CONSTITUTIONAL ISSUES IN SUBSTANTIVE LAW – LIMITS OF CONSTITUTIONAL JURISDICTION

by

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A. The Role of Substantive Interpretation

Defining what *constitutional* issues, as opposed to issues of ordinary law, are and where the limits of *constitutional* jurisdiction in contrast to the jurisdiction of ordinary courts, but also vis-à-vis the legislature run, requires more than a discussion of the technical and organizational viewpoints mentioned in the program. The determination of the scope of constitutional law and constitutional adjudication is to a large extent a question of how constitutional law is interpreted and only in the second place a question of filtering mechanisms, caseload, standing requirements etc. I want to illustrate this by giving two examples taken from the jurisprudence of the Federal Constitutional Court of Germany. Since the topic of my contribution is limited to issues of substantive law I will focus on fundamental rights.

B. The Radiating Effect

My first example is the landmark case *Lüth* decided in 1958[1]. The problem posed by this case was the role of fundamental rights in private law relationships, the so-called horizontal application. In their traditional understanding fundamental rights were limited to vertical application. They regulated the relationship between state and citizens, nothing else. With regard to private law this meant that the legislature was bound by fundamental rights when it regulated the relationships between private persons. But once private law provisions were found to be constitutional their interpretation and application was exclusively a matter of ordinary law and belonged to the ordinary courts alone. The *Bill of Rights* did not reach out to this area and consequently the Constitutional Court had no power to review the application of private law by ordinary courts.

In *Lüth* the Constitutional Court confirmed that fundamental rights were primarily individual rights of citizens vis-à-vis the state. They limited government power and

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1 BVerfGE 7,198.

entitled individuals to defend themselves against government when it had transgressed the boundaries. The Court added, however, that the function of fundamental rights did not end here. Fundamental rights were at the same time objective values and constituted the highest principles of the whole legal system. From this the Court drew the conclusion that they permeate the whole legal order, not only public law, but private law as well and extend their influence not only to law-making but also to the application of the law. Consequently, wherever a provision of private law limits the exercise of a fundamental right or where the application of such a provision in a concrete case has a limiting effect on a fundamental right, the law has to be interpreted in the light of the right affected (the so-called radiating effect – *Ausstrahlung*).

C. The Duty to Protect

The second example is the invention of a protective duty of the state (*Schutzpflicht*), derived from fundamental rights in their capacity as objective principles, which the Constitutional Court developed in the *First Abortion Decision* of 1975[2]. The question posed by this case was whether the liberties guaranteed in the *Bill of Rights* function as negative rights only or whether they operate as positive rights as well. In the traditional understanding fundamental rights were exclusively negative rights. In this capacity they require the legislature to abstain from certain actions regarded as violations of fundamental rights, whereas in their capacity as positive rights they require the legislature to take action in order to protect the constitutionally guaranteed goods or interests from violations by private parties. The Constitutional Court found a purely negative function incompatible with the understanding of rights as highest principles. Only by an addition of the objective dimension could they fulfil their claim to guarantee a free society.

Protection against private actors can only be furnished by the state, which has to discharge the task by making laws protecting citizens against their fellow citizens. Legislation was necessary to fulfil the duty because the menaces to fundamental rights emanating from private instead of state actors are themselves results of the exercise of fundamental rights, e.g. freedom of profession or freedom of occupation, which in turn threaten, say, the right to life or the physical integrity. This means that the duty to protect one fundamental right will usually be fulfilled by limiting some other fundamental right. Limitations of fundamental rights, however, require a law. Hence, the legislature is no longer free to decide whether it wants to solve certain problems or not. If non-action leaves citizens unprotected in their fundamental rights the legislature is constitutionally obliged to act.

2 BVerfGE 39,1. Cf. *D. Grimm*, The Protective Function of the State, in: G. Nolte (ed.), European and US Constitutionalism, p. 137.

D. Judicial Imperialism?

Both, the radiating effect and the duty to protect, are doctrinal developments in substantive law whose immediate effect was a tremendous increase in the number of constitutional issues. *Lüth* brought the interpretation and application of ordinary law under the influence of constitutional law[3]. *Abortion I* made legislative non-action a constitutional issue. At the same time the limits of constitutional jurisdiction were extended at the expense of other actors. Following *Lüth* the whole judiciary was submitted to the control of the Constitutional Court. Following *Abortion I,* legislative acts cannot only be declared unconstitutional by the Constitutional Court if the legislature went too far in limiting a fundamental right, but also if it did too little in order to protect a fundamental right from intrusions by private parties or if it chose to remain totally inactive vis-à-vis manifest threats to such rights.

Although the innovations increased the power of the Court vis-à-vis the ordinary courts and the legislature, it would be too easy to interpret this jurisprudence as a strategy of judges to expand their domain at the expense of other juridical and political actors. Rather, the difference between intent and effect plays a role. The intent was to give full recognition to certain provisions of the constitution. The judges arrived at these results in fulfilling their function of expounding the constitution in view of problems they had to solve. The effect was a shift in the power structure among the various branches of government as well as within the judicial branch. If it is true that the expansion of constitutional issues and the realm of constitutional jurisdiction finds its cause in the interpretation of substantive constitutional law, it seems difficult to convince judges that they should *not* rule what in their view the constitution requires.

E. Blurred Borderlines

On the other hand, the interpretation entails a number of problems. One of them is that traditional borderlines are being blurred. Once it is acknowledged that the constitution influences the interpretation of ordinary law and that the Constitutional Court may review not only a law, but also its interpretation and application the question arises how to distinguish between the realm of constitutional law and that of ordinary law. Clear criteria have not been found, and it is unlikely that they exist. The Constitutional Court constantly asserts that it is not a general court of appeal and that not every misinterpretation of ordinary law violates the constitution. Rather the mistake must consist in disregarding the impact of fundamental rights. But since this is already seen to be the case when an ordinary court failed to give sufficient

3 Cf. *G.F. Schuppert/C. Bumke*, Die Konstitutionalisierung der Rechtsordnung, 2000.

weight to fundamental rights in the process of balancing a clear borderline can no longer be drawn[4].

A similar question arises with regard to the legislature. To what extent is the legislature determined by the constitutional duty to protect fundamental rights? The Constitutional Court did not uphold its view expressed in the first abortion decision that the constitutional obligation may even include the means with which the legislature fulfils this duty. It now distinguishes clearer between the "if" and the "how". When a duty to protect fundamental rights exists the legislature is bound to fulfil it, whereas it enjoys wide discretion as to the ways and means to comply with its obligation. However, the Constitutional Court is not prepared to concede unlimited choice. The legislature has to employ a means that is suitable to furnish protection, and the protection has to be an adequate one. Corresponding to the *Übermaßverbot* in connection with negative rights there is an *Untermaßverbot* in connection with positive rights[5]. This again is not a very clear demarcation, and thus both important substantive innovations are a constant source of conflict.

F. Coping with the Caseload

Another consequence of the expansion of judicial review through substantive interpretation is a growing caseload. How cope with this consequence? The caseload of the German Constitutional Court is ten times higher than that of the European Court of Justice while the number of judges is smaller. Only here the technicalities and mechanisms of handling cases come in. As much as the Constitutional Court expanded the number of constitutional issues and the limits of constitutional jurisdiction in general, as restrictively does it treat individual cases. In cases of concrete norm control – a procedure equivalent to the preliminary ruling of the ECJ – the Constitutional Court submits the referrals by ordinary courts to a strict scrutiny as to the relevance of the question posed by an ordinary court for the solution of the case pending. This includes a search for alternative interpretations that would avoid a constitutional problem. In addition the Constitutional Court places a high burden of argumentation on the ordinary courts, concerning the constitutional question they raise.

On the other hand, constitutional complaints, which account for 95 % of the court's workload, pose the question of the proper function of a constitutional court. Is its task to render justice in each individual case or should it rather determine the

4 Cf. *R.* Alexy/P. Kunig/W. Heun/G. *Hermes,* Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit, in: Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer (VVDStRL), vol. 62 (2002), p. 221 ff.

5 BVerfGE 88,203 (254).

general guidelines by selecting appropriate cases?[6] The statute regulating the Constitutional Court (*Bundesverfassungsgerichtsgesetz*) as amended in 1993 upon demand of the constitutional court itself says that the Court has to accept a case if the constitutional issue it presents has not yet been decided. In addition it has to accept a case if the dismissal would cause great harm to the complainant. The Court added some requirements of admissibility by way of interpreting the statute. In particular the provision according to which complainants have to exhaust all means available to them to obtain redress before complaining with the Constitutional Court is interpreted very broadly.

G. The European Court of Justice Compared

Different from this practice, the ECJ, against the advice of its Advocates General[7], is not restrictive but rather permissive. What is the reason? Do the two courts have different functions? Is there perhaps a general difference between a domestic and an international court? Does it make a difference whether a court is on top of an elaborated judicial system or whether it depends on voluntary cooperation of independent courts? The ECJ usually justifies its approach by asserting that it has to guarantee the unity of European law in all member states. This argument plays no role on the domestic level. One could ask, however, whether unity of the law is less important on the national level. This is hardly the case. Is it less endangered on the national level? This is probably so. But is a certain degree of plurality tolerable or even inevitable in a very heterogeneous community like the EU? The answer to these questions must be left to the following discussion.

6 For a general discussion in connection with handling a growing caseload see Bundesministerium der Justiz (ed.), Entlastung des Bundesverfassungsgerichts, 1998.

7 Cf. *Lennaerts* in this volume, p. 219 ff.