

Protection of individual freedom

Comparison of two constitutional systems: US and EU

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by

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1. Introduction

This lecture compares the constitutional systems of the United States of America and of the European Union under the aspect of how protection of individual liberties are achieved and guaranteed. This positive comparative analysis aims to produce reform proposals for the European Union beyond the Draft Treaty Establishing a Constitution for Europe, adopted by the European Convention in 2003. In case a multi-optional European Constitution for the European Union could be agreed on, with the citizens of the Member States deciding on the level of integration they prefer, access to the European Union should be attractive for Swiss citizens as well. But then the issue of protection of individual liberties will be a decisive one. Thus the comparative analysis undertaken here could be of interest to Switzerland as well.

2. Methodological Approach

Comparing two constitutional systems, a functional approach of comparison of law should be adequate. But existing approaches are in two ways imperfect: (1) They do not take into account the embeddedness of legal rules and norms in their institutional context (problem of contextuality). (2) Necessary comparative impact analyses can only be conducted with a social science-approach which lays open the assumptions and produces refutable hypotheses.

In order to fill the gaps mentioned, the New Institutional Economics approach – together with the sub-discipline of Constitutional Economics – will be introduced. Such an approach starts with the so-called economic paradigm (scarcity of resources, assumption of self-interested rational behaviour of individual actors). With given preferences, the effect of changes of constraints will be analysed. The rationality assumption will be modified (bounded rationality). Information is supposed to be systematically incomplete. The existence of

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transaction costs is assumed. Thus it makes sense to develop institutions (general rules together with an enforcement system), which bring down transaction costs and establish a system of sanctions and incentives for individual actors who are free to make their individual decisions within such a system. It is necessary to distinguish between decisions on rules (institutions) and decisions within rules (within a given institutional framework). The New Institutional Economics approach is focussing on the working of institutions under the assumption that actors respond to institutional changes.

Individual freedom is perceived as freedom of individual activities protected against interventions from other actors (including such actors representing the state). The core of individual freedom cannot be defined positively, but only negatively by the constraints for others not to intervene. Protection of individual freedom is decided upon by collective decisions (contractual approach). The rationale of actors agreeing upon protection of individual freedom takes into account the personal risk of being injured in a world of incomplete information in which the actors do not know their individual risk in advance. They are interested in the substantive definition of individual freedom and in the means necessary to provide effective protection. They are aware of potential restrictions of individual freedom by state intervention and thus are interested in a system of separation of powers, which guarantees the reciprocal control of such powers.

3. The problem situation

Individual freedom may be protected by granting legal protection to such actors whose individual liberties are injured. Such a 'legal protection system' has two layers: (1) Substantive law rules which define the liberties to be protected (e.g. life, freedom of speech, property, etc.). (2) Institutional arrangements in a system of separation of powers which install a system of checks and balances in order to institutionally protect individual liberties (institutional protection system).

These two different, but complementary systems have been developed differently in the US and in Europe. The comparison will refer to these two systems and their interaction.

4. Protection of individual freedom in the US constitutional system

4.1 The institutional framework

Due to the specific experience of citizens of the thirteen American provinces which declared independence in 1776 and then formed the United States of America, the protection of individual freedom focussed on a system of separation of powers with checks and balances.

The US Constitution of 1788 defined in Art. 1 – 3 the powers of the legislature (Congress), the executive branch and the judiciary without clarifying issues of overlaps and potential conflicts. Judicial review – i.e. the power of the judiciary to decide on the constitutionality of acts of the legislature and the executive branch – has not been written into the text of the Constitution, but has been developed by case law of the Supreme Court later on. This is a good example of the power game within the US system of separation of powers. The limits of the executive branch are being defined both by the legislature and by the judiciary. On the other hand, the executive branch may mobilise voters against the legislature and may influence the composition of the Supreme Court. But the legislature has to affirm candidates for the Supreme Court. The rules of the game, laid down in the Constitution, are made in a way that in cases where one of the powers tries to expand its authority, one or two other powers have certain counter strategies at their disposal. Thus the ‘system of institutional protection’ in the US constitutional system is devised in a way of balancing and checking the powers of the legislature, the executive branch and the judiciary.

The legal protection system of individual freedom has not been written into the 1788 Constitution. It was introduced one year later in the form of ten Amendments to the Constitution, called the ‘Bill of Rights’. The working of this legal protection system depends on the relative power of the court system in the given system of separation of powers. The power of the judiciary in matters of protection of individual freedom is that of interpreting the Constitution. Whether or not the Supreme Court is free to introduce public policy issues into that interpretation, depends on the method of interpretation (interpretivism vs. non-interpretivism). But which method will prevail, in turn depends on the composition of the Supreme Court. Thus the ‘legal protection system’ is highly dependent on the ‘institutional protection system’.

4.2 Actions within the institutional framework

Under the assumption of self-interested rational behaviour of individual actors, one may formulate the hypothesis that the power game in the given US system of separation of powers will be played by actors in the legislature, the executive branch and the judiciary who tend to expand and protect their own status and resources. But they are acting under certain constraints. A democratic system may be understood as an interaction between citizens as principals and actors acting on behalf of the legislature, the executive branch and the judiciary as agents. Decisions by citizens – e.g. in elections – constitute a feedback process between the acts of the agents and the attempts of the principals to control them in order to make them act according to the principals’ preferences.

From the principal’s perspective the issue of individual freedom comes into play when agents (of the legislature, the executive branch and/or the judiciary) try to expand their authority with the intended or unintended consequence of restricting the individual freedom of

citizens. The response of citizens may either take place within the democratic feedback process or via legal actions. The effectiveness of the first type of response depends to a large degree on the working of the system of checks and balances. From the citizen's perspective, one constellation is particularly dangerous: The legislature and the executive branch are able to form a coalition against the judiciary. The probability of such a coalition is especially high, if the President – not elected by the legislature, but by public vote – is a member of the same party as the majority of the legislature (Congress). In such a situation the coalition may change the composition of the Supreme Court and thus inhibit the potential countervailing power of the judiciary. It is up to the democratic feedback process of whether or not voters are in position to prevent the danger described. It is interesting to note that, over most legislative periods in the history of the United States, voters have been keen to avoid this danger and elected majorities in Congress which were not members of the President's party. The effect of this prudent use of the democratic feedback process has been that the system of checks and balances has worked into the direction of not undermining the legal protection system.

5. Protection of individual freedom in the constitutional system of the European Union

5.1 The institutional framework

The constitutional system of the European Union is that of a hybrid structure between confederation and federal state. European integration since 1951 (conclusion of the European Coal and Steel Community) has been achieved by means of treaties of public international law between the Member States of the three communities (European Community for Coal and Steel, European Economic Community, and European Atomic Energy Community). Protection of individual freedom remained in the realm of Member States' constitutions.

Whereas the continental Member States followed the historical path, starting in 1791 by the French Constitution, granting civil rights and basic rights enforced by law courts, namely constitutional courts, England had its own tradition based on the Habeas Corpus Act of 1689, and combined that kind of protection of individual freedom with a system of separation of powers with in-built checks and balances. On the European continent, that sort of separation of powers stressing the mutual control of powers was not known. This led to the consequence that protection of individual freedom by means of legal protection broke down in periods where the independence of the judiciary was suspended (e.g. in fascist regimes in Germany and Italy).

Even without having a constitution in a literal sense, the legal fundament of the European Community and since 1992 of the European Union are the Treaties establishing the European Communities together with the Single European Act and the three Treaties on

European Union (TEU), the first one the Treaty of Maastricht, amended by the Treaty of Amsterdam and the Treaty of Nizza. The novelty of the hybrid construction of the European Union is the supranational law-making power, vested in Community organs together with a its own judiciary. Community law has two layers: primary law (formed by the above-mentioned treaties of public international law) and secondary law. Whereas the Member States are in charge of creating primary law, community organs enact secondary law. The judiciary (European Court of Justice – ECJ – and Court of First Instance - CFI) creates case law by interpreting primary and secondary law. In effect, such judge-made law is of supreme importance for the development of the new system of supranational law.

When it comes to the protection of individual freedom in such hybrid European construction by means of a legal protection system, one has to take into account that protection of such freedoms, which are part of the traditional catalogue of civil rights and basis rights, is not covered by primary Community law. Thus it had been case law created by the ECJ which developed legal protection in this field as far as protection against acts of Community organs had been at stake. The basis for such case law had been the common core of civil rights and basic rights contained in Member States' constitutions together with such rights which form part of the European Convention of Human Rights, because all Member States have signed that Convention. Case law being established by the ECJ and the CFI may thus be regarded as a sort of functional equivalent of constitutional provisions protecting civil rights and basic rights. But it has also to be seen that the rights enacted in the European Convention on Human Rights are enforced by the European Court of Human Rights in Strasbourg (ECtHR), the "Strasbourg Court".

Primary Community law contains certain freedoms which are not common to conventional catalogues of civil rights or basic rights which may be called 'movement rights': free movement of persons, goods, services, and capital together with the freedom of establishment. These freedoms are being effectively enforced by the ECJ.

If the European Union is compared to a federal state, these 'movement rights' are nothing special. In the United States of America, such rights are taken for granted. But in the light of the European Union being a hybrid organisation, such rights are essential for the individual freedom of citizens of Member States. It is the case law of the ECJ on free movement of persons, goods, services capital and the right of establishment which adds a further positive aspect to the enhancement of personal freedom in the European Union. This case law opens the way for systems competition, which enables the citizens of the Member States in some fields of law to choose between different legal regimes in case of establishing a business enterprise (party autonomy). Thus the state monopoly for legislation is questioned. If citizens (as principals) have the choice between various agents, this supposedly is strengthening their positions.

The second system for protecting personal freedom via institutional arrangements, i.e. the introduction of a system of checks and balances, is highly defective in the constitutional system of the European Union. As has been pointed out, the European Union has its own legislature, its executive branch and its judiciary. But the legislature is of a hybrid nature. The right of initiative for legislation is vested in the executive branch, the European Commission, and the legislative power is shared between the European Parliament and the Council of Ministers. That Council of Ministers consists of representatives of governments of the Member States. Thus the executive branch of the Member States acts as part of the legislature on the European level. The Parliament is dependent on co-operating with the Council and vice versa. The position of the Parliament is relatively stronger if a grand coalition is formed. Thus the power of the principals, the citizens of the Member States, to control the various agents is minimal. They are not in a position to stop legislative acts on the European level which under the name of 'integration' are more and more curtailing personal freedom by means of over-regulation. This is a general tendency in the European Union. Whereas on the one hand free movement of persons, goods, services capital and the right of establishment leads to deregulation on the national level, there are no effective precautions against over-regulation on the European level which in effect is stifling personal freedom. There is no system of checks and balances which could stop this development.

5.2 Actions within the institutional framework

When it comes to the system of legal protection of personal freedom in the constitutional system of the European Union, citizens of Member States have a choice where to seek redress. If their rights are infringed by acts of their home state, national constitutional courts are in charge. In case national protection of human rights does not work satisfactorily, appeal to the Strasbourg Court is possible, but under the condition of exhaustion of national remedies. Matters of infringement of civil rights and basic rights will only go the ECJ if act of organs of the European Union are at stake. Thus the case law of the ECJ on such matters is still limited. Today legal protection of individual liberty within the constitutional system of the European Union plays a minor role in the light of limited incentives of citizens to seek redress on this level.

The hybrid system of separation of powers in the European Union provides incentives for the various actors which differ from those in the US system. Those persons who are acting for the European Commission, are not directly accountable to the citizens of the Member States. Theoretically the Commission may be disposed by the European Parliament; but the institutional devices are very weak. In practice commissioners and especially bureaucrats on the working level (Eurocrats) are free to engage in activities which promote European integration. Whereas the system of free movements works without the support of the Commission, integration by means of harmonisation of Member States' national laws and by means of strengthening the bureaucracy on the European level (e.g. European regulatory

bodies) is very attractive for those who are working in and for the Commission. In order to do this job successfully, the Commission may either form coalitions with the European Parliament or with the Council. Members of the Council have an interest to shift such issues to the European level where they do not face opposition and/or resistance from voters and national Parliaments at home. In such fields, it makes sense for them to form coalitions either with the European Parliament or the Commission. Members of the Parliament have an interest in expanding the powers of the European level in order to strengthen their relative power vis-à-vis national Parliaments. On the other hand, they are interested in backing by voters to strengthen their relative position vis-à-vis the Council. Thus, they support initiatives which are consumer-friendly. Because consumer protection is a field where the European Union enjoys a (shared) competence, the expansion of this field into other areas (e.g. private law) is attractive for Members of Parliament. The overall constitutional system of the European Union thus contains numerous incentives on actors in different organs to engage in added regulation and to shift powers to the Union level. The effect for citizens of Member States is reduced control, e.g. rising agency costs, and a curtailing of individual freedom by means of over-regulation.

6. Impact of the Treaty establishing a Constitution for Europe

Even if the chances that the Treaty establishing a Constitution for Europe (Constitutional Treaty) comes into force are minimal, it could make sense to ask hypothetically what would be the impact on legal and institutional protection of individual freedom for the citizens of Member States of the European Union. Matters of the institutional framework and the expected working of incentives are discussed together in this case.

The Constitutional Treaty would not change the hybrid character of the European Union. The Treaty is not a constitution in the legal sense, but a treaty of public international law between sovereign nation states. This is the reason why the treaty can only enter into force after ratification in all Member States. The provisions on the interplay between the various organs of the European Union (which would then have legal personality) rather consolidated the existing structures. These structures do not establish checks and balances. They imply the same incentive structure which leads to further incapacitation of citizens of the Member States. The title on 'The Democratic Life of the Union' (Art. 44 – 51) does not contain any provisions leading to a substantively better control of Commission, Council and Parliament than in the existing system. The system of separation of powers of the European Union is not working into the direction of protecting individual freedom. It is rather strengthening such forces which favour more integration by means of over-regulation and weakening the capacity of principals to control agents.

The Constitutional Treaty contains in its second part “The Charter of Fundamental Rights of the Union”. It should be assumed that such a Charter would promote legal protection of fundamental rights. But such optimistic expectation will be disappointed. The Charter will be enforced by the ECJ. Thus part of the work of the Strasbourg Court, whose enforcement of human rights is pretty effective, will be pre-empted. It is an open question whether or not this will strengthen the enforcement of human rights. But the main deficiency of the Charter is the mix between human rights (like life, liberty, property) and such ‘rights’ which in title IV are introduced under the heading of ‘solidarity’ (e.g. ‘fair and just working conditions’ and ‘consumer protection’). Such ‘solidarity-rights’ are either non-enforceable or the ECJ will try to enforce such rights at the expense of Member States. In effect individual freedom will rather be derogated in the latter case. The overall judgement is that the Charter will not strengthen the system of legal protection of individual freedom, but will rather weaken it.

7. Resumé and outlook

Whereas checks and balances are in-built into the US constitutional system and thus enforce legal protection of individual freedoms, the constitutional system in the European Union contains serious deficiencies. In the field of legal protection of individual freedoms, the picture is a balanced one. Strong ‘movement rights’ work into the right direction, whereas legal protection of civil rights and basic rights is shared between the ECJ, the Strasbourg Court and national constitutional courts. Legal protection of such rights would not be improved by the Charter of fundamental rights of the Union, but in effect rather weakened. The existing deficiency of a non-functioning system of checks and balances in the European Union would not be abolished if the Constitutional Treaty would enter into force. Taking into account the negative impact of the Constitutional Treaty in both the system of legal and that of institutional protection citizens of Member States of the European Union would be better off without that treaty.

Just so scale down the Constitutional Treaty to a Mini-Treaty focussing on organisational aspects to make the European Union work more efficiently does not solve the problems discussed here. What is necessary is a different approach, to offer the citizens Member States a choice when it comes to the degree of integration and to rather strengthen the Strasbourg Court and to abstain from introducing a charter of fundamental rights on the level of the European Union.