THE TERRITORIALITY AND MIGRATION OF FUNDAMENTAL RIGHTS*

Stefan Kadelbach

I. Introduction

Fundamental rights are guarantees ascribed to the individual by a legal order, usually in a constitution, either expressly or implicitly. Therefore, they are closely connected to municipal law and the authority from which the latter derives. The fact that their applicability is restricted territorially is implicit in the concept of the sovereignty of the people and thus in the concept of the modern state. On the other hand, the historical context in which fundamental rights found their way into national constitutions testifies to their universal character, which is expressed by the notion of “human rights”. Fundamental rights are therefore guarantees of restricted territorial applicability, but tend to claim universal validity. Typically, they have the potential to migrate across territorial boundaries. This chapter will discuss how fundamental rights relate to their universal potential and what the dichotomy between territoriality and universality means for their normativity.

The jurisprudence of the German Federal Constitutional Court (FCC) provides examples of this ambivalence, such as the *Lueth* judgment of 1958, one of the landmark decisions in German constitutional law. It stresses the importance of freedom of speech for a democratic society and calls upon courts not only to interpret public law, but also the private law which governs the legal relationships between private individuals in the light of fundamental rights. To underline the paramount value of freedom of speech, the Court cites the French Declaration of Human and Civil Rights of 1789. It also quotes Justice Cardozo, according to whom that

---

* The author thanks Günter Frankenberg and Thomas Kleinlein for comments on earlier versions of this chapter.

1 The term *droits fondamentaux* was used for the first time in the 1770s in French political circles around Mirabeau, see G Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriß*, 2nd ed., (Berlin, Duncker & Humblot, 1978), p 66.

The FCC thus refers to the two constitutional systems which influenced German constitutionalism the most, as they did in many other legal orders in Europe.

Since then, the FCC has displayed a certain tendency to immunise fundamental rights against heteronomous, “foreign” influences. Under the pretext of an interpretation doctrine favourable to international and European law, resistance to such influences has gained ground, as is evident in the Görgülü and Treaty of Lisbon decisions. Thus, the Treaty of Lisbon judgment pays lip service to the openness of the Constitution towards international law, but tries to set limits thereto by defending – in rather general terms – the constitutional identity of the German Basic Law, the Grundgesetz, against European Union Law. The way for this approach had been paved in the Görgülü case in which the Court formulated specific reservations with regard to the European Court of Human Rights’ (ECtHR) reading of freedom of speech. The Görgülü decision thus sends a warning signal to the ECtHR that the execution of its judgments by German courts would not proceed unchecked. At the heart of this conflict between the two judiciaries was a case in which the ECtHR had arrived at a balance between the freedoms of the tabloid press and the right of prominent persons to privacy; but the FCC had given more weight to freedom of speech.

It appears that in Lueth, the FCC tried to enhance the persuasiveness of its holding by attempting to link it to an international tradition of human rights protection. The Görgülü case, in contrast, pursues the same

---


