Helsinki, 7th March 2013

Panel "Individual versus collective human rights"

Points for discussion

raised by Revd. Patrick Roger Schnabel

I would like to single out three aspects that have been dealt with in the two previous interventions and offer some comments on them, which can then be taken up for the discussion between you and us panellists. The three aspects are: 1.) the definition of the term "human rights" and "fundamental rights", 2.) the applicability of such rights to groups and corporations of people, and 3.) collisions of individual and collective/corporate fundamental rights.

1.) DEFINITION of the term „human rights"

- Are there "three generations" of human rights?

Dr. Peter Krömer has just described to us the development from the classic freedom rights, i.e. the fundamental rights of the so called "first generation" to the "second generation" of civil and political rights and then to "third generation" of social and cultural rights. These two new forms of human rights have also been enshrined in UN-Covenants. The terminology of successive generations suggests that these rights belong to the same category of international norms, demanding "equal" protection.

However, I would like to challenge the concept of the comparability or even equality of these different categories of rights. I know that this is provocative, especially for human rights activists. But I am convinced that differentiation is necessary and serves the purpose of a high level of protection of fundamental rights. Let me explain why:

My key question is: Is every *right* a human being should have also a *human right*? – In my understanding there are crucial differences between the "first generation", the classic fundamental rights, on the one hand, and the "second and third generations" on the other.

The first difference refers to what is protected by the right in question. The first generation are "freedom rights". They assert a sphere of personal freedom from state intervention. In a wider context state intervention should be understood as any interference in the protected zone by means of public, i.e. sovereign power. This may be vested in state authorities proper, but also in other bodies, acting on behalf and by the means of such authorities.

The nature of protection lies in abstention. The state does not use its sovereign power to interfere. In a modern understanding, he does not grant, but guarantee a sphere of freedom whereto its powers do not stretch. If it does cross the boundaries, this intervention needs to be covered by law, necessary and proportionate.

The second and third generation rights cannot be guaranteed by abstaining from an abuse of power. They require active action on behalf of the state. Obviously, this is very schematic. Also the protection of first generation fundamental rights does require some activity on the side of the state, be it only the establishment of procedures and institutions to ensure their enforceability. Modern interpretation and judicature also deducts more extensive rights of protective measures, not only over against the state itself, but also against other – social – power structures (i.e. in private relationships characterised by heavy dependence of one party on the other, like in employment). But these remarks do not compromise the more general fact, that first generation rights are defensive in character, ensure a sphere free of state intervention, whereas the second and third generation go far beyond personal freedom, but relate to living conditions. To simplify again, the first are about freedom, the core of personal identity, while the others are about physical wellbeing. It is obvious, that the latter does require much more action from the state.

This leads straight to my second point: Judicial enforceability. We must expect any state to guarantee the core of every fundamental right under any circumstances whatsoever. The level of protection is very high. The limits of interference might be different between legal orders or be shifted within one legal order, but the essence of the right must invariably be guaranteed in a meaningful way. This includes that they must, without exemption, be judicially enforceable. A right that cannot be invoked, claimed and enforced is empty and meaningless. The means of realisation of this requirement is the law. All fundamental rights are enshrined in constitutional and organic binding laws, including procedural norms for their enforcement.

Second and third generation rights do not have and cannot have the same anchoring in the legal order. The state can be expected to guarantee my right to freedom of expression, freedom of religion and belief, or to equal treatment before the law. But can it be expected to guarantee every single person a job?

Obviously, some civil and political, but also social and cultural rights are intimately connected to some of the fundamental rights. A certain level of protection can already be the outflow of an effective implementation of the latter. But again, this does not compromise the general fact that the former have for very good reasons already taken the form of enforceable laws, many of the latter the form of a political programme. Many ought to be implemented in the law, but the means of realisation of many will lie in the political sphere rather than in the legal. In order to become laws, a number of preconditions must be met that does not depend on political will alone.

And finally I would like to draw attention to an issue which I believe to be of the utmost importance. If we were to expect “equal” protection of all these rights, with their different character, what would the consequences be regarding the level of protection? There is a very real danger, that states might be tempted to lower the level of protection of fundamental rights to that of the other categories of rights. Their special “sacredness” might easily be jeopardised. Just imagine, one were to take the state’s ability to provide work for everyone as the measure for his duty to guarantee our rights to freedom and equality. It is pure realism that demands different levels of protection and different means to achieve the aim. We must not politicise the legal and juridisice the political.

Please do not misunderstand me. I do not say that the second and third generation rights are not important rights for humanity. They are important goals for politics and for the state. They need to be implemented. Many have a very direct nexus to human dignity. Most are necessary for a free, democratic and just society. All deserve our commitment. But they are not all of the same category, and they cannot all be implemented and protected in the same way, by the same means and to the same extend.

2.) APPLICABILITY of human rights to groups

- Are there individual, collective and corporate human rights?

Historically and from a very strict systematic point of view, the starting point of every fundamental right is the human person, i.e. the individual. Fundamental rights were developed as the fence by which the sphere of personal freedom could be protected from unnecessary, arbitrary and non-proportionate interference by the absolute state. They were instrumental to liberating the subject from the monarchs oppression.

As such they were at the same time the consequence of an individualist approach, an approach that sought to understand the human person as a free agent, a person whose being and relevance can and must be understood without the external factors of social status, religion or political loyalties.

This essential function is key to the understanding of fundamental rights in any political order. It's validity does not depend on the oppressive nature of the state. Any state, also democratic states, interferes with personal freedom when exercising sovereign power to implement political decision. Fundamental rights, in a democracy, ensure the personal freedom of the individual against a totalitarianism of the majority.

This defensive character of freedom rights, to some extent of equality rights, is an essential part of their function and closely connects them with the individual. Therefore, the individualistic element is always present when we talk about fundamental rights.

However, I believe that is a simplification to reduce fundamental rights to their individual aspect. Especially in the dialogue of "Western" culture with cultures of the global "East" and "South", including our present ecumenical exchange between the Latin and Eastern Orthodox churches, on human rights, the one-sidedness of this emphasis on the individual can be a major hindrance on the way towards a common understanding.

I also hold that the assertion of a purely individualistic nature of human rights is wrong. I would not even agree with the predominant concept that the application of a fundamental right to groups (collective) or associations (corporate) is only secondary. I rather suggest that there is an individual as well as a collective and sometimes corporative dimension to many human rights.

In fact, many human rights cannot be properly understood as the right of an individual person without taking the social embeddedness of that person into account. It is a

misunderstanding, resulting from an overemphasis on individuality in mainstream Western thinking, to neglect that personality is in a very elementary way bound up with the social nature of humanity. Thus, some fundamental rights protect the individual's freedom against political (and social) power, others protect the freedom to develop within one's social relations. At least in Christian anthropology, a person cannot in a meaningful way exist without relating to fellow human beings and the outside world.

Of course, fundamental rights have different aims. "Freedom of conscience", "freedom of opinion" to name two are indeed predominantly individual. One might argue that there is no conscience and no opinion without exchange with others either, but the right to follow one's conscience and to form and utter an opinion are something different from the abstract ideas "conscience" and "opinion". The right can only be one's own very personal right, and it must be guaranteed most of all to the dissenter.

Other fundamental rights, however, do not only have a social dimension, but are by their very nature aiming at a plurality of persons. You cannot assemble alone. You cannot associate with yourself only. Here is a difference to the aforementioned examples. It is quite natural to conceive an opinion as a personal thing, while we might acknowledge that there will be outside sources in the process of forming an opinion. The same hold true for conscience. But it does not make any sense to think in an abstract way of assemblies of associations, when only one person is concerned. Here, the social embeddness of both the right and the rights-holder is obvious and necessary for the proper understanding of the right in question.

By the same token, you cannot have a religion alone. At least in German legal thought, any religious view is religious because it relates to an empiric religion and its institutions. If there were only one person believing in the resurrection of Christ, this would be his opinion about the post-mortal fate of a historic person. It is because of Christianity and the Church that this opinion is recognised a religion.

Of course, also the dissenter is protected, not every single view must relate to official teaching. But there needs to be a plausible nexus to a religion. Professor Dr. David McClean has just referred to recent ECHR's jurisdiction, namely the group of cases named by the applicant Ms Eweida. Even if there is no requirement either in Scripture, doctrine or canon law to visible wear a cross, the wearing of a cross is acknowledged to be a "manifestation" of a religious belief, and as such protected by the freedom of religion and belief. Likewise, the German Constitutional Court has ruled that the state has to accommodate the religious objection of a Pastor to swearing an oath in court. Religious freedom, the Court found, also protected strongly held religious views that are not even a widely spread custom within a religion. The reference to the Bible sufficed in this case.

But these examples only go to show that, even if the "manifestation" in question is not compulsory, its legitimacy not as a personal habit or conviction, but as a religious act is derived from the sources attributed to a historic religion, which is also – if differently – practised by a group of people.

Collective rights will usually be invoked by representatives of the collective. In order for such a representation to become legitimate, some form of structure will usually be implemented. This is how the collective right attains a corporative dimension.

But corporations are not only rights-holders *in lieu* of a collective, but also carriers of rights, including fundamental rights. Especially in these cases, it is useful to make a terminological distinction of fundamental and human rights. Not, because they are not the same rights, but because they cannot be invoked by physical persons only.

This is also acknowledged by law. Art. 19 III of Germany's Grundgesetz states that the aforementioned fundamental rights can also be invoked by legal entities, if they can be applied to them according to their nature.

Not all catalogues of fundamental rights, be they national constitutions or international charters, are as explicit concerning the corporate dimension. That does not mean that there is no such dimension. It is, as I have been trying to elucidate, integral to some fundamental rights to have a collective and even corporative dimension.

The ECHR has acknowledged this, even though it took a while to explicitly say so. In earlier case law, the judges held that, for example, churches claimed rights only on behalf of their members. But later they ruled that a church as such can seek remedy if violated in its right to freedom of religion.

Just one last thought on this matter: Especially with (some) minority rights, also international law can come into the equation. In these cases it would definitely be a simplification to understand only individual members as beneficiaries of the rights in question.

3.) COLLISIONS of individual and collective/corporative rights

- What if individual and collective/corporate rights collide?

Our panel and workshop run under the title "individual vs. collective" human rights. However, what I have said so far served the purpose of showing that there are rights that have individual, collective and even corporative dimensions. Some are purely individual, others also have very strong social dimension. As a strict systematic approach to human rights tends to neglect the latter, I also emphasise it with something of an apologetic intention for this aspect of human rights protection.

Already the insight that individual and collective rights can collide is in itself proof that there is something like the collective dimension, i.e. that also a plurality of persons or legal entities might invoke fundamental rights.

Still, usually these dimensions are complementary. There is an "and" instead of a "versus" between them. It is only in cases of collision that the "versus" is needed. I shall keep my remarks on this rather short, as you can read more about my position on the

balancing of individual and collective rights in cases of collision in my contribution to the CEC Human Rights Manual.

In that valuable volume I focus on labour law. That is no random choice. Labour law is the area, where collisions are most likely to occur, and where the legislator and the courts are consequently urged to find adequate solutions. I would like to draw attention to case law especially on legislation pertaining to "discrimination". There have been a number of rulings of the ECHR addressing these issues. I name but a few: Rommelfanger already in the 1980ies, and more recently Obst, Schüth, Baudler, Müller, Reuter, Siebenhaar. I also mention the Eweida case already covered by Professor McClean's intervention.

If I put these cases into groups, we can roughly distinguish three categories:

- A single human right (i.e. religious freedom) collides with itself when it is invoked by an individual against a collective or corporation. Take the priest who feels his religious freedom is infringed because he has to comply with the teachings of his church. Or the Muslim woman who is rejected as an applicant for a position of social worker in a diaconical organisation.
- Two different human rights (i.e. freedom of opinion vs. religious freedom) collide when the one is invoked by an individual against a collective or corporation. Take the doctor, who openly advocates abortion while working with a catholic hospital.
- A human right collides with an ordinary right when an individual invokes it against a corporation. Take Ms Eweida, who wants to act upon a strong religious feeling, while BA wants to use its power of direction as an employer.

The latter is not so interesting, from a legal perspective, as the fundamental right will usually win over any provision in organic law, unless the provision in question serves to protect other values of "constitutional" importance, such as public safety or health, and its application is necessary and proportionate. We need not go into detail here, the "burka"-example David McClean has used was a very good illustration for the legal goods at stake.

The former two groups, however, are cases where we can see very clearly how different the individual dimension of fundamental rights is from the collective dimension. Quite often, the latter will weigh heavier in the legal balancing. Why?

The explanation is that the individual is free to use his or her "walk-away" option: Not without disadvantage, but without being affected in the core of one's personality. Take the Rommelfanger case: The doctor, if he changed to a non-confessional hospital, can still be a doctor and also work in a way congenial to his own convictions. He needs to find a new job, he might take a few months to do so, but that he do so is still not unjust or unreasonable. Because, if you look at the other party in this case, the collective/corporation – here the Roman Catholic Church – would be severely damaged both internally and externally. Internally, because within its own ranks the central teaching about the sanctity of the unborn life would not be generally accepted, with all the subsequent tensions. Externally, because the authenticity and credibility of the church were jeopardised if the people representing it towards patients and their families did not share those convictions that are

perceived to be central to the ethical and moral dimension of faith. Thus, the church could not act according to its own core convictions, and thus not be the church according to its own understanding of what Christianity requires it to teach and to practise.
The other cases are quite similar. Only in the Schüth case, the ECHR found that the right of the individual outweighed the right of the corporation, and the reasons for the decision show as well as the comparison with the other cases show that the court found that no serious balancing had been attempted. That, of course, must not be – if the courts did not engage in the act of balancing conflicting legally protected rights, there would be no judicial protection at all.

But, if the balancing is done, and done correctly, in the vast majority of these cases, the collective identity must be asserted over individual freedom. This goes to show that a purely individualistic approach to fundamental rights is simplistic, even if fundamental rights have (and must have) a very strong individualistic focus.

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Working Group "Individual versus collective human rights"

Points for the plenary

collected and reported by Revd. Patrick Roger Schnabel

- Instead of a "versus", there should be an "and" in the title of the workshop. In our understanding, there are
  - individual rights,
  - individual rights that can also be claimed by a group or legal body,
  - rights that from the start aim at protecting certain groups of people.

  A "versus" is only the exemption which occurs when different rights or different interests of rights-holders collide under certain circumstances.

- Fundamental rights of the "first generation" and some political and social rights are legally enforceable; most of the others are not. UN-Covenants need to be transposed into national law (either constitutional or organic) or into binding international contracts with an effective legal protection system to support them, in order to be "law" and thus to confer "rights". There is also a difference between rights (conferred on concrete persons) and state goals (as a vision for governments to implement into their policies). It is confusing to call all these different things "human rights".

- Churches cannot only address "the world" concerning human rights, but must also look at their own record with regards to human rights. They do not always do enough to fight for the rights of marginalised and disempowered people and groups. The rights of every human being should be promoted by the church, because this is a precondition for a just and humane society.

- Fundamental rights are historically and systematically the rights of individuals to defend their personality and views against a powerful communal structure – usually the state, but also other "public" power structures. In failed states or other society-models intermediate levels between state and individual can constitute such public powers: tribe, religious communities etc.

- When individual and collective fundamental rights collide, it must always be asked, how intense the level of exposure to power structures is. If there is no reasonable "walk-away" option for the individual, and the exposure of the individual to these power structures is high, then also protection of the individual must be high. If such communities exert quasi-public powers, individual rights have a defensive nature.

- In asylum legislation in European states, the change of religion is sometimes not adequately recognised as a ground for the asylum application, as the state tries to examine and verify the actual religion of the applicant. However, questions of faith and membership are matters of individual religious freedom and the right to self-determination of the churches and religious communities. Thus, they are and not for the secular state to decide. Examination can be only formal, not material.

- Also issues of gender-based violence and violence as a consequence of social tensions and economic injustices need further consideration, because they contribute to undermining an effective human rights regime.