

Brno, 30 October 2023

ECJ and Human Rights

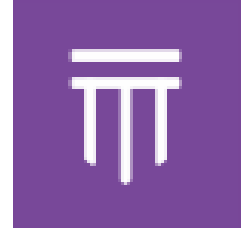


JUSTIN

Judicial Studies Institute

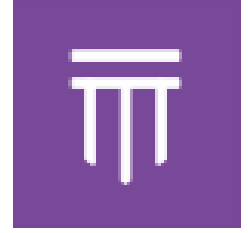
Masaryk University

Katarína Šipulová



Supremacy of EU Law?

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



Primacy 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

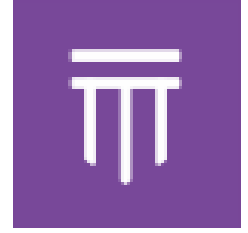


Primacy or Supremacy of EU Law?

Costa v ENEL (6/64)

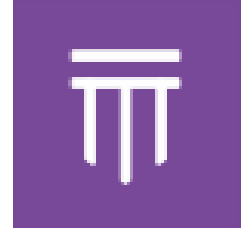
Italian Constitutional Court: in case of conflict, newer law prevails (nationalization statute over Treaty of Rome)

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.



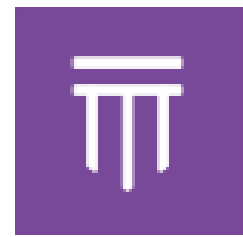
Primacy or Supremacy of EU Law?

- 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



National challenges to Supremacy

- Human rights
- Competence limits



1. HR as a challenge to Supremacy

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
- **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
- Human rights in COE
- Bills of rights as a part of constitutional law

What is the one exception?

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.

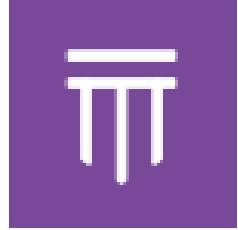
EU Charter of FR

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.

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



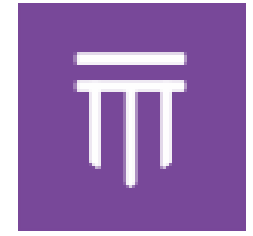
Four Freedoms of Single Market

- 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



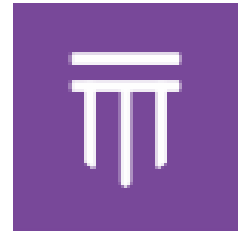
Direct effect and supremacy

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



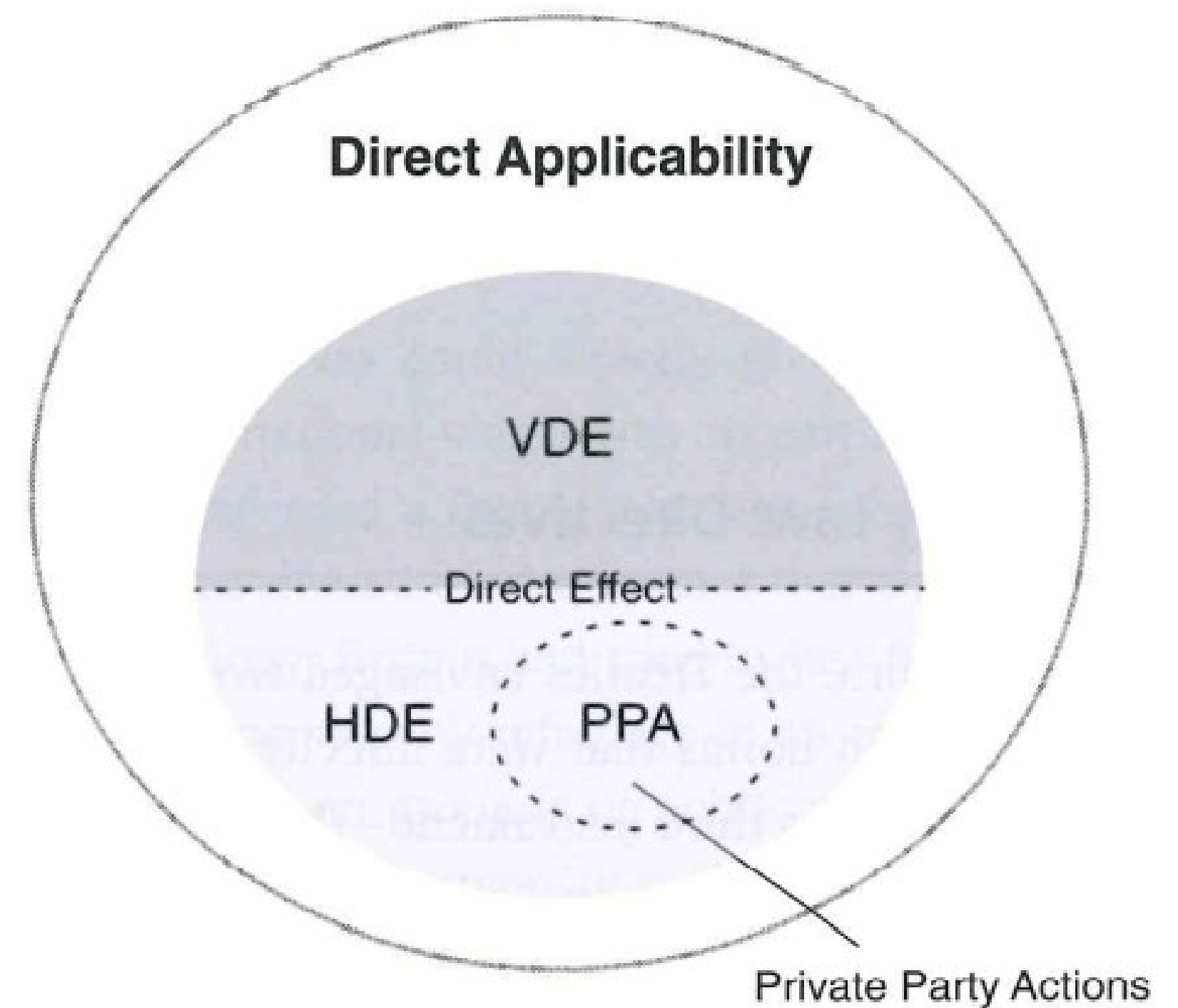
Direct effect and direct applicability

- *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**



Horizontal and Vertical Direct Effect

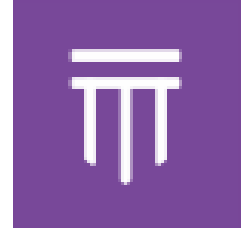
- **Van Gend:** Treaties are theoretically allowed to impose obligations on individuals
- **Horizontal DE:**
 - Between individuals
 - Treaty provisions (*Familiapress v Bauer*)
 - Decisions and Regulations
 - Two exceptions:
 - 1. Reg explicitly calls for a domestic act
 - 2. Reg is too general and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



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?

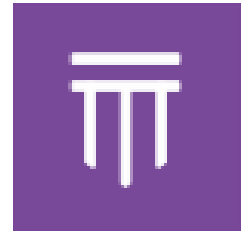
- German Constitutional Court reacts:
 - Solange I. (BVerfGE 37, 271) [1974]
 - Can national fundamental rights affect the application of European law in the domestic legal order?
 - Rejects ECJ's vision: **theory of relative supremacy of European law**
 - German Constitution expressly allowed for the 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 there 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 of 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 -> but a doctrine of HR is developed



Solange II [1987]

- 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 Primacy to Supremacy of EU Law?

- Nold
 - Distribution of fuels – do 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 Primacy 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

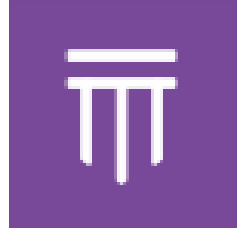
- Hauer
- Vajnai
- Proportionality test?
 - First paragraph
 - Conditions of justified infringement
 - Proportionality test – policy conditions



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

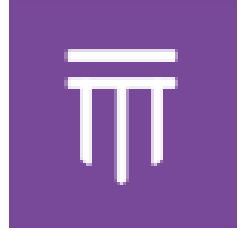


Limits

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

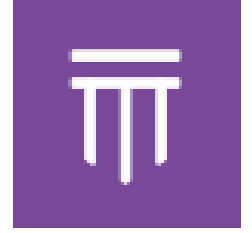


What does Bogdandy et al. propose?



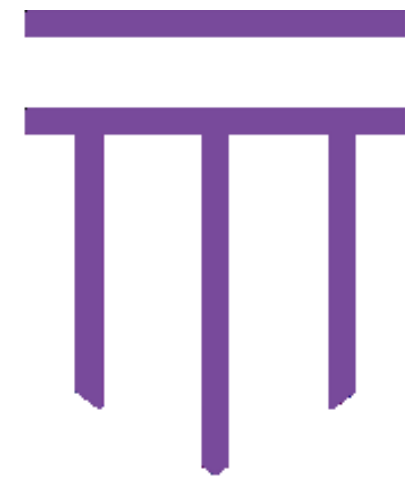
What does Bogdandy et al. propose?

- beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU
- The scope:
 - 1. MS executing obligations from EU law
 - 2. MS implementing EU law (directives)
 - 3. The scope of EU law: national limitations of a right granted by EU law (market freedoms) trigger the application of EU fundamental rights
 - Not applicable to non-economic activities and purely internal situations



What does Bogdandy et al. propose?

- **Systemic violations of the essence of fundamental rights (A2 TEU) by any public authority in the European legal space amount to infringements of Article 20 TFEU which can be considered by national courts in cooperation with the Court of Justice**



JUDICIAL STUDIES INSTITUTE

MASARYK UNIVERSITY BRNO

WWW.JUSTIN.LAW.MUNI.CZ