The Binding Effect of EU Fundamental Rights for Switzerland[1]

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Abstract
The Bilateral Agreements concluded between Switzerland and the European Union rely on the parallel wording of part of their provisions to EU norms and references to EU secondary legislation to achieve a parallel legal situation between the EU and Switzerland. As the present contribution shows, this transfer of notions and concepts of EU law also encompasses EU fundamental rights standards, which possess thus binding effect for Switzerland under certain circumstances, although they are not explicitly mentioned in the agreements. As a result, fundamental rights protection in Switzerland has gained an additional source of protection and increased its effectiveness, which comes, however, at the price of rising complexity.

1. Introduction

The relationship between the EU and Switzerland is determined nowadays by the so-called 'Bilateral Agreements'. Having rejected by a clear majority of the Swiss cantons and a narrow majority of the Swiss people accession to the European Economic Area on December 6th 1992, Switzerland opted to follow what is often referred to as the 'bilateral path' to foster economic relations to the EU internal market. Switzerland's strategy essentially consists thus of the conclusion of sectoral agreements with the EU, but also of a simultaneous unilateral effort of adapting Swiss law autonomously to the

[1] The present contribution is partly based on an earlier book contribution, see Epiney (2013), pp.141 ff.

ever changing requirements of EU law, in particular but not limited to areas covered by the EU internal market.[2]

Two 'packages' of Bilateral Agreements between the EU and Switzerland can be distinguished. The first package was signed in June 1999 and entered into force collectively in 2002. These agreements covered the topics of free movement of persons, research, technical barriers to trade, agricultural products, land transport, air transport and public procurement.[3] The second package of agreements was signed in 2004 and entered into force separately during the subsequent years. These agreements covered the topics of the taxation of pensions received by former EU officials resident in Switzerland, processed agricultural goods, the participation of Switzerland in the European Environmental Agency, statistics, the participation of Switzerland in various programs concerning education, professional training and youth, 'Schengen' and 'Dublin', the taxation of savings income and the combat against fraud.[4]

The various agreements exhibit different structures and objectives and have thus typically been allocated categories: 'Cooperation agreements' provide for the participation of Switzerland in EU-programs, while 'liberalisation and harmonisation agreements' such as the Free Movement of Persons Agreement achieve partial access to the EU internal market; 'partial integration agreements' establish a very close cooperation in particular sectors, typically with an even somewhat integrated institutional framework between Switzerland and the EU.[5] The present contribution does not purport to examine the content of the Bilateral Agreements in further detail;[6] instead, it focuses on the absence of provisions on fundamental rights in the agreements and the questions raised by this absence. This absence is all the more relevant in the light of the topics covered by the agreements, some of which are highly likely to raise fundamental rights concerns such as the free movement of persons or Schengen and Dublin.

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[2] See on the promises and pitfalls of this strategy of 'autonomous implementation' Maiani (2013), pp. 29 ff.

[3] See for the full text in English respectively OJ 2002 L 114, 6 ff.; OJ 2002 L 114, 468 ff.; OJ 2002 L 114, 369 ff.; OJ 2002 L 114, 132 ff.; OJ 2002 L 114, 91 ff.; OJ 2002 L 114, 73 ff.; OJ 2002 L 114, 430 ff.

[4] See again respectively Agreement of 26 October 2004, not published in the Official Journal; OJ 2005 L 23, 19 ff.; OJ 2006 L 90, 36 ff.; OJ 2007 L 303, 11 ff.; OJ 2008 L 53, 50 ff.; OJ 2008 L 53, 5 ff.; OJ 2004 L 385, 30 ff.; OJ 2009 L 46, 8 ff.

[5] See for this categorisation Felder (2006), pp. 101 f.

[6] See for a recent overview of the Bilateral Agreements and their integration mechanisms Pirker and Epiney (2013 (forthcoming)). See also for an instructive overview on the current state of relations between the EU and Switzerland the Report of the European Parliament (2010) Internal Market beyond the EU: EEA and Switzerland.

At a first look, the transfer of parts of the EU legal *acquis* seems thus to exclude the case law of the Court of Justice of the European Union (CJEU) on fundamental rights and the EU Charter of Fundamental Rights which codifies to a considerable extent this case law.[7] Consequently, this case law could be considered irrelevant in the application of the Bilateral Agreements in Switzerland. However, such a conclusion proves deceptive upon a closer look: EU fundamental rights are to be respected throughout the interpretation and application of all EU law, which could also have an impact on the interpretation and application of the Bilateral Agreements. This claim is examined in the present contribution, detailing first the manner of 'transfer' of parts of the EU legal *acquis* into the agreements and the relevance of the CJEU's case law for their interpretation (2.). The scope of the binding effect of EU fundamental rights is subsequently assessed (3.), to conclude lastly with some observations on the consequences of the thesis put forward in this paper (4.).

2. Mechanisms of 'transfer' of the EU legal *acquis* in the Bilateral Agreements

To fully understand the potential relevance of EU fundamental rights in the application of the Bilateral Agreements in Switzerland, we must first turn to the mechanisms of transfer that the agreements establish for the parts of the EU legal *acquis* which they cover. In a second step, we then assess to what extent the interpretation given to EU law by the CJEU is also pertinent to interpret the 'transferred' or parallel norms contained in the Bilateral Agreements.

2.1. Transfer mechanisms in the Bilateral Agreements

A large number of the Bilateral Agreements are based in different ways, but to a substantial degree on the EU legal *acquis*.[8] The object and material scope of each agreement determines the degree of transfer: some agreements aim for integration of Switzerland into parts of EU law more than others and require thus a more far-reaching adaptation to the existing EU legal *acquis*.

[7] See generally on the Charter and on EU fundamental rights law and case law Iglesias Sanchez (2012); De Búrca (2011); Bryde (2010), *passim*.

[8] See for a detailed examination of the various mechanisms of transfer Epiney et al (2012), pp. 140 ff.

Technically, the transfer of EU law is implemented in the respective agreement either through a direct reference to EU legal acts such as secondary legislation[9] or through the use of provisions which replicate or at least resemble in their wording EU legal provisions.[10] Since the agreements are treaties under international law, in principle the obligations they contain are formally of a static nature: in particular, changes in EU law to which they refer or which they replicate do not 'automatically' modify the content of a treaty. However, since the objective of the agreements is to secure a legal situation in Switzerland as parallel as possible to the one in the EU, specific provisions in the agreements provide for an integration of new EU legislative developments into the agreements. Three mechanisms can be distinguished for this purpose.

First, the Joint Committees formed by representatives of the contracting parties are often attributed the competence to modify annexes to agreements to e.g. adapt the list of EU secondary legislation accordingly. Typically, the Bilateral Agreements I contain this mechanism, as the example of the Agreement on the Free Movement of Persons shows. As Joint Committees decide by unanimity, such adaptations may also fail to take place, leaving the *acquis* under the Bilateral Agreements behind concerning relevant new developments in EU law.

Second, the Schengen and Dublin Association Agreements provide for an obligation for Switzerland to continuously adopt new developments in the respective field of EU law, but leave it to Switzerland's ordinary legislative procedure to implement the necessary changes. If new developments are not adopted, the respective agreement is automatically terminated after a certain period of time. There is thus no 'automatic' duty to adopt new EU law for Switzerland, but if new legal developments are for whatever reason not adopted in Switzerland the subsequent termination of the agreement constitutes a very heavy sanction. Switzerland is thus effectively left with little leeway.[11]

A third, somewhat similar mechanism has been found in the more recent Agreement on Customs Security:[12] While initially automatic termination in case of non-implementation of new legal acts by Switzerland had been the

[9] See e.g. Annexes II and III of the Agreement on the Free Movement of Persons, which list relevant secondary legislation and impose an obligation on Switzerland to create 'equivalent legislation'.

[10] See e.g. Annex I of the Agreement on the Free Movement of Persons which replicates at some points word by word EU law.

[11] The literature often uses the term of the 'all or nothing' principle applying for the Schengen and Dublin Agreements, see Epiney et al (2005), pp. 38 ff.; Baudenbacher (2010), p. 258.

[12] OJ 2009 L 199, 24 ff.

objective for the EU,[13] the eventual compromise provides for the possibility for the EU to take compensatory measures if Switzerland does not implement new legal acts. The Joint Committee can then turn to an arbitral tribunal to examine the proportionality of such compensatory measures.

It should be noted that for the future, the EU insists on finding a solution which ensures a continuous and dynamic integration of Switzerland into the developing EU legal *acquis*. The Schengen/Dublin model is thus likely to represent the 'minimum standard' for future bilateral cooperation, while the Agreement on Customs Security constitutes rather a 'special case' than a true model for other, less specific agreements.[14] While the Swiss government is hoping to be able to continue with bilateral, sector-specific solutions,[15] the EU position is more sceptical and demands that before the conclusion of any new agreements an adequate institutional framework has to be found; according to the Council of the EU, such a framework must ensure a dynamic adaptation to the EU legal *acquis* and international mechanisms of surveillance and judicial interpretation of the Bilateral *acquis*.[16]

2.2. The relevance of the interpretations given to EU law by the CJEU

The partial integration of Switzerland into the EU legal *acquis* through the Bilateral Agreements raises the question if and to what extent parallel norms of the Bilateral *acquis* ought to be interpreted in the same way as the parallel norms of EU law.[17] The answer to this question simultaneously lays the groundwork for the main issue of this paper, i.e. whether the interpretation of the Bilateral Agreements requires taking into account EU fundamental rights as used by the CJEU when interpreting the parallel EU legal *acquis*.

The argument in favour of such 'parallel' interpretation is particularly strong where the regulatory objective of an agreement is to achieve a parallel legal situation in the EU and in Switzerland. For this purpose, alignment with the jurisprudence of the CJEU appears indispensable. Some agreements expressly provide for the consideration of such case law. In the Agreement on the Free Movement of Persons, Article 16 paragraph 2 provides that '[i]nsofar as' concepts of EU law are concerned, 'account shall be taken of the relevant case-law of the Court of Justice' prior to the date of signature of

[13] Baumgartner et al (2009/20120), pp. 420 ff.
[14] See on this point *Neue Zürcher Zeitung* (7.7.2010).
[15] See also on other options discussed in Switzerland Thürer (2012), p. 483.
[16] Council Conclusions on EU relations with EFTA countries of 20 December 2012, pt. 33. See on this topic Epiney (2013), pp. 59 ff.
[17] See on this topic Epiney and Zbinden (2009), pp. 7 ff.; Klein (2006), pp. 1 ff.; Bieber (2011), pp. 1 ff.

the agreement. But also in the case of the Schengen and Dublin agreements, the wording and objective of the respective agreement provide strong arguments in favour of a 'parallel' interpretation in line with the CJEU's holdings.[18] Indeed, when interpreting the Agreement on the Free Movement of Persons, the Swiss Supreme Court routinely refers to the CJEU's case law as a relevant source of inspiration.[19]

Of course, the temporary scope of inspiration by the CJEU's jurisprudence also requires clarification. The mentioned Article 16 paragraph 2 of the Agreement on the Free Movement of Persons refers only to case law handed down 'prior to the date of its signature'. Taking a formalist approach, one could thus consider later case law to be irrelevant. However, in practice the Swiss Supreme Court takes a pragmatic approach and routinely takes into account also later case law to fulfil the objective of creating a continuous parallel legal situation.[20] Similarly, the CJEU has referred in the few cases on the Agreement on the Free Movement of Persons to its own earlier as well as later case law while interpreting the Agreement's provisions.[21] This pragmatic approach seems also well founded based on the objectives pursued by individual Bilateral Agreements as well as the overall framework they have established.[22]

While there is thus a good argument in favour of taking into account EU case law generally in the interpretation of the Bilateral Agreements, a number of questions remain to be answered in each concrete case. First, it is not always obvious whether notions in the Bilateral Agreements are effectively taken from EU law. Furthermore, the relevance of new developments in EU law for the interpretation and application of a provision in a Bilateral Agreement is not always obvious, in particular as regards new case law of the CJEU. Contentious questions may eventually only be resolved at the level of the highest courts, with the consequent lack of legal certainty and the additional problem that there may be a simple continuous divergence of opinions between the EU and Switzerland because of the lack of a binding mechanism for dispute settlement between both contracting parties.[23]

Despite these difficulties, we can retain that the need to take into account EU case law in the interpretation of the Bilateral Agreements provides in

[18] Epiney et al (2012), pp. 175 ff. See also with similar results on the Agreement on the Free Movement of Persons Oesch (2011), pp. 583 ff.; Maiani (2011), pp. 27 ff.; Burri and Pirker (2010), pp. 165 ff.; Baudenbacher (2012); pp. 574 ff.

[19] See e.g. the overview over the case law on the Agreement on the Free Movement of Persons Epiney and Metz (2011/2012), pp. 223 ff.

[20] The landmark case to be mentioned at this point is BGE 136 II 5.

[21] See e.g. CJEU, Case C-16/09 *Schwemmer*, ECR [2010] I-09717, para 32 f.

[22] Epiney et al (2012), pp. 169 ff.

[23] Epiney (2011/2012), pp. 81 ff.

principle a basis for the thesis of this paper that the interpretation of the Bilateral Agreements requires taking into account EU fundamental rights as used by the CJEU when interpreting the parallel EU legal *acquis*.

3. The relevance of EU fundamental rights in the interpretation and application of the Bilateral Agreements

To assess to what extent we can speak of a binding effect of EU fundamental rights in the sphere of application of the Bilateral Agreements, we must now as a further step first examine the dogmatic problem of the transfer of EU fundamental rights itself. Then, we turn to an assessment of the scope of the effect of these rights within EU law, to be able to eventually judge to what extent we can actually support such a binding effect for the application of the Bilateral Agreements.

3.1. Defining the problem

The case law on the Bilateral Agreements has yet to address the question as to whether the jurisprudence of the CJEU on fundamental rights is relevant for the interpretation of said agreements. Dogmatically speaking, we must ask whether the 'transfer' of EU law through the Bilateral Agreements encompasses at least in some cases also the EU fundamental rights *acquis* or, put differently, whether the 'concepts' of EU law mentioned in provisions like Article 16 paragraph 2 of the Agreement on the Free Movement of Persons also include EU fundamental rights standards.

The question concerns thus the reach of the transfer of the EU legal *acquis* under the Bilateral Agreements, which is of particular importance because of the CJEU's supreme authority to interpret EU law. Even if the Court is basing its case law on concepts that have not been transposed to the Bilateral Agreements as such, arguably such case law or at least certain parts of it may be relevant to construe provisions of an agreement: 'parallel' rights could be at issue.

This point as well as the difficulty of distinguishing relevant from irrelevant parts of the CJEU's case law can perhaps best be demonstrated with the example of Union citizenship as a concept of EU law. While Union citizenship has not been transposed to the Bilateral Agreements, a number of rights of free movement contained in the Agreement on the Free Movement of Persons are equivalent to and effectively mirror rights held by Union citizens. As soon as the CJEU construes these citizenship-based rights, such jurisprudence ought to be considered relevant just as well for the 'parallel' rights

contained in the Agreement. As an example, the finding of the CJEU that a parent of a minor Union citizen entitled to custody can derive a right of residence[24] was also found pertinent and relevant by the Swiss Supreme Court for a case on the right to free movement of non-workers.[25]

Consequently, as a crucial problem it is only possible to establish which aspects of EU law and the CJEU's case law are relevant in the framework of a case-by-case analysis. Even where at first look no EU law notions or concepts seem to have been transferred to a Bilateral Agreement, only interpretation can tell with certainty for the case at hand whether, notwithstanding this preliminary conclusion, certain aspects of EU case law may prove effectively relevant.

As a consequence, the relevance of EU fundamental rights cannot simply be denied based on the fact that such rights are not explicitly mentioned in the Bilateral Agreements. There may very well be situations where interpretation of the Bilateral Agreements will require recourse to EU legal principles including EU fundamental rights. However, such recourse requires a finding that these concrete principles of EU law interpreted by the CJEU have actually been transferred into the Bilateral Agreement at issue.

By contrast to the mentioned case of Union citizenship, for EU fundamental rights there does not exist a set of rights in the Bilateral Agreements which would be similar to those granted by citizenship but simply based on a different heading such as 'free movement' instead of 'citizenship'. The question therefore is not about fundamental rights having been transferred *verbatim* to the Bilateral Agreements, but rather whether they have become part of the Agreements as an implicit and inextricable part of the treaty obligations, i.e. of the EU legal notions contained in the Agreements. While an answer to this question can only be found on a case-by-case basis by examining each Bilateral Agreement's provisions and notions, the approach of and reason for the potential binding effect of EU fundamental rights is always the same: EU fundamental rights become part of the respective agreement and therefore binding upon Switzerland in the application of said agreement because they form part of the notions of EU law transferred to the agreement which – for the above-mentioned reasons – have to be interpreted taking into account EU law and the latter's interpretation by the CJEU.

[24] CJEU, Case C-200/02 *Zhu and Chen*, ECR [2004] I-9925.

[25] 2 C_574/2010, Judgment of 15 November 2010; see also BVGer, C-8146/2010, Judgment of 18 April 2011. See already earlier on the topic Epiney et al (2004/2005), pp. 42 ff.

3.2. The binding effect of EU fundamental rights for EU Member States

The extent of the binding effect of EU fundamental rights for EU Member States is a complex and disputed subject which cannot be addressed in full for the sake of the present contribution. It ought to suffice to base our findings on the current legal situation as mostly defined by the CJEU's case law. EU fundamental rights apply in principle to the institutions and organs of the EU, but also to Member States when they apply or implement EU law. The codification of fundamental rights through the EU Charter of Fundamental Rights has also included Article 51 paragraph 1 which states that these rights apply 'to the Member States only when they are implementing Union law'. There are various readings as to whether this clause has actually restricted the scope of application of EU fundamental rights under the Charter or simply confirmed the pre-existing practice.[26]

Despite the controversy on details, generally three constellations can be distinguished in which Member States can be bound by EU fundamental rights standards. First, they are bound in 'agency situations',[27] where they are directly applying or implementing EU law. This is often also referred to as the 'Wachauf' situation based on the pertinent jurisprudence by the CJEU.[28] A typical situation is the transposition of provisions of a directive, which has to comply with EU fundamental rights standards.[29] The question remaining is, however, to what degree Member State action must be determined by the requirements of EU law to speak of implementation.[30]

Second, EU fundamental rights must be respected when Member States deviate from the fundamental freedoms of the EU internal market. Based on the respective case law, this is often termed an 'ERT' situation.[31] A pertinent example is the expulsion of EU citizens based on public order or security reasons, which requires respect of EU fundamental rights in particular as regards the right to family life. Some of the literature has offered criticism of the Court's holdings,[32] but the case law continues to require such respect.[33]

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[26] See in favour of a less restrictive reading of Article 51 e.g. Lenaerts (2012), p. 17; reading Article 51 as a mere declaratory clause Borowsky (2011), p. 633 n. 11; in favour of a restrictive interpretation Jacobs (2010), p. 137 f.

[27] See on the notion of agency Kingreen (2011), p. 2959 n. 8 ff.

[28] CJEU, Case 5/88 *Wachauf*, ECR [1989] 2609.

[29] See e.g. CJEU, Case C-540/03 *Commission v. Council*, ECR [2006] I-5769.

[30] See e.g. Nusser (2011), p. 130.

[31] CJEU, Case C-260/89 *ERT*, ECR [1991] I-2925.

[32] Jacobs (2010), pp. 137 f. criticizes the needless overwriting of domestic standards of fundamental rights protection; others argue that Union law permits derogation by Member States it cannot be impeded, even as far as its fundamental rights standards are concerned, see Kingreen (2011), p. 2961 n. 14f.; the possibility of derogation should for some also

Third, recent case law has added that Member States also have to respect EU fundamental rights where EU secondary law provides for various options of implementation without requiring specific action.[34] In the case at issue, the CJEU had to answer several questions on the applicability of EU fundamental rights and the admissibility of refoulement of asylum seekers to Greece under EU asylum law, in particular Regulation 343/2003.[35] Centrally, the Court decided that if a Member State took the decision to examine a request for asylum itself under Article 3 of the Regulation, although based on the 'Dublin' criteria another Member State would be competent, this would constitute an act of implementation of EU law. Despite the fact that the Member State had thus discretion in exercising this right to examine a request itself, the Charter of Fundamental Rights would apply. This somewhat mirrors the situation where Member States have the option of deviating from fundamental freedoms under EU internal market law, but still have to respect EU fundamental rights when doing so according to the Court.

This development is particularly important as the applicability of EU fundamental rights also means that the CJEU is the competent ultimate authority to construe these rights and verify compliance with them.[36] Applying these findings to the case at hand, the CJEU subsequently found that it was contrary to EU law to establish an irrefutable presumption in one Member State that EU fundamental rights would be respected in another Member State and that refoulement under the Dublin system would thus always be admissible without taking into account at all the possibility of systematic failure of the asylum procedure in that Member State with severe consequences for the asylum seekers' right not to suffer inhumane or degrading treatment in the sense of Article 4 of the Charter of Fundamental Rights.

Summing up, it is thus the question of when Member States are implementing EU law that will require further clarification in the future. Bold proposals would ask the reach of EU fundamental rights to be essentially based on the existence of EU competences.[37] Some more cautious proposals

include the freedom to choose domestic fundamental rights protection standards, Borowsky (2011), p. 655 n. 29.

[33] See e.g. CJEU, Case C-368/95 *Familiapress*, ECR [1997] I-3689; Case C-112/00 *Schmidberger*, ECR [2003] I-5659; Case C-438/05 *Viking*, ECR [2007] I-10779.

[34] CJEU, Cases C-411/10 and C-493/10 *N.S.*, not yet published.

[35] OJ 2003 L 50, 1.

[36] Sceptical on a perceived transformation of the CJEU towards a veritable fundamental rights court e.g. Bryde (2010), p. 125; Ludwig (2011), p. 733.

[37] See Conclusions of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano*, ECR [2011] I-01177. See for a discussion of this proposal von Bogdandy et al (2012), p. 500; see more sceptical Streinz and Michl (2012), p. 2864 n. 15.

have been proposed in the doctrine.[38] For the present purposes, it suffices, however, to assess the CJEU's case law. Generally, the Court seems to take a continuously expanding view in its recent decisions.[39] As an example, in one of the most recent decisions it found that a system of criminal and administrative sanctions established under national law to punish infringements of value added tax legislation fell within the scope of EU law and thereby could be considered an implementation of EU law to which EU fundamental rights applied,[40] although it was only the VAT legislation which implemented Directive 2006/112/EC.[41] These findings can now help to understand to what extent the binding effect of EU fundamental rights standards has been transferred to the Bilateral Agreements.

3.3 The 'integration' of EU fundamental rights into the Bilateral Agreements

As previously discussed, the Bilateral Agreements take over EU law in a number of areas. This transfer of law, however, raises the question as to whether EU fundamental rights are also encompassed, i.e. whether the rules just set out on the binding effect of EU fundamental rights for EU Member States are also applicable under the Bilateral Agreements. This would mean that the concepts and notions of the Bilateral Agreements that are based on EU law also have to be applied and interpreted in accordance with EU fundamental rights. Simultaneously, margins of discretion for implementation opened by such concepts or notions would also have to be used respecting EU fundamental right standards.

Since EU fundamental rights encompass a very broad range of rights including economic and procedural ones, practically all Bilateral Agreements could be potentially concerned. The most important agreements in this regard are, however, certainly the Agreement on the Free Movement of Persons and the Schengen/Dublin Association Agreements. As one example, with these principles in mind expulsion of an EU citizen based on the grounds of public order and security as enshrined in Article 5 of Annex I of the Agreement on the Free Movement of Persons would only be possible in accordance with EU fundamental rights as interpreted by the CJEU. Fur-

[38] See e.g. Nusser (2011); others mainly call for cooperation between the various fundamental rights courts active in the EU, see e.g. Iglesias Sanchez (2012), pp. 1606 ff.
[39] See e.g. CJEU, Case C-339/10 *Krasimir A. Estov*, ECR [2010] I-11465; Case C-457/09 *Chartry*, ECR [2011] I-00819.
[40] CJEU, Case C-617/10 *Akerberg Fransson*, Judgment of 26 February 2013, paras 20-21.
[41] OJ 2006 L 347, 1 ff.

thermore, Switzerland would also have to consider the fundamental rights case law of the CJEU under the Dublin Agreement. This would encompass not only case law on the interpretation of the relevant provisions of EU secondary law, but also on the appropriate use of the margin of discretion doctrine which must also comply with EU fundamental rights standards.

As an argument against the relevance of EU fundamental rights some may raise the fact that fundamental rights as such are not part of the Bilateral Agreements. Neither do they appear in the text of the Agreements or their preambles nor are there parallel provisions which are simply based on different grounds as in the case of free movement rights of Union citizens on the one hand and the rights granted to individuals under the Agreement on the Free Movement of Persons on the other hand. Additionally, one could contend that the Bilateral Agreements as a whole aim for a lower degree of integration than e.g. the European Economic Area, which would justify a more cautious approach to the parallel interpretation of provisions of the agreements to the corresponding norms of EU law.[42] Taking into account the effect of EU fundamental rights on EU Member States, one could argue moreover that accepting EU fundamental rights in the legal regime of the Bilateral Agreements may lead to a much deeper integration of Switzerland into the EU legal *acquis* than the substance of the Bilateral Agreements could possibly justify or than it might have been intended by the conclusion of the agreements.

However, at the end of the day the arguments in favour of a transfer of EU fundamental rights standards and the respective case law of the CJEU appear more convincing, as long as the precondition is fulfilled that notions of EU law are to be applied and interpreted because the Bilateral Agreement in question is following EU law in the norm at issue. The Swiss Supreme Court has also followed this approach when adjudicating upon the rights contained in the Agreement on the Free Movement of Persons which are fashioned following the model of EU law including the pertinent EU fundamental rights standards.[43] Centrally, the exact scope and content of such rights or other notions and concepts is to be determined in EU law itself taking into account EU fundamental rights; these standards of fundamental rights protection are thus necessarily part of the norms of EU law that are transferred to the Bilateral Agreements.

[42] See in this sense CJEU, Case C-70/09 *Hengartner*, ECR [2010] I-7233. See, however, a different approach in more recent case law, CJEU, Case C-506/10 *Graf*, Judgment of 6 October 2011, not yet published, and C-257/10 *Bergström*, Judgment of 15 December 2011, not yet published.
[43] BGE 130 II 113.

If the principle of parallel interpretation of such transferred parts of the EU legal *acquis* is accepted,[44] there is no convincing reason why an exception should be made for EU fundamental rights. This point is reinforced by the mentioned objectives pursued by the Bilateral Agreements, which aim for a parallel legal situation in Switzerland as compared to the EU; this aim in particular requires taking into account EU fundamental rights, as otherwise no parallel legal situation could be ensured. Furthermore, it seems more than difficult to try to split the case law of the CJEU on specific legal guarantees into components or layers to be able to avoid taking into consideration those components or layers that are based on the application of EU fundamental rights. The relevance and impact of EU fundamental rights was, moreover, well-known during the negotiation and at the date of signature of the Bilateral Agreements, which makes it possible to claim that exceptions from the principle of parallel interpretation for EU fundamental rights would have had to be laid down more expressly in the text of the agreements.

Summing up, our analysis thus supports a well-founded argument that within the interpretation of notions and concepts in the Bilateral Agreements that have been taken from the EU legal *acquis* EU fundamental rights have to be respected in the same manner as under EU law. If we generalize this approach, the implicit relevance of principles of EU law can also play a role as regards other norms or legal acts of primary or secondary EU law which have not been explicitly mentioned in the Bilateral Agreements. As an example, it appears conceivable that during the interpretation of the Dublin Regulation under the Dublin Association Agreement systematic interpretation would also refer to other legal acts of EU asylum law even if those acts are not part of that Agreement. As a consequence, such legal acts would be relevant for Switzerland not via their integration into the Agreement, but as part of the interpretation of the Dublin Regulation.

Having found EU fundamental rights applicable under the Bilateral Agreements based on the previous reflections as far as they have been transferred implicitly to those agreements as part of EU law notions and concepts, one may wonder whether there is also a direct legal basis to apply EU fundamental rights under the Bilateral Agreements. There is, however, no such basis as a matter of principle, as far as an 'isolated' reliance on EU fundamental rights is concerned. EU fundamental rights are only binding standards as part of the notions and concepts of EU law included in the Bilateral Agreements; they are not granted as self-standing rights as e.g. the rights granted under the European Convention on Human Rights. Still, they can be relied upon by individuals in the framework of the implementation of

[44] See already section 2.2.

notions of EU law used in the Bilateral Agreements. As a consequence, an asylum seeker can e.g. argue that his transfer to a certain EU Member State based on the obligations under the Dublin Association Agreement violates his right under Article 4 of the EU Charter of Fundamental Rights not to suffer torture or inhumane or degrading treatment or punishment. Similarly, an EU-citizen could rely on Article 7 of the Charter on the respect for private and family life to contest the legality of his expulsion for reasons of public order or security. In the mentioned cases, however, EU fundamental rights are not applied directly as self-standing guarantees, but only as a result of the need to apply and interpret the relevant provisions of the Bilateral Agreements in conformity with EU fundamental rights.

4. Conclusion

The approach developed in the present contribution which suggests that EU fundamental rights are relevant also in the application and interpretation of the Bilateral Agreements is not only of theoretical or dogmatic interest. In practice, the fundamental rights at issue are substantially also contained in the European Convention on Human Rights and therefore binding for Switzerland. Furthermore, also the CJEU's case law constantly takes inspiration from that of the European Court of Human Rights, and Article 52 paragraph 3 of the EU Charter of Fundamental Rights requires that Charter rights corresponding to those contained in the European Convention ought to have the same scope and content as those rights. All this notwithstanding, the binding effect of EU fundamental rights as argued for in this contribution is not only a different dogmatic construction, but has also significant practical implications. In particular, the present approach requires a relevant interpretation reached by the CJEU to be respected simultaneously under the Bilateral Agreements, irrespectively of whether the European Court of Human Rights has already given a reply to the question at issue or not. Furthermore, the catalogue of rights of the EU Charter of Fundamental Rights is more comprehensive than the one of the European Convention on Human Rights; several of the rights not contained in the European Convention on Human Rights could arguably be relevant under the Bilateral Agreements.

At the same time, the suggested approach also illustrates the difficulty of assessing the exact scope of the EU legal *acquis* that has effectively been transferred through the Bilateral Agreements; not easily predictable aspects are encompassed under the obligations contained in the Bilateral Agreements, despite the fact that the contracting parties may not have clearly considered them at the time of negotiation.

As regards the respect for human rights, the approach suggested in this contribution entails a further 'internationalisation' of human rights protection in Switzerland. The minimum standard granted to date only by the European Convention on Human Rights is enlarged in terms of substance, as far as the application of notions of EU law under the Bilateral Agreements is concerned. Moreover, the jurisprudence of a further international court – the CJEU – must be considered in Switzerland as regards the protection of human rights if the mentioned preconditions are fulfilled. Ultimately, an additional, dogmatically different mechanism of implementation becomes available for the human rights granted under the European Convention on Human rights next to the European Court of Human Rights; the effectiveness of the protection of fundamental rights is likely to benefit both in general and as regards the rights granted under the European Convention on Human Rights. It thus becomes conceivable that the rights granted under the Agreement on the Free Movement of Persons are at least partly considered to be 'fundamental rights', which could – just like the rights granted directly by the Euroepan Convention on Human Rights - even claim primacy over federal law where the Swiss legislator intentionally legislated contrary to international obligations such as those included in the Agreement on the Free Movement of Persons.[45] This is of particular relevance for the current problems related with the initiative on expulsion (*Ausschaffungsinitiative*).[46]

At the end of the day, the binding effect of EU fundamental rights as part of the application and interpretation of provisions of the Bilateral Agreements entails a diversification of the system of protection for fundamental rights, which is certainly advantageous in terms of effectiveness. At the same time, the rising complexity of the system of fundamental rights protection must not be underestimated, which encompasses three levels, none of which are identical neither in terms of the content of fundamental rights nor in terms of their mechanisms of implementation. Fundamental rights protection thus operates at the level of the Swiss Constitution, the European Convention on Human Rights and the Bilateral Agreements.

[45] In the *Schubert* case (BGE 99 Ib 39), the Supreme Court had accepted such legislation as having primacy over international law within the Swiss legal order, unless obligations under the European Convention on Human Rights would be at stake. This latter exception would thus also apply here.

[46] See on the topic Epiney (2011/2012), pp. 107 ff.

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