

The Role of the Constitutional Court to protect the Constitutional Rights of the Citizen in the Era of Globalisation

I. Introduction

1. Human rights, fundamental rights, constitutional rights
 - the philosophical concept of pre-legal ("natural") human rights
 - the legal implementation of this concept in the form of fundamental rights
 - in particular those anchored in the Constitution (constitutional rights)
 - primary role of the Constitutional Court to protect the fundamental rights, not the human rights
2. The role of the Constitutional Court to protect the fundamental rights
 - prominent role but not the primary institution for the protection of fundamental rights
 - protection by abstract or concrete constitutional review of laws or on individual constitutional complaint against laws or even, in some countries, any acts of public authority
3. Globalisation and geo-regionalisation as a benefit and threat for the protection of fundamental rights
 - better acceptance of the idea of human rights and concrete steps for their protection all around the world
 - however, *reduced significance of the national constitutions* due to the power of not-submitted actors: multi-national companies, intern. organisations and in Europe a supranational union exercising on a large scale public power in its member states

II. The protection of fundamental rights through the constitutional review of international treaties

- many important decision of European Constitutional Courts concern treaties reforming the European Union
- *practical problems* of the constitutional review of laws ratifying intern. treaties
 - risk of fait accompli or a long delay of the entry of the treaty into force
 - no possibility of hindering only the ratification of some individual clauses in the treaty
 - consequently, in the history of European integration no Constitutional Court has ever stopped a reform

III. The Constitutional Court and the protection of fundamental rights against supranational powers

- While the EU is not bound to the constitution of its member states (→ autonomy of Union law), its supranational legal acts are binding to the authorities and citizens in the states even in case of conflict with the national constitution (→ primacy of Union law)
- long vivid *debate about the limits of the primacy of Union law* and possible interventions of the national Constitutional Courts
 - Italian Constitutional Court [Corte costituzionale]: Frontini Franco (1973)
 - German Federal Constitutional Court [Bundesverfassungsgericht]: Solange I (1974), Solange II (1986), Maastricht judgement (1993), Banana market organisation (2000)
- emerging European "common sense": no encroachments on the identity of the constitution
- the need of an own catalogue of fundamental rights in any supranational organisation with vast competences from the beginning

IV. The Constitutional Court and the parallelism of human rights protection systems

1. The plurality of human rights protection systems
 - international human rights treaties as "mutual insurance" and *second safety net*
 - geo-regional human rights treaties as expressions of the identity of civilisations
 - up to 5 levels of fundamental or human rights regimes binding the public authorities in European states
2. General aspects of the parallelism of human rights protection systems
 - intensified protection through cumulative requirements
 - parallel operation without correlation or interference
 - mutual influence of interpretations
3. Conflicts between different fundamental and human rights regimes
 - only possible where fundamental/human rights clauses require intervention *against* a citizen
 - the problem of *tripolar constellations* where the state must restrict the freedom of private persons in order to protect the rights of others
 - the jurisprudence of the German Federal Constitutional Court about the limits of obedience to the decisions of the European Court of Justice

¹ Außerplanmäßiger Professor (adjunct professor) at the University of Göttingen; Advisor (placed by CIM/GIZ) at the Academia de Administrare Publică in Chişinău (until 08/2017); Guest lecturer at the Hochschule des Bundes für öffentliche Verwaltung, Brühl, Germany (from 10/2017); www.jura.uni-goettingen.de/schmitz, <http://home.lu.lv/~tschmit1>, www.thomas-schmitz-hanoi.vn; E-Mail: tschmit1@gwdg.de.

V. Conclusion

Further Reading

- Bleckmann, Moritz*: Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union [National fundamental rights in the scope of application of European Union law], 2011
- Costa, Jean-Paul*: The Relationship Between the European Court of Human Rights and National Constitutional Courts?, Sir David Williams Lecture 2013 [scientific lecture], www.cpl.law.cam.ac.uk/sir-david-williams-lectures/jean-paul-costa-relationship-between-european-court-human-rights-and
- European Court of Human Rights (editor)*, Dialogue between Judges 2014: Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility? Proceeding of the Seminar 31 January 2014, www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf.
- Popelier, Patricia; Mazmanyan, Armen; Vandenbruwaene, Werner (editors)*: The Role of Constitutional Courts in Multilevel Governance, 2013
- Popelier, Patricia; Van de Heyning, Catherine; Van Nuffel, Piet*: Human Rights Protection in the European Legal Order. The Interaction between the European and National Courts, 2011
- Schmitz, Thomas*: Integration in der Supranationalen Union. Das europäische Organisationsmodell einer prozeßhaften geo-regionalen Integration und seine rechtlichen und staatsrechtlichen Implikationen [Integration in the Supranational Union. The European model of organisation for process-oriented, geo-regional integration, and its concomitant legal and theoretical implications], 2001, English summary at www.iuspublicum-thomas-schmitz.uni-goettingen.de/SupranUnion/SupranUnion_en.htm.
- Schmitz, Thomas*: Jurisprudence on European Integration. An internet compendium on important decisions of the European Court of Justice and the constitutional courts of the member states, last updated 2015, www.iuspublicum-thomas-schmitz.uni-goettingen.de/Lehre/Jurisprudence-on-integration.htm.
- Schmitz, Thomas*: Das Bundesverfassungsgericht und das Recht der Europäischen Union, in: Piotr Czarny/Piotr Tuleja/Krzysztof Wojtyczek (editors), Verfassung im Zeitalter von Globalisierung und Europäisierung, 2011, p. 21 - 45; updated version of 2015 ("Die Rechtsprechung des Bundesverfassungsgerichts zur Beteiligung Deutschlands an der europäischen Integration") at http://home.lu.lv/~tschmit1/Downloads/BDHK-Symposium_11-12-2009_Schmitz3.pdf.
- Schorkopf, Frank*: Karlsruhe will Kommunikation, nicht Konfrontation, Legal Tribune Online, 2016, www.lto.de/recht/hintergruende/hbverfg-2bvr273514-eu-haftbefehl-auslieferung-verfassungsidentitaet-menschenwuerde-gg-eu-recht-emrk.
- Schwerdtfeger, Angela*: Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts - Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem, *Europarecht* 2015, p. 290 ff.
- Zenger, Jonas*: Wandel im Kooperationsverhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof im grundrechtlichen Mehrebenensystem der Europäischen Union, *Bucerius Law Journal* 02/2016, p. 33 ff., <http://law-journal.de/archiv/jahrgang-2016/heft-2/wandel-im-kooperationsverhaeltnis-zwischen-bundesverfassungsgericht-und-europaeischem-gerichtshof-im-grundrechtlichen-mehrebenensystem-der-europaeischen-union>.

The Role of the Constitutional Court to protect the Constitutional Rights of the Citizen in the Era of Globalisation

I. Introduction

1. Human rights, fundamental rights, constitutional rights
2. The role of the Constitutional Court to protect the fundamental rights
3. Globalisation and geo-regionalisation as a benefit and threat for the protection of fundamental rights

II. The protection of fundamental rights through the constitutional review of international treaties

- no Constitutional Court has ever stopped a treaty reforming the European Union...

III. The Constitutional Court and the protection of fundamental rights against supranational powers

- the debate about the *limits of the primacy of Union law* and the intervention of the Constitutional Courts:
 - Italian Constitutional Court: Frontini Franco (1973)
 - German Federal Constitutional Court: Solange I (1974), Solange II (1986), Maastricht judgement (1993), Banana market organisation (2000)
- no encroachments on the identity of the constitution!

IV. The Constitutional Court and the parallelism of human rights protection systems

1. The plurality of human rights protection systems
 - international human rights treaties as *second safety net*
 - geo-regional human rights treaties as *expressions of the identity of civilisations*
2. General aspects of the parallelism of human rights protection systems
 - intensified protection through cumulative requirements
 - parallel operation without correlation or interference
 - mutual influence of interpretations
3. Conflicts between different fundamental and human rights regimes
 - the problem of tripolar constellations

V. Conclusion