

ABSTRACTS

Social Rights and WTO Law

Is socio-economic Certification of Bioenergy compatible with International Trade Law?

By *Jochen von Bernstorff*, Heidelberg

The “move to bioenergy” has far reaching and world wide implications for the promotion and protection of a range of economic and social human rights. Replacing traditional food production by large scale biomass-production in third world countries not only affects rural land use, ownership structures and employment opportunities, it can also affect the availability of locally produced food in local communities. In order to mitigate negative repercussions of the “green gold rush”, private and public actors have considered introducing socio-economic certification measures (alongside ecological ones) regarding the production of bioenergy with the aim of restricting imports of bioenergy, the production process of which did not fulfil specific criteria. One of the central arguments in the political debate against the introduction of such certification measures is their perceived incompatibility with non-discrimination rules under international trade law. The paper, a more extended version of which served as a legal background document for the 2008 UN High Level Conference on Food Security, focuses on the human rights dimension of bioenergy production as a legal basis for certification schemes and analyzes in detail the claim of incompatibility of rights-based certification with WTO Law. It concludes that rights-based certification measures are in conformity with international trade law as long as they display certain legally required characteristics. The paper argues that an international co-operative effort regarding a joint certification standard based on universally accepted human rights standards as well as globally co-ordinated implementation activities would help to prevent the occurrence of trade related disputes over such measures. Measures taken on the basis of such universally agreed socio-economic standards for the production processes of bio-energy are unlikely to conflict with substantive provisions of the GATT and – in case of a conflict – are more likely to be saved from illegality as an authorized exception under Article XX GATT.

Opportunities and Challenges of a Soft Law track to Economic and Social Rights – The Case of the Voluntary Guidelines on the Right to Food

By *Marie von Engelhardt*, Geneva

Where a legal regime suffers from the stigma of ineffectiveness, the occurrence of soft law can pose an opportunity or challenge to existing standards. Soft law can complement hard

law by elaborating, operationalizing or developing its content – or it can occur as an alternative to hard law in place, threatening its gradual softening or demise.

Economic and social rights are established legal norms so widely disregarded in practice that the search for alternative routes to advancing implementation becomes a compelling task. The *Voluntary Guidelines on the Right to Food* constitute a pertinent case study to highlight both opportunities and challenges arising where soft law interacts with existing but ineffective economic and social rights. A set of non-binding policy recommendations adopted at the Food and Agricultural Organization in 2004, they are a promising approach to bridge the gap between abstract obligation and policy implication. Yet where states renegotiate the substance of assumed obligations, the extent of congruence between the Guidelines and the legal right to food must be analyzed to avoid that soft law renders voluntary what is already obligatory.

This article argues that soft law, more than mere policy tool or precursor to hard law, can lead to the spread or retrenchment of legalization. Where it is used to complement economic and social rights, it should be confronted with a reasonable combination of impartiality and caution. An analysis of the Right to Food Guidelines shows that only with an understanding of its possible normative impact can the potential of soft law to overcome the alleged weaknesses of socio-economic rights be fully grasped.

Socio –Economic Rights in India: Democracy Taking Roots

By *Uday Shankar / Divya Tyagi*, Kharagpur / Raipur

Civilization of a society scales upon realization of human rights. Human rights are inalienable rights of every individual. Every society constitutes certain principles to promote and protect human rights. After tyrannical rule of Britishers, the Indian society also adopted a new dispensation containing human rights. Human rights were distinguished in two categories; fundamental rights as justiciable and directive principles as non-justiciable in court of law. Fundamental rights were largely in the nature of civil and political rights whereas directive principles were in nature of socio-economic rights. The categorization was based upon Indian values and guided by struggle of independence. The judicial approach to non-enforceable rights raised serious doubts about commitment of legislature and executive in implementation of these rights. The judiciary started with negative note realized the importance of socio-economic right in humane development. However, judicial effort is to be viewed in the light of inherent limitations of the institution in ordering priorities based on budget and related factors. Therefore, a study is undertaken to examine the judicial approach in India and to suggest an establishment of suitable enforcement of institution to enforce socio-economic rights so that socio-economic rights need not take shelter of civil and political rights for their enforcement

What's the use of socio-economic rights in a constitution? – Taking a look at the South African experience

By *Mirja Trilsch*, Montreal

In the past, socio-economic rights have rarely been the subject matter of constitutional law. The Constitution of the Republic of South Africa has radically changed this. Not only does it feature a number of provisions guaranteeing enforceable socio-economic rights – such as the rights to have access to housing, health care, water and social security –, the country's Constitutional Court has also taken up the task of providing these rights with a workable methodology for judicial review.

The article will review the historical developments that led to the inclusion of socio-economic rights in the post-apartheid Constitution for South Africa, the normative structure of the relevant provisions and their interpretation by the Constitutional Court. Three landmark rulings have marked the South African socio-economic rights jurisprudence: *Soobramoney*, *Grootboom* and *Treatment Action Campaign*. A brief outline of these cases will serve as a basis for an assessment of the achievements as well as the drawbacks of this jurisprudence. It will be shown that while the methodology developed by the Constitutional Court is praiseworthy for its innovative force in rendering socio-economic rights justiciable, it is not entirely beyond reproach.

The so-called “test of reasonableness” is at the heart of the Court's approach to socio-economic rights and is footed in the limitations set by the Constitution for the positive obligations resulting from socio-economic rights. Unequivocally dismissing concerns about the non-justiciability of these rights, the Court uses the “test of reasonableness” to strike a balance between the doctrine of separation of powers and the constitutionally mandated review of governmental conduct in drafting social policy and legislation. It will be shown that in doing so, it has developed a practical set of criteria for reasonableness review. It has also let itself be inspired by international human rights law without however assuming all of its concepts in relation to economic, social and cultural rights. Finally, given the long-lasting lack of jurisprudence on the enforceability of socio-economic rights before *Soobramoney & Co.*, the burgeoning jurisprudence of the Constitutional Court has invited extensive comparative analysis on the subject matter of the constitutional protection of socio-economic rights.

The Jurisdiction of the Colombian Constitutional Court on Social Rights

By *Rodolfo Arango*, Bogotá

In this essay I would like to describe the role of the Colombian Constitutional Court in the realization of the social fundamental rights. Therefore I divided the article into three sections: First I refer on historical circumstances, which make possible the adoption of an ambitious fundamental rights catalogue and an extensive law system for its protection.

Afterwards I describe briefly the composition, functions and influence of the Colombian constitutional law system. In a third part the principal guidelines of the constitutional jurisprudence on social fundamental rights are to be summarized. This material could be useful in order to reflect over the political effect of constitutional activism per social rights from the perspective of „not well ordered societies“ like the Colombian, i.e. societies with high levels of social injustice and general malfunction of the social state.