The horizontal application theory and its influence on the freedom of contract – a French point of view

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1 INTRODUCTION

Is our freedom of contract becoming "miltonian"? Will it be seen as a part of "paradise lost" because of its numerous limitations by statutory law? Or is there substance in the suggestion that the paradise of freedom of contract might be regained through its promotion to the rank of a fundamental right, horizontally applicable? Is freedom of contract horizontally applicable? Strictly speaking, this would imply the right of one party to sue the other for having restricted the first party's freedom of contract by means of a clause included in their agreement.

There are a number of terms in various contracts which are meant to restrict the freedom of one party to make parallel agreements with third parties – non-competition clauses, exclusivity agreements, clauses restricting the right of one shareholder to pass his or her shares to a third person by requiring the agreement of the rest of the share-holders in the company. These terms are valid within the limits imposed by freedom of trade and competition (non-competition and exclusivity clauses must not be unduly anti-competitive) or by the right of private ownership of property (the share-holder's right to pass his ownership of the shares to someone else must not be suppressed). Freedom of contract justifies such clauses rather than holding them at bay; where a limitation or prohibition is regarded as valid, it is based on another freedom or fundamental right.

Direct evidence of the horizontal application of freedom of contract is not to be found in French law. The question remains that of its vertical application between individuals and the state. May the state, for example, by legislation restrict freedom of contract? Will a private citizen be able to successfully challenge state interference in, and limitation of, freedom of contract? Will such success be ensured by the state's commitment to an international convention which protects freedom of contract, or by a constitutional principle in terms of which freedom of contract is accorded the status of a fundamental prerogative of the individual?

Is freedom of contract a fundamental right in French law? In French constitutional law the answer to this question is twofold. On the one hand, there is no doubt that freedom of contract is a "fundamental principle of the law of obligations". According to article 34 of the French Constitution

this right may be regulated only by an Act of Parliament and not by a decree issued by the government. Both the Constitutional Council[1] and the Council of State[2] have contributed to the protection of freedom of contract by putting it out of reach of infringement by the exercise of governmental powers. On the other hand, any French lawyer who would label freedom of contract as a fundamental right, that is, a right which may not be restricted or suppressed even by Act of Parliament, would have to challenge the authority of the Constitutional Council, which by its decision 97-388 DC,[3] made it clear that:

> "[t]he principle of freedom of contract has in itself no constitutional value; a claim of violation of this principle is examined by the Constitutional Council only in the case where it may lead to the violation of constitutionally guaranteed rights and liberties. There is no ground in the Declaration of Human Rights or any other norm of constitutional value for any such constitutional principle as the alleged freedom of the will".

Yet, notwithstanding this decision, two questions arise. If freedom of contract is not a principle of constitutional value, could it, nevertheless, be regarded as a fundamental right? And, indeed, should it be so regarded?

2 COULD FREEDOM OF CONTRACT BE REGARDED AS A FUNDAMENTAL RIGHT?

In terms of European law freedom of contract could be indirectly protected through other fundamental rights or general principles. In France, the Constitutional Council could declare invalid statutory provisions which restrict freedom of contract if they violated freedom of enterprise.

2.1 European Law

Both European Community Law and the European Convention on Human Rights could grant indirect protection to freedom of contract.

2.1.1 *European Community Law*

Although freedom of contract does not emerge as a general principle of European Community law, the European Court of Justice has consecrated certain principles and fundamental rights which, in order to be effective, imply a certain amount of freedom of contract. These are essentially the right of private ownership to property[4] and the right of free exercise of economic activity. The standard of protection of the freedom of economic activity could be fairly applicable to freedom of contract as well. It is, according to the European Court of Justice, "subject to limitations justified by the objectives of general interest of the European Community, provided these limitations do not alter the substance of the right".[5]

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1 Constitutional Council 59-1 FNR 27 Nov 1959 Rec 71.

2 Council of State 3 Oct 1980 *Fédération française des professionnels immobiliers et commerciaux Rec* 348; 7 Feb 1986 Ass *FO Consommateurs et autres Rec* 31; 20 Jan 1989 *SA Berry-Loire Rec* 26.

3 20 March 1997 JORF 26 March 1997 4661; (1997) 30 RFDC 333 s obs L Favoreu.

4 13 Dec 1979 44/79 *Liselotte Hauer/Land Rheinland Pfalz* [1979] ECR 3727.

5 27 Sept 1979 230/78 *Eridiana/Ministre de l'Agriculture et des Forêts* [1979] ECR 2749 10 July 1991 C 90/90 and C 91/90 *Neu v Secrétaire d'Etat à l'Agriculture et à la Viticulture*

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It must be added that freedom of contract is at least recognised as a principle in certain areas of European Union law, and noticeably so by Regulation 1103-97[6] preparing Europe's transition to its new currency, the Euro. The measure aims at achieving a compromise between the principle of continuity of contractual agreements where a performance is expressed in one of the former currencies of the Member States, and the principle of freedom of contract.

The extent to which contractual terms might derogate from the provisions of this Regulation, and the manner in which they might balance the contractual duties of the parties in terms of the new currency, remain arguable. There is, for instance, a controversy as to whether the parties could consider the transition to the Euro as "hardship", leading to a renegotiation of the contract under a hardship clause. Furthermore, stipulations which may be held valid in terms of Regulation 1103-97 may, especially in insurance and banking contracts, create a significant imbalance in the contractual duties of the parties, thus failing to comply with the test set by Directive 93-13 EEC on Unfair Terms in Consumer Contracts.[7]

It appears that the question in dispute is not so much that of the recognition of the freedom of contract as a fundamental right, as that of the measure of freedom to be left in the hands of a party enjoying a position of dominance in the contractual relationship. Should the alpha and omega of the law of contract not be fairness rather than freedom? In recent years, good faith has increasingly become a matter of policy – hence a "fundamentalistic" view of freedom of contract would be inappropriate if it were to cause a drastic limitation of the power to use legislation to advance the requirement of good faith. In situations of gross economic inequality between the parties to a contract, good faith can simply not be left to the good will of one of the parties, even though a degree of protection of freedom of contract has to be maintained.

2.1.2 *European Convention on Human Rights*

Under the European Convention on Human Rights, a degree of protection of the freedom of contract could be achieved through article 1 of the First Protocol.[8] But the attempt to guarantee freedom of contract via the right of property is subject to difficulties. As a fundamental right, the right to property does in fact mean the free use of one's possessions, but the use of property rights has to be subject to limitations in the public interest. The legislator's appreciation of the public interest must be respected as long as it is not manifestly unreasonable, because the state must be left in command

[1991] ECR I 3618; 13 Nov 1990 C 370/88 *Criminal Proceedings/Marshall* [1990] ECR I 4071.

6 *OJ L* 162 17 June 1997.

7 *OJ* 1993 L 95/29 5 April 1993.

8 "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

of economic and social policies. The means to use property rights are contracts; limiting and regulating the use of one's possessions necessarily means restricting freedom of contract. For instance, statutory law reducing rents or postponing eviction of tenants after termination of the lease has not been found by the European Court of Human Rights[9] to be invalid. Protecting freedom of contract through the right of property may have been a classical civil law concept since, in the Code Napoléon, contracts are basically considered as means to acquire property. But the Code Napoléon was the Code of *uti possidentes* while present day private law is the law of the "busy entrepreneur". Constitutional law in France has, so to speak, a more "economically correct" approach to freedom of contract when linking it to freedom of enterprise.

2.2 Constitutional law

In all cases up to this day, claims of violation of an alleged constitutional principle of freedom of contract have been associated with alleged violations of freedom of enterprise. As stated by the Constitutional Council in its decision 97-388 DC:

> "The freedom of enterprise, which is neither general nor absolute, is exercised within legislative limits (provided) the restrictions established by the legislator do not produce excessive alterations of the nature and aim of this freedom."

This leaves the legislator with a discretionary power as long as its policies are justified by and proportionate with objectives of public interest. For instance, in decision 97-388 DC, a contractual term by which an employer may prohibit participation by his or her employees in any other pension fund than the one he or she had established, was held as valid even though it might restrict freedom of contract. Similarly, a term requiring insurance companies to adhere to a specific government agreement when managing a pension fund, was not considered to be in violation of the freedom of enterprise.

In other cases the approach of the Constitutional Council has been consistently the same. A 40% tax to finance educational projects for labourers which was levied on the resources of a fund collecting contributions from employers, has for instance been held not to be in violation of freedom of contract.[10] Similarly it has been decided that the requirements of a special agreement with the Ministry of Social Affairs for the establishment of privately run companies which pay pensions to workers who do not benefit from the general social security pension system, may be restrictive of freedom of contract, but that no constitutional norm guarantees this freedom.[11]

Statutory provisions which require a written form and certain specific clauses in contracts relating to an advertising campaign, have been held to

9 *Mellacher* 19 Dec 1989 A Series no 169; *Scollo* 28 Sept 1995 A Series no 315-C.
10 96-385 DC 30 Dec 1996 *JORF* 31 Dec 1996 19557.
11 94-348 DC 3 August 1994 *JORF* 6 August 1994 11495; *JCP* 1995 II 22403 obs Y Broussole.

be consistent with transparency of economic activities, which is an objective of public interest, and therefore the freedom of enterprise is not violated.[12] As far as freedom of contract is concerned, the Constitutional Council in that decision did not even bother to consider the argument that it might be unduly restricted.

The Constitutional Council had previously adopted the same approach in its decision 88-244 DC.[13] A provision in an amnesty law obliging an employer to re-integrate a dismissed worker and trade unionist was examined by the Council only with reference to violation of freedom of enterprise, while there also was a claim of violation of freedom of contract. In theory, a restriction on freedom of contract which would violate freedom of enterprise could be considered as unconstitutional. In practice, this has not yet been the case. But, after all, should it be?

3 SHOULD FREEDOM OF CONTRACT BE REGARDED AS A FUNDAMENTAL RIGHT?

Even though this remains pure theory, it can be argued that freedom of contract should be of constitutional value. However, it is not infrequent that contracts contain clauses restrictive of fundamental rights. Even if freedom of contract has no constitutional value, contractual restrictions on economic or personal freedoms, such as freedom of trade, the right of privacy, sexual freedom, and so on, remain under judicial control. The gains of "constitutionalisation" should not be measured without at the same time considering the cost. One has to know what might be lost, and may predict it by considering what has already been lost.

3.1 What might be lost?

There already are examples of cases in which the court has allowed the contract to limit a fundamental right. The *Cour de Cassation* in the *Dame Roy* case[14] accepted that a contract between a catholic school and a teacher could validly stipulate that if the teacher re married after having been divorced, she could be dismissed. It is true that the *Cour de Cassation's* decision was not based on respect for freedom of contract, but on respect for the catholic character of the school – the idea was that a teacher in a catholic school should behave in accordance with the doctrine of the Church. Yet, this case may give an indication of what too much freedom of contract in the hands of employers might lead to, especially if they relied on the Constitution.

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12 92-316 DC 20 Jan 1993 *RJC* I-516; *RFDC* 14-1993 obs L Favoreu J Frayssinet X Philippe T Renoux A Roux; *Petites Affiches* 2 June 1993 4 obs B Mathieu M Verpeaux.

13 20 July 1988 *RJC* I 334; *RDP* 1989 no 2 399 obs L Favoreu; AIJC IV 1988 392 405 obs B Genevois; *JCP* 1989 II 21202 obs M Paillet; D 1989 269 obs F Luchaire Droit social 1988 755 obs X Prétot; *AJDA* 1988 p 753 obs P Wachsmann.

14 Assemblée pleinière 19 May 1978 *Association Sainte Marthe/Dame Roy* D 1978 541; *JCP* 1978 II 19009.

3.2 What has already been lost?

It appears, though, that freedom of contract need not be "constitutionalised" in order to protect it. This is exemplified by the recent history of competition law in France. Before 1986, the refusal by one professional to sell or provide services to another professional or to a consumer was both a tort and a penal offence. The prohibition of such a refusal to supply goods or services was considered to be a very significant restriction on freedom of contract, since such freedom entails the autonomous discretion to select one's partner in a contractual agreement, and the choice to conclude the contract or not. By Regulation of 1 December 1986 the prohibition was maintained, but it was no longer a criminal offence, except in professional or consumer relationships. When the Regulation was revised on 1 December 1996, this penal offence was maintained, but no longer applied to relationships between professionals, protecting only consumers.

Freedom of contract, without ever being admitted into the realm of fundamental rights, has substantially gained ground over freedom of competition during the last decade. The corrosion of the prohibition on the refusal to sell or provide services, especially between professionals, is similarly anti-competitive in effect, while there is little doubt that fair competition is a fundamental requirement in a free-market economy.

One may thus justifiably question whether the paradise of freedom of contract is worth regaining at the cost of diminished commercial fairness. The economic and ethical desirability and acceptabilty of such a paradise may, to say the least, be doubted.