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Human Rights as a Basis for Reevaluating and Reconstructing the Law

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WHAT MAKES FUNDAMENTAL RIGHTS FUNDAMENTAL?

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Let me say from the start that I have not hesitated very long before accepting the invitation to speak at this conference, one of the reasons for doing so being that I simply find its general title fascinating: "Human Rights as a basis for reevaluating and reconstructing the law". This prompted me to address in my own contribution the question of what should make human rights capable of "reevaluating and reconstructing the law". In other words, what tells you that human rights are capable of doing this? And what are the requirements for human rights to be capable of doing this? In other words still: what is it which makes human rights capable of reevaluating and reconstructing the law? Actually, all these questions boil down to one basic question: "What makes fundamental rights fundamental?", the reference to fundamental rights being understood here as including human rights, which indeed form a special category of fundamental rights to which I will revert in a few moments.

In this presentation I would like to share two ideas with you. Firstly, the fundamental nature of fundamental rights is made of three different elements: their role, their content and their effects. These three elements will also provide the structure of my presentation. Secondly, each of these elements is under threat, which calls for an increased vigilance in protecting them.

(1) Text presented on 29 May 2015 (Louvain-la-Neuve). Any opinions expressed are strictly personal. The oral style of the presentation has been maintained for the most part. However, the text has been updated as at 1 November 2015 and complemented with some footnotes.

A. – The Role of Fundamental Rights

When I look at the general title of this conference, I can only think that to expect human rights to provide the basis on which to reevaluate and reconstruct the law is assigning them a very high task. And indeed the subject matter of many of your research and PhD projects – the list of which I examined carefully – confirms the high expectations that seem to be placed in human rights, in many different legal areas. What those subject-matters have in common is an idea that seems on the rise and ever more accepted in modern legal theory, *i.e.* the idea that fundamental rights are a kind of founding and validating principle, that they are at the very foundation of any democratic legal system and that, as a consequence, every part of that legal system has to past the test of fundamental rights in order to be considered valid. In other words, fundamental rights seem to be ever more perceived as one of the basic benchmarks of every democratic legal system.

Maybe this idea has been best expressed so far by the CJEU in a number of its recent judgments, notably in its recent Opinion 2/13: "Respect for the fundamental rights enshrined in the EU-Charter are a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU". (2) A concrete illustration of this approach can be found in the recent ruling by the CJEU in the case of *Digital Rights* declaring the Directive on data retention (3) to be invalid for breach of the right to respect for private life and to the protection of personal data (Art. 7 and 8 EU-Charter). (4)

But also in national constitutional law, fundamental rights are increasingly seen as a pre-condition for the validity of any action by public authorities, including the law-maker. They are the test which any such action has to pass in order for it to be acceptable, *i.e.* validated and legitimized. This is indeed an additional task being assigned to fundamental rights in modern legal theory, next

(2) CJEU, 18 December 2014, Op. 2/13 on the draft agreement providing for the accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms, § 169. *See* also CJEU, 3 September 2008, *Kadi and Others*, C-402/05 P and C-415/05 P, § 284.

(3) Dir. 2006/24 of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

(4) CJEU, 8 April 2014, *Digital Rights Ireland Ltd and Seitlinger and Others*, joined cases C-293/12 and C-594/12.

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to protecting the individuals: to validate and legitimize State action which is compliant with them and to correct action which is not. National Constitutions – especially the younger ones – also bear the marks of this development. Probably the strongest acknowledgment of this foundational role of fundamental rights is to be found in the German Basic Law which, in a very symbolic way, places fundamental rights on top of all other provisions and refers, in its Article 1, to the "inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world". (5) The Constitution of the Netherlands has a similar opening: its first Chapter is about fundamental rights and its first Article is about non-discrimination. And the Swiss Constitution, for its part, states in its Article 35: "Fundamental rights must be upheld throughout the legal system. Whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation". (6)

If one asks what could be the explanation for this trend, the answer appears quite simple. It indeed looks like fundamental rights today are increasingly expected in modern democracies to help ensure that the human person remains at the heart of every legal system and of every single State action. The role of fundamental rights is no longer confined to occasionally protecting individuals against State action. It now also covers screening the law as such, most often through constitutional remedies but also via preventive mechanisms, in order to ensure its compatibility with fundamental rights in general. The reason for this could well be a kind of perception that without such a requirement of general compliance with fundamental rights, modern law risks losing part of its humanity, because it is too technocratic, too complex, too efficiency- or system-oriented, or indeed too much the work of powerful lobbies. In short, fundamental rights help preserve the humanity of the law.

However, if this is the role assigned to fundamental rights, they should also be given the means to fulfil it. This brings me to the

(5) "Das Deutsche Volk bekennt sich [...] zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt" (Art. 1, § 2, of the German Basic Law).

(6) "Les droits fondamentaux doivent être réalisés dans l'ensemble de l'ordre juridique. Quiconque assume une tâche de l'État est tenu de respecter les droits fondamentaux et de contribuer à leur réalisation" (Art. 35, §§ 1 and 2, of the Federal Constitution of the Swiss Confederation).

question of the content and the effects of fundamental rights, the two other criteria defining those rights.

B. – The Content of Fundamental Rights

The trouble with the content of fundamental rights is the great variety of such rights and the fact that their content is not always harmonized. This is the result of a certain inflation in the number of legal instruments protecting fundamental rights, especially at European and international level. One of the worst examples in this respect is the *non bis in idem* principle which is laid down, with varying formulations, in a long series of different international legal instruments. (7) Only in EU law there are not less than three different versions of it, depending on the area to which it applies. (8)

Thus, the question arising here is whether all these rights are really – and equally – fundamental? If so, why? What is it which makes them fundamental? What exactly are we talking about when we refer to fundamental rights and human rights? Surprisingly, in constitutional legal literature or jurisprudence not much is to be found on the question why some rights – as opposed to others – are to be considered fundamental; or on the difference, in terms of substance, between ordinary and fundamental rights. And when this issue is addressed, most often you get a positivistic answer to the effect that fundamental rights are those rights which are conferred this status by law or by the Constitution. However, the choice of the law-maker in this respect is hardly ever questioned, let alone challenged. At most, there is a discussion about whether

(7) By way of example, *see* among the Conventions adopted within the Council of Europe: the European Convention on Extradition (Art. 9), the Additional Protocol to the European Convention on Extradition (Art. 2), the European Convention on the Punishment of Road Traffic Offences (Art. 8-9), the European Convention on the Transfer of Proceedings in Criminal Matters (Art. 35-37), the Convention on the Transfer of Sentenced Persons (Art. 8), the European Convention on Offences relating to Cultural Property (Art. 17), the Agreement on illicit traffic by sea (Art. 2, 3, 14), the Convention on Action against Trafficking in Human Beings (Art. 31), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Art. 28).

(8) On this, *see* J. CALLEWAERT, "The European Convention on Human Rights and European Union Law: a Long Way to Harmony", *Eur. Hum. Rts L. Rev.*, 2009, pp. 779 and ff.; Adv. Gen. J. KOKOTT, Opinion in the case of *Toshiba Corporation and Others*, CJEU, C-17/10, § 117.

some rights are justiciable or not. (9) By contrast, the question why certain rights are to be considered fundamental is the subject of much more attention when international fundamental rights are concerned. (10)

This is not satisfactory. For if the answer is only that fundamental rights are those rights which are declared such by the law or the Constitution of a given country, this would entail a number of questionable consequences. Firstly, the effects of the fundamental nature thus conferred on those rights would in principle be limited to the country concerned. Secondly, this nature would be entirely left in the hands of the national law-makers. Moreover, those law-makers would be free to confer this status to any kind of right, even such rights which do not call for this status, and conversely could deny this status to rights which obviously warrant it. Finally, the overall picture concerning fundamental rights would vary from country to country. One immediately feels that this cannot be right, that beyond those 'national' fundamental rights, there are also rights which somehow impose themselves on a larger scale as fundamental, because they correspond to essential and rather universal needs or aspirations of every human being: the right to life, to dignity, to respect for private and family life, to freedom of thought, of religion, of expression, to mention but a few. Those rights, given their international and indeed sometimes universal dimension, can rightly be called human rights, because they largely correspond to something which is common to all human beings. As a consequence, they should not be left entirely in the hands of national law-makers.

Thus, by their very nature, these fundamental rights presenting a kind of universal dimension, a dimension which transcends national categories and boundaries, call for an international protection, as a complement to their protection at national level, for a double reason: in order for their universal nature to be properly acknowledged and for them to be better protected, *i.e.* prevented from being left in the hands of national authorities who could give them all sorts of different contents, thereby weakening them by ig-

(9) *Mutatis mutandis*, a similar discussion is still on-going on the relationship between the rights and the principles laid down in the EU-Charter of Fundamental Rights. On this, *see* Art. 52, § 5, of the Charter and the explanations given by Adv. Gen. MENGOZZI in his Opinion in the *Melchior* case, C-647/13, § 60.

(10) *See* e.g. C.R. BEITZ, *The Idea of Human Rights*, New York, OUP, 2009

noring their universal dimension. A good but sad example of what national law-makers can do with such universal rights are the current attempts in Hungary to reintroduce the death penalty.

However, at international level too, we have to be careful, because of the inflation of legal instruments containing different versions of the same rights. Provided some sort of harmony is maintained between those instruments, so as to preserve legal certainty, international protection of fundamental rights enhances their impact. If, however, this is not the case, international protection only creates more confusion and, ultimately, weakens fundamental rights. A particular challenge in this respect is the relationship between the European Convention on Human Rights ('the Convention') and EU law. The directives on defense rights in criminal proceedings – with, as the most recent example, the Directive on the right to access to a lawyer (11) – provide a good illustration of the problems arising on this score. Next to some provisions which extend the protection currently provided by the Convention, this Directive also contains other provisions obviously intended to weaken the requirements of Article 6 of the Convention, notably by expanding the scope of a few marginal exceptions allowed in the Strasbourg case-law. A fair amount of confusion as to the applicable standards in this area seems therefore inevitable. (12)

C. – The Effects of Fundamental Rights

Compliance with fundamental rights is not only about giving them a proper content. It also requires that they be given the effects which are inherent in their specific nature, by regulating their relationship to other, non-fundamental rights. Remember what I said earlier on: fundamental rights have a foundational role, *i.e.* they legitimize the functioning of the legal and political systems to which they belong by validating State action which is compliant with them and correcting State action which is not. (13)

(11) Dir 2013/48 of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

(12) On this, *see* J CALLEWAERT, "To accede or not to accede· European protection of fundamental rights at the crossroads", *Eur J Hum Rts*, 2014, pp 500 and ff

(13) L MICHAEL and M MORLOK, *Grundrechte*, Baden-Baden, Nomos, 3rd ed , 2012, p 34

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All of this, however, can only work if fundamental rights are the higher norm against which the others are tested, as only higher norms or values can have the authority capable of producing a legitimizing effect. Moreover, without this higher authority, *i.e.* a higher rank in the hierarchy of norms, fundamental rights could not prevail and allow the setting aside of any other norm or action not compliant with them.

One could indeed ask the question why some rights are called 'fundamental', if not for the purpose of conferring on them specific *effects* by reason of their specific *content*? It is because of the essential importance of some specific legal interests that the rights protecting them are called 'fundamental' and, as a consequence, are given effects which normally trump those of 'ordinary' rights, without therefore necessarily becoming absolute rights. Thus, the very notion of 'fundamental rights' appears to be based on a clear link between the importance of some legal interests worth being protected in a more 'fundamental' way, the specific 'fundamental' nature of the rights protecting those legal interests and the effects of those rights, including their scope and rank in the hierarchy of norms of the legal system concerned. Any attempt to break up this logical link would only weaken fundamental rights as it would render meaningless, by comparison with 'ordinary' rights, the reference to their specific fundamental nature, in the absence of any added value linked to that denomination. In short, it does not make sense to call a right 'fundamental' without ensuring, by reason of its content and importance, its prevalence over other non-fundamental rights.

In practice, while national fundamental rights are quite naturally considered the higher norm by the domestic courts applying them, the picture is a mixed one as far as international fundamental rights are concerned. (14) Interestingly, we also seem to have a new kind of problem in this respect with the EU, which could also have an impact on national legal systems, especially in the Mem-

(14) Whereas the Contracting Parties to the Convention adopt a variety of different approaches as regards the rank of the Convention in the hierarchy of norms, the European Court of Human Rights has made it clear that Art. 1 of the Convention makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention. It is, therefore, with respect to their 'jurisdiction' as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention (ECHR, 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, 19392/92, § 29).

ber States. It was already emerging from some parts of the CJEU case-law but it has now received a kind of formal confirmation in Opinion 2/13. In this Opinion, the CJEU states that "respect for the fundamental rights enshrined in the EU-Charter are a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU". (15) The CJEU then immediately goes on to qualify this statement by considering, in essence, that fundamental rights must be interpreted and applied in accordance with the EU constitutional framework and notably the objectives being pursued by the EU, which include the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and the competition policy. (16)

The question arising here is whether these two statements are compatible with each other. Is it compatible to say, on the one hand, that respect for fundamental rights is a condition of the lawfulness of EU acts and, on the other, that fundamental rights should be interpreted in accordance with the pre-established constitutional framework which includes the structure and the objectives of the EU? As if the setting of objectives was not itself also an act the lawfulness of which has to be tested against fundamental rights. How can objectives limit the effects of the same fundamental rights which should legitimise them? Could we imagine a State arguing in Strasbourg that fundamental rights apply to it only to the extent that they permit certain economic or political objectives to be achieved? In other words, if fundamental rights are a condition of the lawfulness of EU-law, if they are to legitimize EU law, they are also to be considered the higher norm and should not be capable of being limited by the very norms or instruments that they are to legitimize. Otherwise the approach is circular: a lower norm limiting the effects of the higher norm which itself is called on to validate the lower norm. How can this be right? Ultimately, it all comes down to asking whether fundamental rights are to be adapted to objectives or objectives to fundamental rights. (17)

(15) Op. 2/13, § 169.

(16) Op. 2/13, §§ 170-172. A similar idea was expressed already in CJEU, 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70 but in this judgment fundamental rights were not presented as a condition of the lawfulness of Community law.

(17) In the same sense, *see* W. WEISS, "The EU Human Rights Regime Post-Lisbon: Turning the CJEU into a Human Rights Court?", in *Fundamental Rights in the EU – A Matter for Two Courts* (J. MORANO-FOADI and L. VICKERS dir.), Oxford/Portland, Hart, 2015, p. 69, sp. pp. 83 and ff.

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(18) Op. 2/13, §§ 19

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(20) CJEU, 1 July

(21) *N.S. & M.E.*, §

As a consequence of this approach advocated by the CJEU, the impact of fundamental rights under EU law can be limited for the sake of preserving the efficiency of some mechanisms considered to be essential for the achievement of the objectives thus mentioned. And indeed this is what seems to be happening in an increasing number of areas. In the area of mutual recognition, for instance, judges in an executing Member State are denied the competence, including under the Convention, to assess respect for the fundamental rights of the person concerned in the requesting State, save in exceptional circumstances. (18) This can result in the level of protection of fundamental rights being significantly reduced. Under the Dublin-Regulation, for instance, only very serious *systemic* flaws in the asylum procedure and accommodation of asylum seekers in the Member State competent to process their application can render their transfer to that Member State incompatible with Article 4 of the Charter prohibiting ill-treatment. (19) And in matters concerning international child abductions falling under the Brussels II*bis* Regulation, the Courts of the requested State are denied the competence to assess whether the child's return could give rise to a breach of his fundamental rights, regardless of the circumstances. (20)

As mentioned above, the rationale underlying this approach is the preservation of the efficiency of mutual recognition. Thus, in *N.S.*, the CJEU stated: "It cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No. 343/2003. At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights". (21) This, however, amounts to gradually replacing the *individual*

(18) Op. 2/13, §§ 191-194.

(19) CJEU, 21 December 2011, *N.S. & M.E.*, C 411/10 and C 493/10, 10 December 2013, *Abdullahi*, C-394/12. The systemic flaws test now features in Art. 3, § 2, of the Dublin III-Regulation (Regul. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person).

(20) CJEU, 1 July 2010, *Povse*, C-211/10 PPU.

(21) *N.S. & M.E.*, §§ 82-83.

scrutiny of fundamental rights with a kind of *collective* scrutiny, at variance with the basic principles of the Convention. (22) Out of the same concern but in a different field, the CJEU stated in the *Radu* case: "The European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system". (23)

In sum, increased reliance is being placed on the need to limit or indeed suspend the effects of fundamental rights for the sake of preserving the efficiency of certain mechanisms, notably in the field of mutual recognition. Efficiency is certainly a legitimate concern but the question is to what extent such considerations can be allowed to limit the effects of fundamental rights. It is certainly true that under the Convention, fundamental rights are not absolute either: they can be restricted for a limited number of legitimate aims, if those restrictions, considered on a case-by-case basis, are proportionate. However, another methodology is being applied here by the CJUE whereby fundamental rights are being balanced against the efficiency of a number of mechanisms considered to be of the same importance as respect for fundamental rights, despite the foundational role of the latter. It comes down to asking how to preserve the system from the effects of fundamental rights rather than how to preserve fundamental rights from the effects of the system.

This approach entails a clear risk of instrumentalization of fundamental rights. As noted above, fundamental rights fulfil a double – legitimizing and correcting – function. They are two sides of the same coin: it is because of their correcting effect that fundamental rights can also have a legitimizing effect. Only what could have been corrected but was left uncorrected ends up being legitimized. (24) Yet in the field of mutual recognition the legitimizing effects of fundamental rights are being relied upon to their full extent, while their correcting effects are being restricted so as to not

(22) ECHR 21 January 2011, *M S S v Belgium and Greece*, 30696/09, ECHR, 4 November 2014, *Tarakhel v Switzerland*, 29217/12. Critical of this approach V. MITSILEGAS, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", *Yearbook of Eur. L.*, 31, 2012, p. 319.

(23) *Radu*, cited above, § 41.

(24) *See* already Beaumarchais' Figaro saying "Sans la liberté de blâmer, il n'est point d'eloge flatteur" ("There can't be flattering praise without the liberty to blame").

disrupt the efficiency of the mutual recognition mechanisms. This kind of cherry-picking has the potential of seriously weakening fundamental rights. For the more fundamental rights are relied upon for their legitimizing effect but at the same time deprived of their correcting effect, the more they find themselves reduced to mere propaganda. The danger with this trend is that it might easily spread further across EU law, as a tempting and convenient way to deal with fundamental rights when they appear to stand in the way of any other objective considered worth achieving. Where will that stop? Today it is mutual recognition and to some extent also the return directive. (25) What will be next? Has a Pandora's box been opened here? (26)

We should not forget what Advocate General Cruz Villalon said in one of his opinions: "Although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area". (27)

Conclusion

At the beginning of this presentation I referred to two main ideas. Firstly, the fundamental nature of fundamental rights is made of three different elements: their role, their content and their effects. Secondly, each of these elements is under threat. I can now add a third and final one: in order to be able to protect individuals and "to reevaluate and reconstruct the law", as the title of this conference rightly suggests they should do, fundamental rights themselves need protection, namely protection of their fundamental nature.

(25) Dir. 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. As an example of this approach in the application of this directive, *see* CJEU, 10 September 2013, *M.G. and N.R.*, C-383/13 PPU and, by contrast, the view delivered by Adv. Gen. WATHELET at § 57. On this judgment, *see* J. CALLEWAERT, "To accede or not to accede", *op. cit.*,pp. 506 and ff.

(26) *See*, as a recent example of how this trend could spread, Adv. Gen. BOT suggesting in his opinion in Schrems (C-362/14) that the 'systemic flaws' test used in *N.S.* (see above) be applied when assessing, pursuant to Dir. 95/46, the level of protection of personal data in third countries to which such data are to be transferred (§§ 101-105).

(27) Op. in *I.B.*, C-306/09, § 43.