

"Churches together for human rights"
Individual vs. Collective rights from the legal perspective

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Ladies and gentlemen!

First of all, I would like to apologize for my lack of proficiency in English. I hope that you will be able to understand my presentation nevertheless.

INTRODUCTION:

Since we are holding a conference on Human Rights for the European Churches, my comments will be based on the European Convention on Human Rights (ECHR), including its additional protocols, which are applicable to all Member States of the Council of Europe; on the European Social Charter of the Council of Europe (ESC); as well as on the EU Charter of Fundamental Rights for the Member States of the European Union (EU-CFR). I will partly take into consideration the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in 1948, and the two International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), 1966.

CATEGORISING HUMAN RIGHTS:

Human Rights, in general, can be divided in different categories. Usually, we distinguish two major categories: the first generation of human rights, which includes civil and political rights and the second generation with economic, social and cultural rights.

To the civil and political rights belong the so-called classical individual rights such as right to life, personal liberty, freedom of religion, freedom of expression, assembly and association, procedural rights before the courts of law, and to the political and citizens' fundamental rights belong the right to nationality, the right to participate in the state decision-making, the right of access to public offices and other similar rights.

Economic rights as human rights of the second generation and social rights in a broader sense include the right to work, right to fair and equal pay for the 'like work'; social rights in a narrow sense include the right to social security, right to healthcare, mother and child protection; the cultural rights: the right to education, right to training and other similar rights.

In addition to these two major categories, there is currently a new one, namely the human rights of the third generation, which refers to rights such as the right to development, right to make use of the natural resources, right to a healthy environment.

The civil and political rights, the so-called human rights of the first generation, which we can mainly find in the European Convention on Human Rights, including its additional protocols and in the EU Charter of Fundamental Rights, were initially designed as individual rights, as

rights of individuals. These fundamental rights are protected in various European countries, through judicial protection systems; cases of violation of fundamental rights are submitted to independent courts, and an appeal is possible before constitutional courts. In addition to that, however, supranational and international law courts are also available, such as the European Court of Justice of the European Union in Luxembourg (ECJ) and the European Court of Human Rights (ECHR) in Strasbourg. The latter provide for the enforcement of fundamental rights in the Member States concerned.

The economic, social and cultural rights, the so-called social rights, are partly designed as individual rights, but also as rights of groups or associations of groups, as well as rights of legal entities. These rights, however, are not guaranteed by judicial protection systems in general, and are, therefore, not so easily enforceable by the affected person.

In this regard, especially in the international law related to the Revised European Social Charter, a quasi-judicial system of protection exists, but it is not a protection for an individual.

The human rights of the third generation are usually protecting groups or a group of individuals (collective, corporation) and States, rather than individuals. These rights are, if at all, protected by political safeguards in international law. In each country, these basic rights, for instance the right to a healthy environment, are not considered as fundamental rights, but as constitutional guarantees and State goals, which shows the problem of their enforceability.

From the above you can see that basic human rights are conceived primarily as individual rights, consequently the right of an individual person. However, some of the fundamental rights within the rights of the second generation - social rights - are designed for a community or associations of people, also for the purpose of joint exercise. In this respect, one often refers to collective or corporative fundamental rights.

Nevertheless, the following feature has now developed also in the so-called classical fundamental rights, the first generation of human rights:

Not only has a single human individual been recognized as a carrier of different fundamental rights, but also a legal person, usually the association of individuals endowed with legal personality. With the development of international law, but also of the case-law of the ECtHR, some fundamental rights have different aspect depending on who is exercising them, a natural or a legal person, that is a collective or corporation. One compares for example the religious freedom of a single individual and the collective religious freedom of churches and religious communities as associations of their members. The particularity is that the recognition of a legal entity as a carrier of fundamental rights leads with some of them, not all, to an alteration of the content of that fundamental right against the individual fundamental right. This can also be a reason for tensions.

INDIVIDUAL FUNDAMENTAL RIGHT – CORPORATE or COLLECTIVE FUNDAMENTAL RIGHTS:

I may illustrate this with three examples, also referring to the connection between the different generations of human rights:

a) Freedom of religion (Article 9 ECHR, Article 10 EU-CFR)

The human right of religious freedom, from the wording, is defined as a traditional individual right of a physical person. Simplified, the fundamental right of religious freedom provides each individual with the right to have a belief and to manifest it in private or in public, either alone or in community with the others in worship. The right includes not having a religion at all or to change it. This simple definition, based on the wording of relevant legal texts, shows that such a right can only be exercised by a physical person.

Nevertheless, it is by now indisputable, that any Church or religious community as an association of believers of the same denomination or religion can also exercise the fundamental right of religious freedom acting as a legal person.

Churches and religious communities can therefore make their own rights to religious freedom enforceable. In this regard, we can speak about corporate or collective religious freedom as a fundamental right. This corporate or collective religious freedom slightly differs in content from the right of religious freedom of the individual.

The legal starting point for the corporate or collective religious freedom is the right of the individual to publicly confess his faith with the others and to exercise common forms of worship, for which some legal texts give examples. The collective and corporative religious freedom of churches and religious communities initially includes the right to uphold the religious freedom of its members, that is to say of third persons, against state intervention. In addition, part of the corporate or collective freedom of religion of churches and religious communities is the right to establish themselves as such and gain legal status. Furthermore churches are entitled within the framework of the collective or corporate freedom of worship also a right to self-determination, i.e. autonomy. The right to gain legal capacity as a religious community means that the State must ensure, in a legal system with different legal forms of religious communities, in a non-discriminatory manner that even existing religious communities can get the privileged legal status of a church or religious community. The right to autonomy of churches and religious communities prevents the State from interfering in the internal affairs of churches and religious communities. The internal affairs, in the collective or corporate religious freedom, include the definition of beliefs and their manifestations, as well as the internal organization of the community and the determination of the religious leader and the Church authorities. Furthermore, special demands from church workers form also part of the right to autonomy within the framework of collective religious freedom of churches. These comments show that the human right of religious freedom for churches and religious communities has in parts different contents from those of individuals.

Even conflicts of interest can arise between the individual and the church or religious community related to the right to religious freedom. The pastor of a church cannot invoke religious freedom and expect remedy from State authorities against the sentencing by a church disciplinary authority, related to his breaching the Church's teaching. In this regard, for instance, the corporate or collective religious freedom of the Church is stronger than the right to religious freedom of the individual, in the present case ecclesial employee.

b) freedom of assembly and association (Article 11 of the ECHR and Article 12 EU CFR) in conjunction with the right to collective bargaining and action (Article 28 EU CFR and Article 6 ESC):

The human rights of assembly and freedom of association are conceived as individual rights of every human being, while being referred to as community-based political and fundamental rights. They cover the individual's right to assemble or unite with others. Undoubtedly, these rights, literally only granted to individuals, should also be granted to legal persons, i.e. to such associations of individuals that have attained legal personality.

There is essentially no difference of content in the freedom of assembly when exercised by individuals or by associations as legal entities.

The situation is different with regard to freedom of association. In this classic fundamental right of the first generation of human rights, it is explicitly stated that the freedom of association also includes, in order to protect the interests of individuals, the right to form and join trade unions. The latter form of association of individuals is known as the coalition right of employees and employers. This freedom of association, however, does not only protect the single individual, but also, despite the restrictive wording, trade unions and, by the same token, employers' organizations from State intervention. The right to form trade unions includes also right of self-administration of their own affairs. This also includes the ability to set conditions for the establishment and termination of the membership. From the traditional right of association – as stated in the Article 11 of the ECHR – follows also the right of unions to defend the professional interests of its members through collective action and to fight for it; States have to accept it as part of the coalition right. Trade unions (workers' organizations), but also of the employers' associations, hold, from the perspective of the fundamental right of freedom of association, rights that go beyond the collective or corporate rights of individual employees.

From this freedom of association for trade unions, including collective or corporate rights of trade unions and employers' organizations, derive further fundamental rights, namely in the area of social rights, the human rights of the second generation. Article 6 of the European Social Charter, which does not enjoy constitutional status in all Member states, as well as article 28 of the EU Charter of Fundamental Rights, establish the distinctive right of workers, but most of all employers' organisations and trade unions to negotiate and conclude collective labour agreements and make use of collective action to defend their interests, including strike action. The latter provisions are a development or clarification of the freedom of association. The fundamental social right to collective bargaining and action is primarily a collective or corporate right of workers' organizations, such as trade unions and employers' organizations. These rights are designed primarily as collective social rights, although the rights of individuals continue to exist, too. Generally, the right to conclude collective agreements may only be granted to organizations, whereas there are differences between the European states regarding the individual, collective or corporate emphasis of the 'strike and lockout law'.

The particularity lays in the fact that, where the right to conclude collective agreements has been granted to the trade unions and employers' organisation, such the collective wage agreements (collective agreements) then bind all the individual members of such organisations. Upon conclusion of a collective agreement (collective bargaining agreement), it is not possible for an individual worker to negotiate an individual contract below the standards of the collective agreement. In this regard, there is also a conflict of interest between the individual rights of a person and the corporate or collective rights of the employers' organisation or trade union, resulting from the article 6 ESC and 28 EU CFR.

I may point out that the various relevant legal issues are complex. I just would like to show that employers' organisations and trade unions have – within the relevant fundamental right to freedom of association – slightly different rights as opposed to the individual, stretching also to collective bargaining and collective action.

c) The third generation of human rights and minority rights:

With regard to the only now developing human rights of the third generation, such as the right to make use of natural resources, or the right to sustainable development, it is important to note that these rights are usually rather granted to States or legal entities as associations of individuals or groups, than to individuals themselves. Here, I will not go into details.

In this respect, special attention should, however, be given to the so-called protection of minority rights. By minority we mean a group of people, which is disseminated in the State majority population, but can be distinguished by the following characteristics: numerical inferiority, non-ruling political status, ethnic, linguistic, cultural, religious or other special features. While there is a terminological difference between them, minority protection is generally viewed as part of the protection of human rights.

Within the framework of international agreements on the minority protection, depending on the norms of the convention, the protection of minorities may, for example with national minorities, consist in a special reinforcement of human rights for this group, or else in explicitly granting collective rights to minorities, even to the extent that fundamental rights of members of the particular minority may become collectively enforceable. Usually, where the law grants to minorities collective rights, we are in the field of international law. Unfortunately, in this short presentation, I cannot go into detail, but can only point to the difference between individual rights for members of a minority versus the collective rights of such a minority.

On the subject of individual rights versus collective or corporate rights in the field of human rights much more could be said. I hope that with these remarks from a legal perspective I have created an appropriate basis for discussion.

Thank you for your attention.

02/28/2013
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Used and Cited Literature:

Neuhold-Hummer-Schreuer, *Österreichisches Handbuch des Völkerrechts (Austrian Manual of International Law)*, Wien 2004;

Grabenwarter/Pabel, *Europäische Menschenrechtskonvention (European Convention on Human Rights)*, 5. Auflage (Edition), München, Basel, Wien 2012;

Meyer, *Charta der Grundrechte der Europäischen Union (Charter of Fundamental Rights of the European Union)*, 3. Auflage (Edition), Baden-Baden, 2011.