Fundamental Rights of Companies and other legal persons in Transnational Law

Luis Gordillo
E-mail: lgordill@der.deusto.es

University of Deusto
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I. Preliminary Questions

• A matter of words:
  – Human Rights
  – Fundamental Rights
  – Constitutional Rights
  – Civil Rights

• Legal instruments of protection

• Are companies / corporations able to hold fundamental rights?
• If yes, why it is relevant?
• Are companies / corporations able to hold fundamental rights?
• If yes, why it is relevant?
  – Ability to enjoy certain rights
  – Qualified access to Court

II. Companies as Fundamental Rights holders

• US Constitutional Law
  – Corporate personhood
EUREKA!! WE'VE GIVEN PEOPLE'S CONSTITUTIONAL RIGHTS TO CORPORATIONS. LONG LIVE "CORPORATE PERSONHOOD"!!

THIS "FREEDOM OF SPEECH" THAT WE ALL ENJOY IS THE GREAT EQUALIZER! WOULDN'T YOU SAY?...
II. Companies as Fundamental Rights holders

- US Constitutional Law
- Corporate personhood includes today:
  - Rights to equal protection
  - Due process
  - Freedom of speech
  - Freedom from unreasonable searches and seizures
  - Political rights
The situation in Europe

- Several Constitutions recognize fundamental rights to legal persons (Germany, Portugal)
- Constitutional Courts have also extended fundamental rights to legal entities
  - Which rights?
    - Substantive rights compatible with their nature (domicile, property)
    - Procedural guarantees (access to justice, right to a fair trial, non bis in idem-double jeopardy)
- Practical importance: possibility to use the individual appeal for the protection of fundamental rights (Spain, Germany, Austria, Switzerland, Poland)

III. Companies rights in a multilevel constitutionalism

- National Level (Constitutional Law)
- EU Level
- ECHR
National Level (Constitutional Law)

- Constitutional guarantees in ordinary proceedings
  - Access to justice
  - Fair trial
  - Presumption of innocence
  - Etc.
- Individual appeal

European Convention of Human Rights (ECHR)

- ECHR, ECtHR, Council of Europe
  - Scope of the Convention
    - Ratione personae, materiae and loci
  - Proceedings before the ECtHR
  - Present situation
    - Protocol 14 (blocked)
- Company’s Rights before the ECtHR:
  - Substantive: Domicile (art. 8), property (art. 1, First Protocol)
  - Procedural rights (art. 6, 13)
• **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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• **Article 1 – Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The English version uses the word "**possessions**" and the French one uses "**biens**", which connotes a broader scope. The ECtHR stated:

«The Court recalls that the notion "possessions" (in French: biens) in Article 1 of Protocol No. 1 (P1-1) has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision», *Case of Gasus Dosier- und Fördertechnik gmbh v. The Netherlands*, 1995.
Companie’s rights

- Article 6 – Right to a fair trial
  1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
  2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
  3. Everyone charged with a criminal offence has the following minimum rights:
     a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
     b. to have adequate time and facilities for the preparation of his defence;
     c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
     d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
     e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

European Union Level

- EU: art. 6.2 EU Treaty

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”
IV. Companies rights and conflicts of legal orders

- National Constitutional Level – EU Level
- EU Level - ECHR
- EU Level – UN Sanctions

- Constitutional Courts accept Fundamental Rights interferences
  - From the EU/EC “as long as” the level of protection dispensed EC/EU is equivalent to the one recognized by the national constitutions.
    - Germany: Solange Decisions, Maastricht Urteil, Bananenstreit Decision, Lisbon Treaty (30 June 2009)
    - Italy: Granital, Fragd
    - Spain: DTC 1/2004
    - Poland: Case K 15/04

- They usually remain competent to control that compatibility
EU Level – ECHR Level

• Art. 6.2 EU Treaty

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

• How do we control it?
  • Senator Lines Case, 2004
  • Bosphorus Case, 2005
  • Kadi vs. Council and Commission, 2008

Bosphorus Case

• Introduction: Travel Agency
• Bosphorus’ right to property (under ECHR) and Ireland’s obligations under EU Law
  • The question was if, and to what extent, the general interest of compliance with EC obligations could justify the State’s interference with Bosphorus’ property rights
  • Two major principles:
    • 1.- Neither the EU nor the EC can be sued before the ECHR.
    • 2.- Absolving contracting parties completely from ECHR responsibility in areas covered by transfer of power to international organizations would be incompatible with the purpose and object of the ECHR
  • Solution: “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights”
Bosphorus Case

- Equivalent protection doctrine: which level of protection?
  - "By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights’ protection.
  - "such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights».
- Has the ECtHR established a “two standard” level of protection of fundamental rights?

EU Level – UN Sanctions

- The fight against terrorism.
- Smart sanctions / targeted sanctions
- UN Security council resolutions and access to justice
  - Possibility to contest the sanction?
  - Guidelines (diplomatic protection)
- Yusuf / Kadi / Ayadi Cases
  - The CFI established a kind of equivalent protection doctrine, even when it recognizes the weaknesses of the access to justice right.
  - The ECJ has reversed this judgement in September 3rd 2008 (C-402/05 P)
Concluding Remarks

• Companies may profit any Fundamental right compatible with its nature
• Fundamental rights (especially) “fair trial” must be always taken into account in companies’ transnational litigation
• Companies' lawyers are major contributors to the development of this field which includes also the relationship between the different HR’ protection systems