

FUNDAMENTAL RIGHTS AND FUNDAMENTAL FREEDOMS: SHORT REMARKS

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I. Introduction

The purpose of this contribution is to describe a problem that may be viewed as a new phenomenon contained in the draft of the European Constitution (“Draft Constitution”). This new phenomenon may be seen in the change of the status of fundamental rights and the resulting change in their relationship to the fundamental market freedoms. It may appear as though – and this is the case not only in the field of the fundamental freedoms, but also in other fields of law such as private law¹ – fundamental human rights force out and substitute the general protection of individuals, or at least that these specific sectors of law (including the fundamental freedoms) become a mere instrument of fundamental human rights.

This problem not only shows an increase in the importance of fundamental human rights within Community law, but may also be seen as a particular part of a much broader phenomenon. The influence of fundamental human rights can be found in many legal sectors both at the international and the national level.²

In this contribution it has been assumed that the Draft Constitution will become the formal source of European Union primary law, but no attention is paid to the provisions of Articles 51 and 53 in the Charter of Fundamental Rights and Articles 111 and 113 of the Draft Constitution, which address the level of protection of human rights and the relationship to the Convention on Fundamental Human Rights and Freedoms and to human rights protection at the national level.

II. Status of fundamental rights prior to the Constitution

One characteristic feature is beyond doubt. Since the creation of the European Community there has been a marked shift in the status of human rights. In terms of their general importance, there has certainly been a growth of the significance of

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1 For an example which illustrates a very strong tendency see the discussion in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law*, Oxford, 2001.

2 On the influence of the ECHR on national private law, see the contributions of R. Ellger, F. Ferrand, G.-R. de Groot, W. Pintens and M. Roth, in *Rabelz*, 1999, vol.63, p.625-748.

human rights since 1958. In comparison, however, the change in the significance of fundamental human rights in the framework of Community law is of an entirely fundamental character. The creators of the founding Treaties did not mention this institution in the primary law, nor did they have it in mind. They were chiefly concerned with the creation of a common market as the economic basis for achieving the aims of the EC Treaty. The market citizen was viewed as a homo economicus.³ The appearance of human rights was aided (and certainly under the influence of national development) by the European Court of Justice, on the basis of its own creative activity without it being expressly empowered to do so.⁴ As a consequence of this continued beneficial judicial activism, human rights began to infiltrate the entire organism of Community law. Now they are being formally placed at the center of the European Constitution.

Up to now fundamental freedoms and fundamental rights have been understood as separate categories of subjective rights both from the point of view of terminology and content. Fundamental freedoms have constituted economic rights inside the European Community against unauthorized restriction mainly on the part of the Member States. Fundamental rights have represented legal principles developed by the European Court of Justice to protect individuals against interventions by the Community.⁵ Despite there being certain parallels between their functioning, it has been understood that they differ from each other both in terms of function and primary addressees.

III. Recent change in the status and significance of fundamental rights

The argument of an immense increase of the importance of (Union/Community) fundamental rights and the above mentioned change in the character of the relationship between fundamental human rights and the other fields of law, including fundamental freedoms, may have received new impetus by the establishment of the Charter of Fundamental Rights of the European Union and its inclusion as the second chapter of the Draft Constitution.

The features which may constitute the new quality of the fundamental human rights may be summed up as follows:

- 3 See N. Reich, Schutz und Förderung diffuser Interessen durch die Europäische Gemeinschaft, 1989, p.58; Alston/Weiler, Human Rights Agenda For the European Union for the Year 2000, in: Alston (ed.), The EU and Human Rights, 1999, p.7; von Bogdandy, Grundrechtsgemeinschaft als Intergrationsziel?, JZ, p.167.
- 4 See a short overview in A.Weber, Die Grundrechte im Integrationsprozess der Gemeinschaft in vergleichender Perspektive, JZ 1989, p.965.
- 5 E.g. H.-W. Rengeling, Grundschutz in der Europäischen Gemeinschaft, 1993, p.14,15.

- a) The Constitution gives fundamental rights a constitutional framework. The consequence of this is, firstly, that fundamental rights become an immanent part of primary law. This differs significantly from the status to date with the fundamental rights being the least autonomous part of Community law. They have been influenced both by international and national laws.⁶ Secondly, the inclusion of fundamental rights into the Draft Constitution entails their application to the entire legal order of the Community.
- b) The formal status of fundamental rights is being changed. They are becoming a second part of the Draft Constitution and they precede the regulation of the fundamental freedoms, which are contained in the provisions governing the internal market in the third part of the Draft Constitution. Fundamental rights thus represent a significant contribution to the anthropocentric understanding of law.⁷
- c) The content and structure of the fundamental rights are undergoing a substantial change. Significant economic and social rights are coming into play, which are an important contribution of the Charter to the catalogue of fundamental rights that have not, as of yet, been developed by the European Court of Justice.
- d) Fundamental rights include all fields in which an individual may be active, predominantly including the internal market. The catalogue of human rights contains, for the first time on this level, fundamental legal duties and tasks (contained only e.g. in the European Social Charter) and de facto also rights of satisfaction of basic needs.

IV. Influence of fundamental freedoms on the internal market, primarily on fundamental rights

Fundamental human rights influence the development of the entire legal order of the Community. Their influence was even felt in the field of fundamental freedoms long before the Charter of Fundamental Rights was adopted. Therefore, the question is often raised as to what degree this involves market freedoms and to what degree even this field has transformed into a kind of offshoot of fundamental rights. The decisions of the European Court of Justice in the matter of Kreil and Sirdar⁸ provide a marked example of this influence.

Despite this, human rights did not absorb fundamental (market) freedoms, although the latter can be regarded – to some extent – as special forms of the former.

6 E.g. among many Lenaerts, *Fundamental rights in the European Union*, *European Law Review*, 2000, p. 580 passim, rightly pointing out the possible divergences between the case law developed by the Community courts and that of the European Court of Human Rights.

7 See F.C.Mayer, *La charte européenne des droits fondamentaux et la constitution européenne*, *RTDE* 2003, p.175, passim.

8 See cases C-285/98 and C-273/97.

For example, the fundamental freedoms as prohibitions of discrimination may be considered as instruments of the equality (equal treatment) principle.⁹

While human rights are on the rise, the function of the fundamental market freedoms is heading primarily towards maintaining the standard of functioning of the internal market.

The functions of fundamental freedoms mainly consisted in the basic integrative-conceptual contribution to the creation of the internal market.

These changes are the grist to the mill of the case law of the European Court of Justice, which has also to date already interpreted a number of provisions of secondary law as well as legal rules containing fundamental rights (see e.g. Razzouk¹⁰ in Directive 76/207). Equal treatment of women and men, the prohibition of discrimination, but also the legal regulation regarding Community asylum and refugees are currently only a part of fundamental rights regulation.

V. Analytical remarks on the relationship between fundamental rights and fundamental freedoms

Fundamental rights and fundamental freedoms have different legal basis, purpose and methods of enforcement.¹¹ Fundamental rights protect individuals against interventions primarily by the Communities, but also by the Member States. Community fundamental rights were only developed during the existence of the Communities in the case law of the European Court of Justice. Only in the future may they become a part of formal primary law as a result of the reception of the Charter of Fundamental Rights into the European Constitution. Fundamental freedoms - on the other hand - are the basic instrument to create and implement the common market. They have been one of the basic legal tools within the primary law from the very beginning of the Communities. However, they are not a purpose in of themselves as is the case with fundamental human rights, but only a means. In particular, they serve against measures of the Member States.¹²

The orientation of both groups of instruments is different. Fundamental human rights are aimed at enforcing common interests and are secured by institutional guarantees. Fundamental freedoms serve individual interests and are secured by individual guarantees.

To a certain degree it is possible to infer the basis of fundamental freedoms from fundamental rights. Free movement of goods then may be considered as the use of

9 See Ehlers in Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 2003, p.323.

10 See case 79/94 *Razzouk v. Germany*.

11 See Müller-Graff, *Grundfreiheiten und Gemeinschaftsrechte*, in: Cremer et al. (eds), *Festschrift für H. Steinberger*, 2002, p. 1285f. Frenz, *Grundfreiheiten und Grundrechte*, *EuR* 2002, p. 603f.

12 Finding based on the case law of the ECJ on Art. 28ff E.C.

the ownership right. Free movement of persons may, to a large degree, result from the right of assembly. Nevertheless, the two instruments differ in their purpose, as stated above.¹³ Therefore, fundamental human rights may represent certain limits in the enforcement of fundamental freedoms.¹⁴

For reasons mentioned above they may overlap in their purpose. Prohibition of discrimination is a part and content of the fundamental freedoms, but is also simultaneously an expression of the fundamental right to equality.

Since fundamental rights and fundamental freedoms have different mechanisms of enforcement, they also have different measurements of enforcement,¹⁵ or, as the case may be, the determination of deviations from a standard and thus from the fulfillment of obligations.

There is no doubt that the enforcement of both fundamental rights and fundamental freedoms may cause conflict. In resolving such conflicts it is necessary to take into consideration the degree of involvement of both these principles in a given case. It cannot be said that one regulation should unambiguously prevail over the other, except for the core of the fundamental rights, which may form the basic limits in the enforcement of fundamental freedoms.

VI. Importance of fundamental rights vis-a-vis other fields of law including fundamental freedoms

Fundamental human rights partly have their own significance and partly overlap with other legal areas, including the regulation of fundamental freedoms.

As they form a part of the objectives of the Communities, they have no special status. Moreover, the mode of enforcement is typical of them. However, they cannot replace the specific regulation of individual legal domains. Similarly, due to the specificity of the regulation of fundamental freedoms, they cannot replace or displace the fundamental freedoms.

In reality, fundamental human rights infiltrate all areas - they influence them, create certain limits and represent a certain *ultima ratio*, i.e. the last instrument of legal protection if specific instruments are unable to provide adequate and efficient protection.¹⁶

13 Not quite precisely Frenz, op.cit. supra, p.606.

14 See Frenz, op.cit. supra, p. 608.

15 Schindler, Die Kollision von Grundfreiheiten und Gemeinschaftsgrundrechten; Entwurf eines Kollisionsmodells unter Zusammenführung der Schutzpflichten und der Drittwirkungslehre, 2001, p.165f.

16 See case C-265/95 Commission v. France, and comments of Müller-Graff op. cit. supra, p.1296, 1297.

VII. Resolution of conflicts

The area of conflict between fundamental rights and fundamental freedoms constitutes a special issue.

This problem, in its current form, needs to be addressed in similar way as the problem of conflict between individual fundamental rights. A concrete example of such conflict is provided by the realistic situation of a confrontation between demonstrators for the preservation and protection of the environment and demonstrators for a free market, i.e. freedom of movement of goods and labor. Such a conflict may occur during the construction of a highway between two Member States, where, on the one hand, the highway represents a means of implementing fundamental market freedoms, while on the other it constitutes one of the main sources of environment pollution.¹⁷

It can hardly be concluded – if the fundamental human rights and fundamental freedoms are conflicting – that the former prevail or generally should have the upper hand. Such a rule cannot be established. The situation is much more complicated, but as a general rule, it should be held as there not being a general primacy of fundamental human rights over the fundamental freedoms.

Basically it depends on the involvement of each of the two conflicting sets of rules in a given case. Only if the involvement (or the extent of involvement) is the same, will fundamental human rights prevail over the fundamental freedoms.

VIII. Conclusions

- a) In relation to fundamental freedoms, fundamental human rights play a similar role vis-à-vis other areas of Community law.
- b) The status of fundamental human rights transforms, strengthens and formally fortifies. An expression of another change is the inclusion of the Charter of Fundamental Human Rights as a part of the European Constitution.
- c) Fundamental human rights infiltrate all areas of the common market as well as influence and modify the fundamental freedoms. They create their framework.
- d) However, fundamental human rights can neither displace the specific regulation, including the regulation of fundamental freedoms, nor can they replace the fundamental freedoms regardless of how they determine their content.
- e) In resolving any conflict between the fundamental freedoms and funda-

¹⁷ See indirectly Müller-Graff, *op.cit. supra*, p. 1281 *passim*, Schindler, *op. cit. supra*, especially 145 and *passim* and W. Frenz, *op. cit. supra*, p.604 *passim*.

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mental rights it is necessary to take into consideration the purposes of both these instruments and to evaluate them in accordance with the interests in any particular case.

- f) Fundamental human rights remain a basic rule, a norm, as well as a purpose, i.e. a basic principle that is, however, also directly applied as an *ultima ratio* in the case of fundamental freedoms.