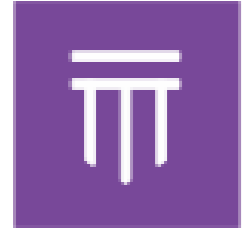
Katarína Šipulová

Why so little on HR in founding treaties?



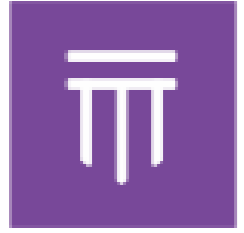
Why so little on HR in founding treaties?

- Focus on economic cooperation
- Human rights in COE
- Bills of rights as a part of constitutional law



Why so little on HR in founding treaties?

- Focus on economic cooperation
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Why so little on HR in founding treaties?

- Focus on economic cooperation
- Human rights in COE
- **Bills of rights as a part of constitutional law**

Article 119 TEEC

Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.

For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment.

Equal remuneration without discrimination based on sex means:

(a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and

(b) that remuneration for work at time-rates shall be the same for the same job.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

Article 7

(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

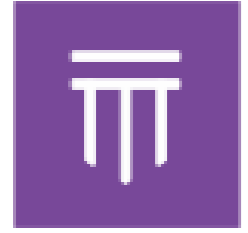
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

EU Charter of FR

Article 51

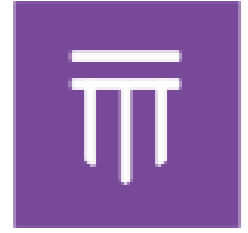
Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for 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 and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.



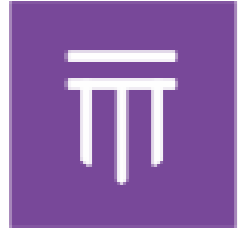
4 crucial elements of HR in EU

- Importance (sensitivity)
- Crosscutting
- No general EU HR competence
- EU competences increasing



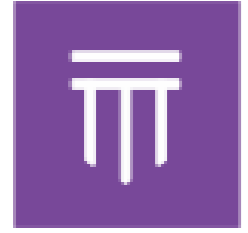
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4 crucial elements of HR in EU

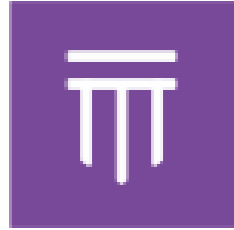
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4 crucial elements of HR in EU

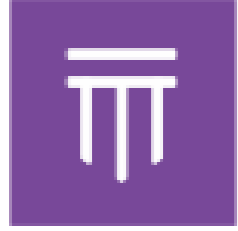
- Importance (sensitivity)
- Crosscutting
- No general EU HR competence
- **EU competences increasing**

Human Rights v Fundamental Rights and Freedoms



Concepts used by CJEU

- Human Rights
 - Human, civil, political, justice, equality, solidarity
- Fundamental Rights
 - EU Charter ~ human rights
- Fundamental Freedoms
 - Related to the internal market: freedom of movement of persons, capital goods and services, and freedom of establishment
- Clashes?
 - Which prevails?
 - *Viking Line*
 - Favoured market freedoms over the right to strike



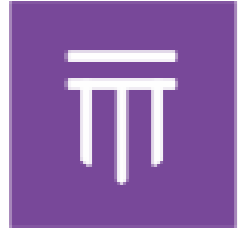
Four Freedoms of Single Market

- Freedom of movement of persons
- Freedom of movement of goods
- Freedom of movement of Services and capital
- Freedom of establishment

Why did HR issues enter on the ECJ agenda?

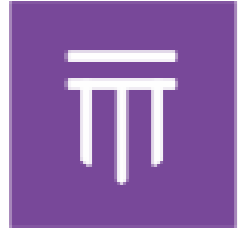
Why did HR issues enter on the ECJ agenda?

Direct effect + IHG + Solange



Direct effect and supremacy

- What is the direct effect?
- Where do you find it?
- How did the ECJ arrived to direct effect?



What is the direct effect?

- Monism v Dualism
 - M: international law directly applicable as any domestic law
 - D: binding only on the state, not in; transposition needed

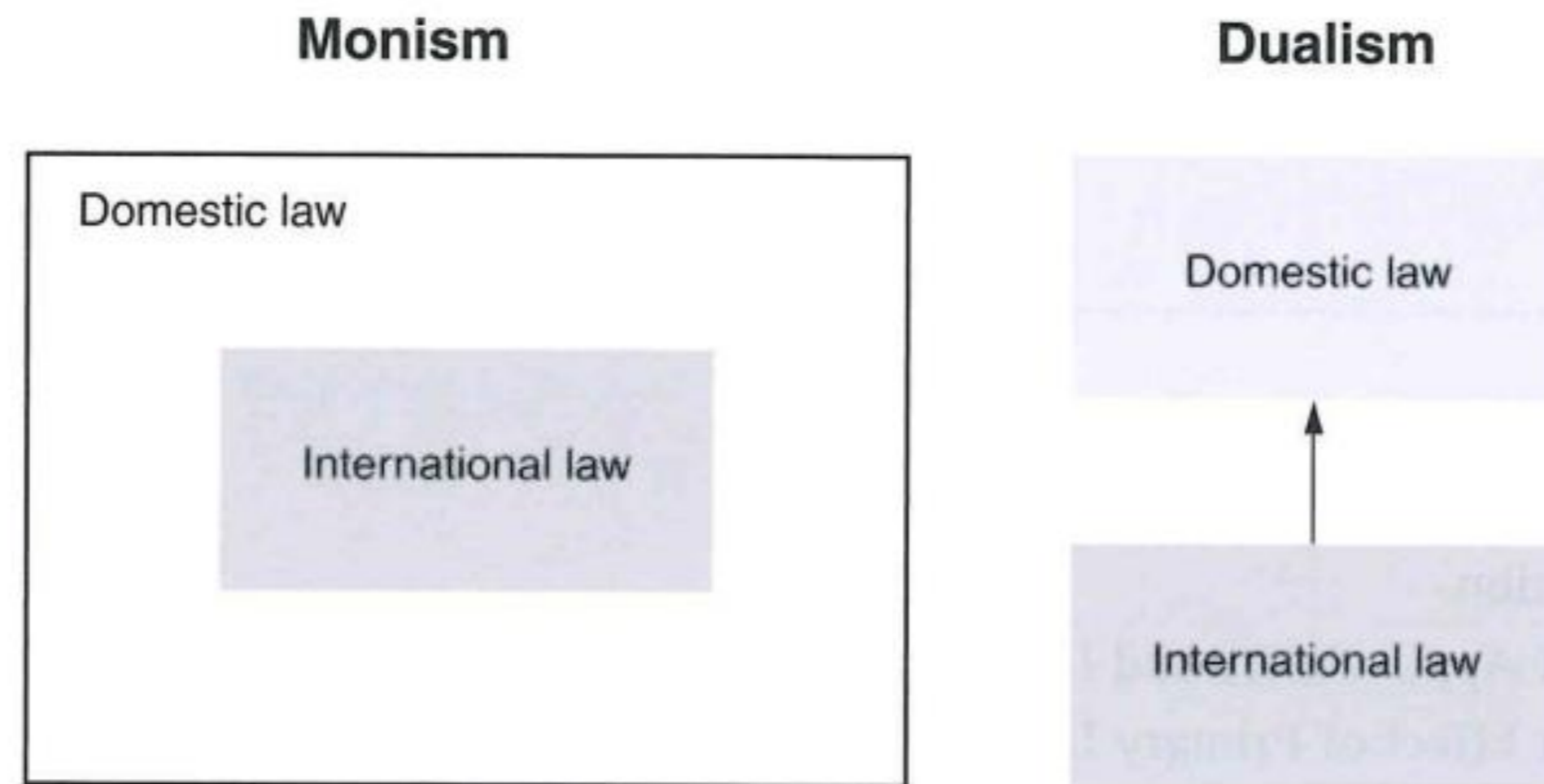
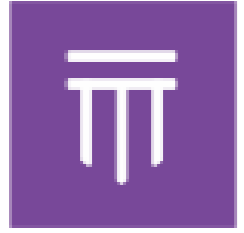
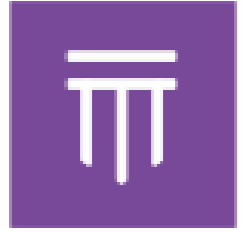


Figure 5.1 Monism and dualism



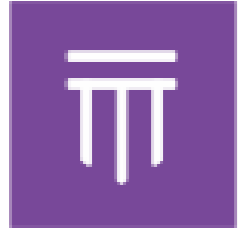
288 TFEU

- [1] To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
- [2] A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
- [3] A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
- [4] A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
- [5] Recommendations and opinions shall have no binding force.



Direct effect and direct applicability

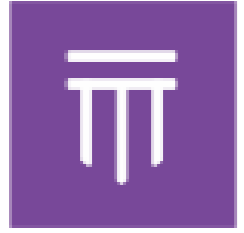
- Regulations and decision: contain directly applicable norms
- *Van Gend en Loos* (Case 26/62)
 - Origins: reclassification of a chemical into a custom category entailing higher customs charges (BENELUX)
 - Van Gend en Loos: postal and transportation company, transporting formaldehyde from West Germany to the Netherlands
- Opposes import tariff as contrary to the A12 of the Treaty of Rome:
 - "Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other."



Direct effect and direct applicability

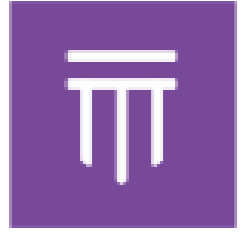
- *Van Gend en Loos* (Case 26/62)

The wording of article 12 contains **a clear and unconditional prohibition** which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. **The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.**



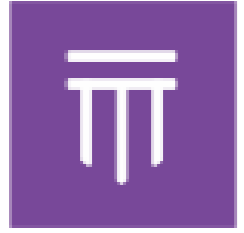
Van Gend en Loos

- The objective of the E[U] Treaty, which is to establish a **common market**, the functioning of which is of direct concern to interested parties in the [Union], implies that this Treaty is **more than an agreement which merely creates mutual obligations between the contracting States**. This view is confirmed by the preamble of the Treaty which refers not only to the governments **but to peoples**. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member States and also their citizens. Furthermore, it must be noted that the nations of the States brought together in the [Union] are called upon to cooperate in the functioning of this [Union] through the intermediary of the European Parliament and the Economic and Social Committee.
- In addition the task assigned to the Court of Justice under Article [267], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the States have acknowledged that **[European] law has an authority which can be invoked by their national before those courts and tribunals**. The conclusion to be drawn from this is that the [Union] constitutes a **new legal order of international law** for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their national. **Independently of the legislation of Member States**, [European] law therefore not only imposes obligations on individuals but is also **intended to confer upon them rights** which become part of their legal heritage.



Direct effect and direct applicability

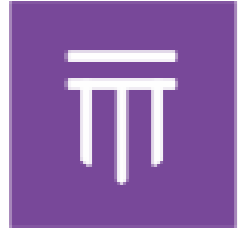
- *Van Gend en Loos* (Case 26/62)
 - ECJ cut the umbilical cord with classic international law
 - A12 is capable of creating personal rights
 - **European legal order in a new legal order**
 - **It is more than international law**
 - **It has authority which can be invoked by citizens**
 - **It poses the citizens obligations and confers rights, independently on the legislation of member states**
-
- *AG opposing opinion



Repercussions of direct applicability

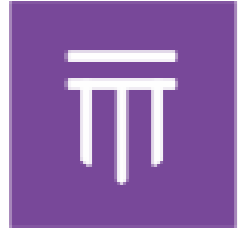
- Not all norms are directly applicable: justiciable norms (can be applied by a public authority)
- Test:
 1. Clear provision
 2. Unconditional (does not depend on subsequent legislation – automatic prohibition)
 3. Absolute provision (does not allow reservations).

ECJ eventually moved to a more lenient test (widening the interpretation of 3 criteria)



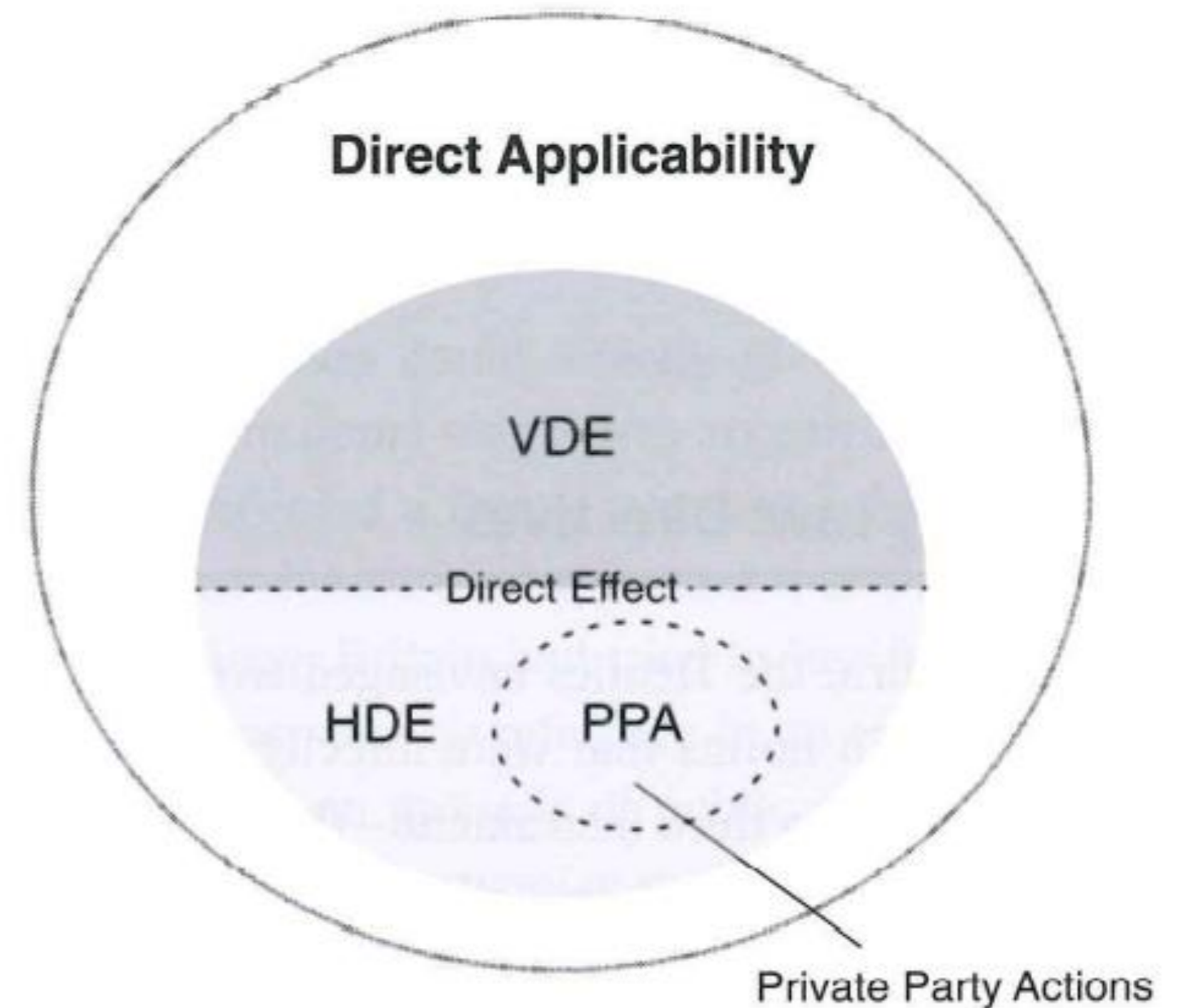
Examples of direct applicability?

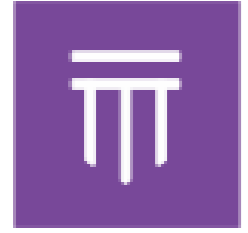
- **Defrenne:** Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
- **Reyners:** In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.
- **Van Duyn:** The prohibition on quantitative restrictions on imports shall not preclude [national] prohibitions or restrictions on imports, exports, or goods in transit justified on grounds of public morality, public policy or public security.



Horizontal and Vertical Direct Effect

- **Van Gend:** Treaties are theoretically allowed to impose obligations on individuals
- **Horizontal DE:**
 - Between individuals
 - Treaty provisions (*Familiapress v Bauer*)
 - Decisions and Regulations
 - Two exceptions:
 - 1. Reg explicitly calls for a domestic act
 - 2. Reg is too general and needs a domestic act
- Directives: binding on states, dualist
 - *Variola*: sets out aim, not the road
 - ***Francovich*: vertical direct effect**





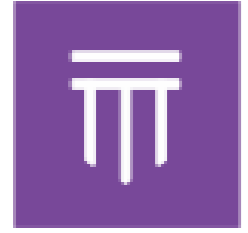
Repercussions of direct applicability

Direct applicability => Direct effect and Supremacy of [EU] Law

Direct applicability: no transposing national provision is needed

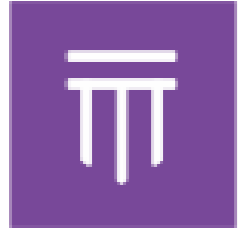
Direct effect: sets out rights/obligations for individual (sufficiently precise and clear provision)

Supremacy: only of those provisions, which have direct effect. I.e. not whole system of EU law, but! Potentially also any norm of EU law, irrespective of its legal force



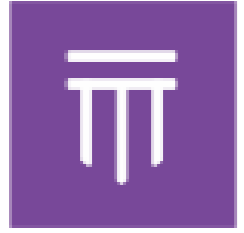
Supremacy of EU Law?

- Two perspectives:
 - *European*
 - Absolute
 - *National*
 - Relative
 - Ultra vires control



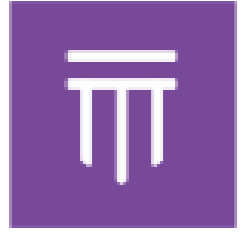
European Perspective of Supremacy

- Over internal law
 - Fear of decentralization
 - *Costa v ENEL*
- Over constitutional law
 - Internationale Handelsgesellschaft
 - Solangene?
- Over international treaties
 - A 351 TFEU
 - The rights and obligations arising from agreements conclude before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one ore more on the other, shall not be affected by the provision of the Treaties.
 - Limits:
 - Obligations towards third states
 - Kadi: x derogation from principles of liberty, democracy and respect for human rights and fundamental freedoms of A2 TEU



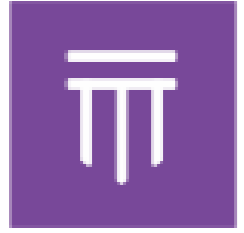
Premacy or Supremacy of EU Law?

- Costa v ENEL (6/64)
 - Italian Constitutional Court: in case of conflict, newer law prevails (nationalization statute over Treaty of Rome)
- Should EC law, the Treaty of Rome in particular, be considered dominant over national statutes?
- Treaty's provision on single market did not have direct effect -> only the Commission can bring a case against Italy. HOWEVER, Mr Costa can turn to Italian courts and contest the compatibility of national law with the EC law



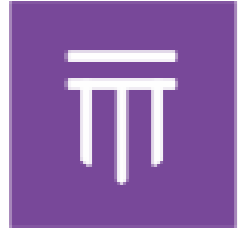
Premacy or Supremacy of EU Law?

- Costa v ENEL (6/64)
 - Italian Constitutional Court: in case of conflict, newer law prevails (nationalization statute over Treaty of Rome)
- By contrast with ordinary international treaties, the E[U] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply...The integration into the laws of each Member State of provisions which derive from the [Union], and more generally the terms and the spirit of the Treaty, make it **impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.** Such a measure cannot therefore be inconsistent with that legal system. **The executive force of [European] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...**It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [European] law and without the legal basis of the [Union] itself being called into question.



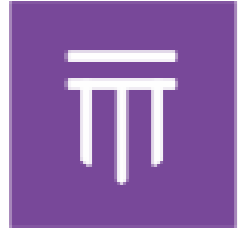
Premacy or Supremacy of EU Law?

- European view: supremacy
 - confirmed in Internationale Handelsgesellschaft
 - Can European legislation violate fundamental rights as granted by the German Constitution?
 - Are the fundamental structural principles of national constitutions, including human rights, beyond the scope of Union supremacy?
 - ECJ: Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the [Union] would have an adverse effect on the uniformity and efficiency of [European] law. The validity of such measure can only be judged in the light of [European] law.
 - The whole of European law prevails over the whole of national law



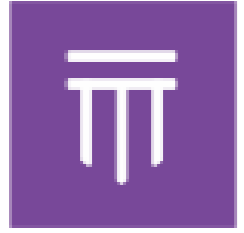
Repercussion of the Supremacy

- *Simmenthal II*
 - *What consequences flow from the direct applicability of a provision of [Union] law in the event of incompatibility with a subsequent legislative provision of a Member State?*
- National courts are under a direct obligation to give immediate effect to European law.
- Supremacy = rules of [European] law must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force
- Effect
 - Break (x)
 - Principle of precedence:



Repercussion of the Supremacy

- Principle of precedence (Simmenthal 106/77)
 - [I]n accordance with the **principle of precedence** of [European] law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force **render automatically inapplicable** any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also **preclude the valid adoption of new legislative measures** to the extent to which they would be incompatible with [European] provisions.
- = principle of executing force



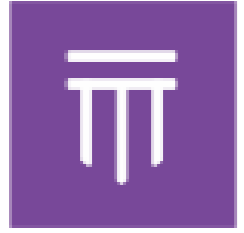
National challenges to Supremacy

- Human rights
- Competence limits

How did the ECJ approach HR?

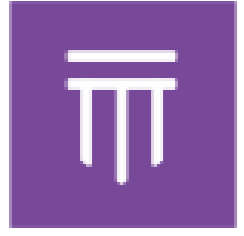
How did the ECJ approach HR?

Initial resistance, then *Stauder*
(FR as general principles of Community law)



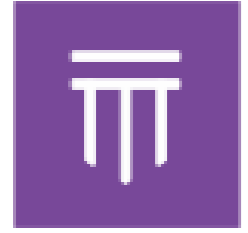
Human Rights: from Premacy to Supremacy of EU Law?

- Internationale Handelsgesellschaft
 - forfeiture of a deposit lodged in connection with the issue of export licenses for maize meal
 - The plaintiff had failed to export the quantities of maize he had obtained a license for (more profitable to sell to a domestic buyer)
 - Failure to export = forfeiture of the deposit (unless a force majeure)
 - Claim: disproportional to German constitutional right to conduct business (a general right to **freedom of action and economic liberty**)
- **AG:** the individual should not have his freedom of action limited beyond the degree necessary for the general interest
- NO VIOLATION FOUND



Human Rights: from Premacy to Supremacy of EU Law?

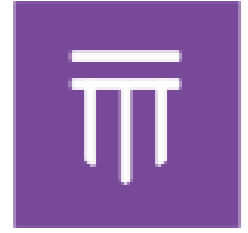
- German Constitutional Court reacts:
 - Solange I. (BVerfGE 37, 271) [1974]
 - Can national fundamental rights affect the application of European law in the domestic legal order?
 - Rejects ECJ's vision: **theory of relative supremacy of European law**
 - German Constitution expressly allowed for the transfer of sovereign powers to the EU in A24, this transfer was **limited** by the constitutional identity of the German State.
Fundamental constitutional structures are beyond the supremacy of European law.
 - Solange II. (BVerfGE 73, 339) 1987



Human Rights: from Premacy to Supremacy of EU Law?

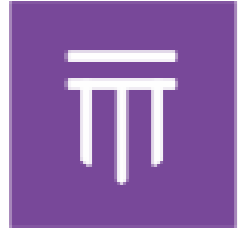
Solange I

- The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. ... In this, the present state of integration of the Community is of crucial importance. The Community still lacks ...in particular, a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law ...
- So long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the [Union], the reservation derived from Article 24 of the Constitution applies...



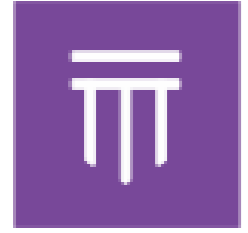
Human Rights: from Premacy to Supremacy of EU Law?

- If is a hypothetical case of a conflict between [European] law and a part of national constitutional law or,...the guarantees of fundamental rights in the Constitution, there arises the question if which system of law takes precedence...In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails so long as the competent organs of the Union have not removed the conflict of norms in accordance with the Treaty mechanism.
- NO CHANGE TO THE TREATIES ->



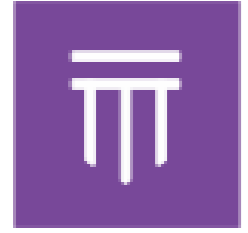
Solange II

- BVerfG recognized a creation of substantially similar fundamental rights guarantees
- *In view of those developments it must be held that so long as the European [Union] and in particular in the case law of the European Court, generally ensures an effective protection of fundamental rights as against the sovereign powers of the [Union] which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary [Union] legislation cited as the legal basis for any acts of German courts...*



Human Rights: from Premacy to Supremacy of EU Law?

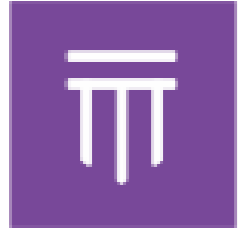
- Nold
 - Distribution of fuels – do the EC rules require companies to meet certain volume of sales requirements to qualify as a direct wholesaler with a right to direct purchase from a selling agency?
 - Denial of the status based on reduced sales = violations of the **fundamental right to freely practice the trade and profession**
- NO VIOLATION FOUND



Human Rights: from Premacy to Supremacy of EU Law?

- **freedom of action and economic liberty**
- **right to freely practice the trade and profession**

- **ECHR:** no right to liberty or to pursue a trade/profession
- **Right to property:** restricted



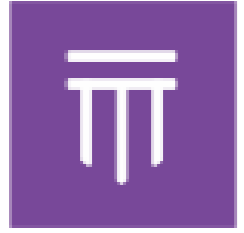
Motives of incorporating HR?

- Unified interpretation of European law
- Strong position of ECJ because of multi-level system

No EEC Bill of Rights – where to find them?

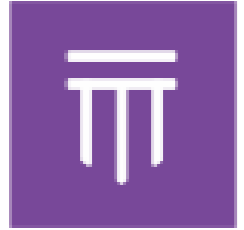
No EEC Bill of Rights – where to find them?

EEC Constitutions + int treaties



Limits

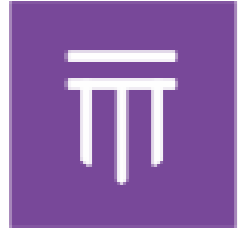
- Hauer
- Vajnai
- Proportionality test?
 - First paragraph
 - Conditions of justified infringement
 - Proportionality test – policy conditions



Limits

- Proportionality test
 - Legitimate aim
 - Regulation of the market
 - Necessary measure
 - Is there any other equal measure?
 - Proportional burden

- ECtHR Proportionality test:
 - (scope and interference)
 - Legality
 - Legitimate aim
 - Necessity in a democratic society (proportionality test)



Limits

- ECtHR: Is political measure a legitimate & proportional restriction of the human right?
- CJEU: is human right a legitimate & proportional restriction of the fundamental freedom?



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