8 Human Rights in the New European Union

The European Community, and now the European Union, has increasingly talked about rights, and more and more about human or fundamental rights. The more it has talked about these rights, the louder has been the surrounding criticism of its efforts. Most recently, it has been repeatedly suggested that the new Europe is not taking rights 'seriously' (Coppel & O’Neill, 1992). In this chapter, I want first to discuss the state of human rights in European law and to assess the veracity of these critiques. In the second section I then want to suggest some alternative approaches to human rights which might be more appropriate and perhaps more workable in the new Europe.

1 HUMAN RIGHTS IN TODAY'S EUROPE

There is no human rights basis to the Treaty framework, and it is this omission that lies at the root of any perceived inadequacies. The ambition of the Community has always remained firmly economic (cf. Frowein et al., 1986, pp. 231–4). The Rome Treaty was very much a product of its time and, despite some flowery rhetoric, human rights was never part of what Weiler terms the founding fathers’ ‘conception’ (Weiler, 1986, pp. 110–13). Since the first days of the Community, the nation-states have proved to be especially intransigent when it has come to renouncing their so-called ‘margin of appreciation’ in the area of human rights (Clap- ham, 1990, p. 311). This fact has led to two immediate conclusions. First, in the absence of any definitional guide, there is a considerable amount of confusion with regard to what a human right in the Community is. All sorts of things are bandied around as potential fundamental or human rights. Some commentators have suggested that administrative law rights, such as rights to a fair hearing, are fundamental human
rights (Schwarze, 1986). Numerous areas of social law, such as the much vaunted social dialogue, are frequently portrayed as human rights. Indeed, even the free movement rights are often presented as human rights. Thus the European Court's refusal to support the application of the Spanish fishermen to fish in certain waters was alleged to be a breach of their 'human rights' (Churchill & Foster, 1987, pp. 430–3).

Clearly, there needs to be some form of definitional realignment, otherwise the demarcation of fishing rights will be jurisprudentially indistinguishable in human rights terms from the worst forms of cruel and unusual punishment. The most popular distinction is made between 'fundamental' and merely 'aspirational' rights. In an influential essay, Koen Lenaerts has developed this distinction into a 'concentric circles' model for a 'catalogue' of fundamental rights protected in European law. There are four of these circles; first, those contained in the European Convention, second, those 'general principles of law' as articulated by the European Court on the basis of Article 164, third, those fundamental rights attached to Community citizenship, and fourth, those that are 'aspirational', into which are bundled social and economic rights (Lenaerts, 1991). Though certainly viable, I shall suggest in the second part of this chapter that such a demarcation remains firmly within an essentially modernist liberal philosophy of rights, and thus similarly trapped by all the tensions which such a discourse cannot resolve.

The second result of the absence of a human rights basis in the Treaty framework is that the evolution of a human rights jurisprudence is almost exclusively the work of the European Court. Although initially wary of overt promotion of human rights, the establishment of core constitutional principles, namely supremacy and direct effect, provided the impetus for the Court. Famously in 1969, in the Stauder case, it articulated a determination to protect 'the fundamental human rights enshrined in the general principles of Community law' (Stauder). The following year, in Internationale Handelsgesellschaft, the Court implicitly approved the Advocate-General's suggestion that such a jurisprudence was to be found in the 'philosophical, political and legal substratum common to the Member-States' (Internationale Handelsgesellschaft). The idea of constructing a human rights jurisprudence from