

## Civil law and Constitution

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- I. If we look at the title of the conference it seems that civil law and constitutional law are in an equal position. However, according to a remark of the President of the German Federal Constitutional Court (FCC), Mr. Voßkuhle, German jurists regularly do not doubt that the Constitution has important impact on the legal relations between private persons.

If we consider the fundamental rights as guaranteed by the Constitution we will have doubts on whether fundamental rights are regulating also private law relations. The reason is that article 1.3 of the German Basic Law (BL) clearly obliges the public powers, legislation, the executive and the judiciary, to respect fundamental rights but says nothing about private persons. It corresponds to this fact that jurisprudence only accepts an *indirect impact* of fundamental rights on civil law relations. Fundamental rights are traditionally seen as subjective rights of defense against the intervention of public power. Specific arguments have been necessarily

put forward for justifying the constitutional impact on civil law.

- II. The most important landmark in the jurisprudence extending the field of application of constitutional law, especially of fundamental rights to civil law relations has been the famous "Lüth case" of the FCC. The Court has qualified fundamental rights as an *objective order of values* which are applicable to all branches of law including civil law. This was the starting point for the predominance of constitutional law over civil law.

The German FCC has created in its jurisprudence the "model of impact" which means an indirect influence of fundamental rights on civil law matters, which is characterized by the "radiation" (*Ausstrahlungswirkung*) of fundamental rights on civil law norms. This means that constitutional law, in particular fundamental rights have an impact on civil law through the interpretation of civil law norms, especially of general clauses of civil law in the light of constitutional law.

Nowadays the model of the "obligation to protect the values embodied by fundamental rights" (*Schutzpflichtenmodell*) is the leading concept, supported by the FCC.

However it should be kept in mind that the impact of fundamental rights on civil law is not something very

particular because civil law regulations are rules for the living together of human beings which correspond to what fundamental rights want to regulate.

### III. Reasons for the discordance of civil law and constitution law.

#### 1. Non-constitutional courts (ordinary courts, Fachgerichte) and constitutional courts

The problem arises from the question to which intensity the constitutional court can review non-constitutional courts decisions. This comes up in Germany because there is a possibility to impugn civil law cases which are largely constitutionalized, with the individual constitutional complaint (Verfassungsbeschwerde) before the FCC. When constitutional courts decide on these matters on the basis of constitutional law they have not the detailed and sophisticated civil law dogmatic at their hands. They have to apply fundamental rights and other constitutional norms with broad formulations and are therefore rather rude in their argumentations in comparison with civil law courts.

#### 2. Criteria for the constitutional court decisions

The criteria for the constitutional court decision are rather rough and undetermined. The legislator has a large discretionary power for fulfilling the obligations resulting from the Constitution. The principle of proportionality

which is of great flexibility in its application is of importance in this context.

#### IV. Different Impacts of Fundamental Rights on Civil Law

##### 1. Impact on the civil law legislator

The legislator has to respect constitutional law to a full extent.

##### 2. Impact on private persons

Here a difference must be made between *contracts* and *torts*.

As to *contracts* the fundamental right of freedom to contract must be duly taken into consideration. If private parties create law by the contract they have not to respect constitutional law in its full dimension.

The German FCC has introduced, in its well-known "bail decision" (Bürgschaftsentscheidung), the specific argument that fundamental rights are applicable if one of the contracting parties has a "structural predominance" ("structural inequality"). This argument seems doubtful for its incompatibility with the nature of a private contract. Structural inequality in a contract relation cannot be an overall convincing argument.

In the field of *torts* the impact of fundamental rights can be accepted to a larger extent. The situation of the *Lüth* case concerning the question of the constitutional law impact in the context of a boycott appeal is paradigmatic.

### 3. Courts

Courts as public institutions are fully bound by the fundamental rights according to article 1.3 BL. However, if courts decide on civil law matters, in particular contracts, they have to respect the reduced constitutional law impact on contracts as it is a consequence of the constitutional freedom to contract. This means a limitation of article 1.3 BL as it has been pointed out in 1992 by the famous German civil lawyer *Dieter Medicus*.

## V. How the FCC deals with these problems.

### 1. Reduction of the intensity of the review

The FCC is aware that its jurisdiction is not that of a "superrevision". Civil law matters have to be decided in substance by ordinary courts and not by constitutional courts.

Reviewing ordinary courts decisions for their constitutionality by constitutional courts can only be carried out in a limited, reduced form. The decision of an ordinary court is unconstitutional only if (1) the

court does not see at all the impact of fundamental rights in the case to decide, or (2) the court fundamentally misunderstands the importance of the fundamental right in the context of the case to decide. This would occur if a piece of legislation corresponding in its contents to the result of the court's decision would not be constitutional (according to the famous "Schumannsche Formel", formula of Prof. Schumann). (3) The third aspect of unconstitutionality of an ordinary court's decision is the unconstitutional development of existing law (verfassungswidrige Rechtsfortbildung) by the court.

Considering these aspects the FCC should have restricted its review in the mentioned "pledge case" to a control of arbitrariness in the sense of article 3.1 BL.

### 3.The particular structures of civil law

In particular in the field of contract law it is an important particularity that the positions on both sides of the contract are protected by fundamental rights. During centuries this relation of opposite parties has been developed by civil law and expressed by jurisprudence and theory. This has led to the existence of a highly developed layer of law which makes the court decisions predictable and duly

implements the principle of rules law. Civil law has created a rich spectrum of legal instruments. In a certain contrast constitutional law is dependent, to a great extent, on weighing out principles and reconciling opposite positions. The argumentation is less differentiated.

## VI. Final Remarks

The FCC takes care of respecting the particularities of civil law by reducing its intensity of constitutional review. However from the perspective of civil law this seems not to be completely satisfying. In particular the question of the constitutionality control of ordinary courts decisions is to a great extent left unresolved.