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REPORT

Review by the Constitutional Courts of Proceedings before Ordinary Courts Applying Community Law: the Experience of the Federal Constitutional Court of Germany

by Rainer ARNOLD

Jean-Monnet-Department for European Law
Regensburg University, Germany

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I. The impact of the Constitution on ordinary courts

The German Constitution, the Basic Law, is the supreme set of law binding on all the state institutions: Parliament, the executive and the judiciary. This is a consequence of the Rechtsstaat, the rule of law, which implies, in its modern form, the binding force of the Constitution (as it is expressed in Article 20 of the Basic Law). Constitutional norms on the institutional structure of the German system as well as on fundamental rights (as it is laid down in Article 1 § 3 of the Basic Law) are obligatory for the judiciary.

For this reason, decisions of ordinary courts (as well as of administrative courts and courts of other law branches, such as specific courts on labour law, social law or finance law) must be conform to the Constitution. Also the proceedings before the courts have to be compatible with constitutional law. In case of non-conformity either of an ordinary court decision or of ordinary court proceedings as such, control by the Constitutional Court can be initiated.

If ordinary courts (or courts of other law branches) are applying Community Law, the Constitutional Court's control is also possible but there are certain particularities which have to be taken into account.

Several questions arise: Which are the criteria for such a control: national Constitutional Law or Community Law? Can the application of Community Law be a breach of national Constitutional Law followed by the reaction of the Constitutional Court? Is non-conformity to Community Law a violation of Constitutional Law? Especially, is the omission to make a preliminary question to the European Court of Justice by an ordinary court a breach of the Constitution?

The jurisprudence of the Federal Constitutional Court of Germany has dealt with Community Law in important cases so that experience regarding to some of these questions does already exist. The following contribution shall explain, in a comprehensive way, the main solutions found by the Federal Constitutional Court.

First of all, it must be underlined in this context that the relationship between Constitutional Court and ordinary courts is characterised by the fact that the Constitutional Court is limited to control violations of constitutional, not of ordinary law. The Constitutional Court is not the supreme instance of ordinary courts and must therefore refrain from judging on ordinary law itself. It is not easy to find the adequate distinction between a breach of Constitutional law and a breach of ordinary law, but the Constitutional Court always tries not to intervene into the sphere of the ordinary courts.

And a second remark on how such constitutional control can be launched: by an individual constitutional complaint *(Verfassungsbeschwerde)* or by the reference to be made by an ordinary court to the Constitutional Court for the preliminary control of the constitutionality of alaw to be applied by the ordinary court (konkrete Normenkontrolle or Richtervorlage, in the sense of Article 100 § 1 of the Basic Law).

II. The solution of a conflict of national ordinary law and Community Law by the ordinary courts

In accordance to the Simmenthal decision of the European Court of Justice (1978, 629) it is up to the ordinary court (or a court for a specific law branch) to decide in case of conflict between national and supranational law. The principle of Community Law supremacy means that the ordinary court has to apply EC Law and to refuse the application of the contravening national law. There is no doubt that the instance court which is competent to decide a certain case has to resolve, on the basis of this principle of EC Law supremacy, this conflict by itself. No reference can be made in such a case to the Constitutional Court for violation of the so-called integration norms (Arts. 23 § 1 and 24 § 1 of the Basic Law). The Constitutional Court itself has no competence to decide such a conflict between Community Law and national law as if it were a violation of Constitutional Law.

A different question is whether a German law which is not conform to EC Law can be annulled by the Constitutional Court for this reason. A decision of the Czech Constitutional Court shows this way until now not yet practised by the German Constitutional Court. But as to the European Convention of Human Rights the Constitutional Court in the Görgülü case the German Constitutional Court pointed out that violation of the Strasbourg Convention means also a violation of an internal fundamental right (See. R. Arnold, La Cour constitutionnelle fédérale allemande et la Cour européenne des Droits de l' homme, Revue internationale de droit comparé 2005, 805 – 815). It is not excluded that the Constitutional Court will transfer this concept also to violations of Community Law and regard them as a violation of fundamental rights. This would have the consequence that the Court could annul an ordinary court decision applying a German law which is not compatible with Community Law. But this question shall not be deepened here.

III. The acceptance of the main structures of the supranational order by the German Constitutional Court

In early decisions, the Federal Constitutional Court (22, 293) accepted the main structures of the supranational order as pointed out in the basic decision of the European Court of Justice in the Costa/ENEL case (6/64, 1964, 1251): the autonomy of EC law, its direct applicability and its primacy over national law. Primacy was also expressly accepted by the Federal Constitutional Court, without any reservation. A reservation was made later, in the field of fundamental rights.
In a later decision, the Constitutional Court underlined the right of the European Court of Justice to develop Community Law and to state the possibility of direct applicability of a directive what had been denied by the Supreme Financial Court (75, 223).

The binding authority of the Federal Constitutional Court decisions entail the necessary obedience of the ordinary court to follow these positions.

IV. The particularities in the field of fundamental rights

Two famous decisions of the Federal Constitutional Court have characterised the development of the jurisprudence from a more national to a more supranational standpoint: the so-called Solange I decision of 1974 (37, 271), rendered on the basis of a reference for a preliminary question under Article 100 §1 of the Basic Law, made by the administrative court of Frankfurt a.M., gave preference to the national fundamental rights denying primacy of a EC regulation.

The argumentation of that decision was that the individual must be efficiently protected by fundamental rights against interventions of the supranational power. The Court, ready to accept a fundamental rights protection on the supranational level within the European Communities as a consequence of European integration, stated at that time that there was no sufficient fundamental rights protection by the Community. Thus, the Constitutional Court applied the national fundamental rights but underlined that this solution shall be in application only until a sufficient fundamental rights protection will be created on the supranational level.

In 1986, the Solange II decision of the Federal Constitutional Court was rendered (73, 387). In this decision, 12 years after the first judgment in this field, the Court now renounced to apply national fundamental rights stating that the rights protection in the Community area had been developed by the judges creating so-called general principles of Community Law with fundamental rights function. This judge-made fundamental rights charter was considered, in this second decision, sufficient and equivalent to the protection standards of the German Basic Law itself.

The Court now described the role of the European Court of Justice and the Federal Constitutional Court (as it was expressly said in the Maastricht decision of 1993 – 89, 155) as a role of cooperation. The Luxembourg Court should control the compatibility of the EC legal acts with the general principles of Community Law while the Federal Constitutional Court only had a role of a general observer with the task to control if the fundamental rights standard at the supranational level has been maintained or reduced. In case of an essential reduction of the supranational protection standard, the Constitutional Court would re-open the constitutional review ofEC legal acts under German fundamental rights.

In 2000, in a case on the banana market, the Constitutional Court confirmed the Solange II position declaring inadmissible the preliminary control of the EC regulation with German fundamental rights by the Federal Constitutional Court initiated by the Frankfurt administrative court. The Federal Constitutional Court stated that there has not been any essential reduction of the EC protection standard until now so that it would not make any control under the national fundamental rights (June 7 2000, 2 BvL 1/97).

This position has not been abandoned in the recent Federal Constitutional Court's decision on the European arrest warrant (July 18 2005, 2 BvR 2236/04). In this decision the Constitutional Court did not challenge the constitutionality of a European Union decision (within the framework of pillar III), but declared unconstitutional and void the German Act of Parliament implementing EU law on the arrest warrant. Thus, only the constitutionality of the internal German law was concerned by the decision not that of European Union law.

With regard to the types of the proceedings leading to the two Solange decisions of the Constitutional Court it can be said, that the Solange I decision was based on a preliminary question made by the Frankfurt administrative court to the Federal Constitutional Court (Richtervorlage) whereas the Solange II decision was rendered on behalf of an individual constitutional complaint (Verfassungsbeschwerde). As to the first decision the Constitutional Court had modified the requisites for a preliminary question under Article 100 § 1 of the Basic Law, modification which encountered vehement critics in literature.

It is also important that the Federal Constitutional Court underlined its exclusive competence to decide on whether the supranational fundamental rights protection standard is sufficient or not (R.Arnold, La unificación alemana. Estudios sobre derecho alemán y europeo, Madrid 1993, 132). Thus, it is not up to the ordinary courts to have a different view in this respect.

As a summary it can be said that the Federal Constitutional Court has chosen a way between the positions of the Italian and Spanish Constitutional Courts on the one side and the European Court of Justice on the other side (R. Arnold, Die europäischen Verfassungsgerichte und ihre Integrationskonzepte in vergleichender Sicht, Festschrift Friedrich Koja, Wien, New York 1998, 3-22). In the Court's view it is indispensable that a sufficient protection of the individual is guaranteed, no matter whether on the supranational or the national level. As a consequence of integration the Court accepts that the individual's protection shall be realised by the supranational order and, only in lack of such a sufficient protection, the national order shall take over this function.

This position can also be extended to the field of Rule of Law (Rechtsstaatlichkeit) given the fact that the European Court of Justice also developed general principles of EC Law in this field. But the Federal Constitutional Court of Germany has had no occasion until now to decide on such a matter.

V. The ultra vires concept of the Maastricht decision

In the decision of the Federal Constitutional Court on the constitutionality of the Treaty of Maastricht in 1993 (89, 155) it claimed the right to control whether an EC legal act is ultra vires or not. If the Constitutional Court would state this, the German institutions would not be allowed, according to the Constitutional Court's opinion, to apply this act within the territory of the Federal Republic. This position was vehemently criticised, especially under the fact that the Constitutional Court would not comply to its obligation to refer, by asking a preliminary question, to the European Court of Justice when deciding whether ultra vires or not.

In the Maastricht decision the Court also stated the possibility to attack directly EC legal acts for being ultra vires, without any regard to the fact that the EC legal acts derive from an autonomous legal order, normally not underlying German constitutional jurisdiction.

VI. Omission of ordinary courts to make a preliminary question to the European Court of Justice under Article 234 of the EC Treaty

The Federal Constitutional Court has developed the idea that a German ordinary court, obliged under Article 234 of the EC Treaty to make a preliminary question to the European Court of Justice, would violate the constitutional guarantee of the lawful judge (Article 101 of the Basic Law) if it omits to make such a reference.

As it is well known, ordinary courts of last instance are obliged to address to the European Court of Justice, by a preliminary question, for the interpretation of Community Law applicable in national proceedings. An exception is only admitted if there are no objective doubts on the interpretation of this EC norm. This was clearly stated by the European Court of Justice in the CILFIT decision (283/81, 1982, 3415).

In a series of judgments, the Federal Constitutional Court stated that the European Court of Justice is a court the national constitutional guarantee of the lawful judge refers to. But for a long time, the Constitutional Court hesitated to state a violation of this guarantee. A mere incompatibility to Article 234 was only regarded as an "error in procedendo" but not as a violation of the constitutional guarantee. Only in qualified cases such a violation would occur. This was stated by the Federal Constitutional Court for the first time when the Supreme

Financial Court in Munich refused to make a preliminary question to the Luxemburg Court (though the first instance had done this) and refused to accept the position of the European Court of Justice stated in its judgment for the first instance (75, 223).

A violation of the lawful judge guarantee was also statedby the Federal Constitutional Court (NJW 2001, 1267) with regard to a decision of the Hanseatic Supreme Administrative Court which omitted to make a preliminary question to the European Court of Justice and which interpreted the Community Law it had to apply in contravention to EC fundamental rights. Thus, this omission was regarded as a hindrance to realise the fundamental rights protection for the individual: the Luxembourg Court would have interpreted the EC norms – contrary to the Hanseatic court − in the light of the Community fundamental rights. This was sufficient for the Federal Constitutional Cour to state a violation of the guarantee of the lawful judge under Article 101 of the Basic Law.

VII. Conclusion

It can be concluded that the Federal Constitutional Court has made an essential contribution to the acceptance of Community Law by the ordinary courts. The EC law impact on national law clearly prevails in the jurisprudence of the German ordinary courts.