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AND POPULAR SOVEREIGNTY IN EUROPE”**

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**COMMENTARY ON CATHERINE SCHNEIDER’S
“HUMAN RIGHTS AND TRANSFERS OF SOVEREIGNTY IN THE
EUROPEAN UNION: CONSEQUENCES FOR THE DEFINITION
AND DEVELOPMENT OF HUMAN RIGHTS”**

by
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The question of the relationship between the transfer of sovereignty, competences and human rights at the European Union level also necessitates clarification of our understanding of freedoms and fundamental rights. If we use the standard definition of the concepts of transfer of sovereignty and competences as meaning the handing over of legislative powers from the Member State level to the European Union, we have to clarify the extent to which such a transfer can have any impact on fundamental rights. As a rule, the transfer of competences should have no effect on fundamental rights as long as responsibility for implementing the transferred legislation remains with the Member States (1.2), although this does not apply to the same extent to a thoroughgoing positive fundamental rights policy.

1. This is precisely the point that emerged in the early phases of European construction – and, in fact, there was a similar process at the birth of the United States of America. European fundamental rights, as distinct from European fundamental freedoms, have no role to play in Community law, because interference in individual freedoms resulting from the latter is committed by national authorities and is restricted by national basic rights. For this reason itself, the dimension of EU law geared to protecting fundamental rights, which the European Court of Justice (ECJ) has been promoting since the 1970s, was initially therefore only relevant to a very small number of cases. As legal theorists quickly realised, this very much involved a strategy for legitimating the expansionism of the Court.

A second reason why fundamental rights were initially of very limited significance was to be found in the areas covered by the regulations relating to European integration. In most cases, the reciprocal opening of domestic markets, far from restricting rights, actually facilitated active expression of individual freedoms. The phase which was rightly referred to as “negative integration” removed Member States’ restrictions on transnational trade. This is why it would seem less than convincing to interpret the so-called fundamental freedoms as set out in the European treaties, which the ECJ has formulated as directly applicable subjective rights, as the exclusively economic origin of European fundamental rights. Fundamental rights are legal remedies which individuals can invoke *vis-à-vis* the authorities or legislators. However, the fundamental freedoms set out in the treaties were hardly ever directed against the European legislative process; on the contrary, they have been used to facilitate and expedite the latter. Given that the ECJ interpreted the basic rules in the treaties as subjective rights, intensive use was made of transnational economic freedoms, which in turn led to a need for pan-European standardisation. Where the protection of these fundamental freedoms is supported, the European legislator is able to regulate the single market. In establishing the scope of a transnational subjective right, eg the right to free trade in the EU area, the ECJ is also defining the European legislator’s competences in relation to the Member States, because only the EU legislator is then empowered to further develop these transnational freedoms. The enforceability of these “mobile freedoms” before the ECJ indirectly bolsters the sway of the European legislator. It would appear perfectly reasonable to accuse this mechanism of being confined to economic matters, but this criticism is ultimately directed less against a European conception of fundamental rights and more against European policy, which was expressly geared from the outset to facilitating political integration by forging economic ties between the various European countries.

2. The question of comprehensive EC/EU competence theoretically lapsed when the ECJ decided also to apply fundamental rights to European sovereign decisions. The introduction of Article 6 § 1 EU and the dialogue that developed between the ECJ and the European Court of Human Rights has further contributed to solving any problems regarding jurisdiction. Of course, the European integration process itself has changed. At the very latest, the Maastricht Treaty transformed the EU into an organisation which massively restricts individual rights, notably in the field of the Third Pillar. In principle, the fundamental rights which could be relied on in this connection are available even before the entry into force of the Charter of Fundamental Rights. The ECJ lacks any culture of fundamental rights protection not only vis-à-vis Member States but also in relation to the EU itself. Perhaps the Charter serves as a political signal to the European courts that they should also be protecting European citizens more effectively against European sovereign decisions.

3. An implicit negative or liberal interpretation of fundamental rights has underlain the comments so far, with fundamental rights being seen first and foremost as a means of defence against the public authorities. Such an interpretation is obviously not the only one, as shown by the creative way the European legislator has dealt with fundamental rights. This positive interpretation of the legislative construction of freedoms lends greater weight to the question of competences, as has also emerged from the examination of fundamental freedoms. Such an institutionalised fundamental rights policy, eg in the form of action against racism or other forms of discrimination, is more characteristic of some Member States than of others, but it is also a distinguishing feature of the European Union, which thereby seeks *inter alia* to secure the standards of Article 6 EU, without interfering excessively in the Member States' domestic politics. In this field, however, particular urgency attaches not only to the question of competences, but also to that of the legitimacy of all European action, because the organisation and securing of fundamental rights through sovereign organisations can easily prompt suspicions of paternalism.