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Mirja A. Trilsch, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innerstaatlichen Recht

Summary

The Justiciability of Economic, Social and Cultural Rights in Domestic Law

Since the end of World War II, the protection of individuals through subjective rights has become a central concern of public international law. Numerous human rights instruments of regional and universal vocation bear witness to this development. Traditionally, a distinction is made between two categories of rights: civil and political rights on the one hand and economic, social and cultural rights on the other. While both categories of rights are recognised in principle, considerable differences exist with respect to their domestic implementation. These differences result from the widespread belief that econonomic and social rights lack justiciability and therefore cannot be enforced by the judiciary. The present thesis challenges this common assumption which is particularly popular amongst German constitutional scholars. It examines whether constitutionally guaranteed economic and social rights are compatible with the German Basic Law and, based on recent developments in international and comparative human rights law, develops a new theoretical and methodological concept for this category of rights. The course and conclusions of the study can be summarised as follows:

I.

More than sixty years after the adoption of the Universal Declaration of Human Rights, the substance and status of economic and social rights remain controversial (*Chapter 1*). Commonly referred to as the second generation of human rights, economic and social rights are regularly assimilated with the notion of positive rights and thus labeled as too resource-intensive and too vague to be justiciable. More recently, however, the international community has come to acknowledge that the two categories of rights are indivisible and interdependent and, as a consequence, has reiterated the need to respect and to implement all rights irrespective of their classification. States are thus reminded of

their obligation to give full effect to the economic and social rights to which they have subscribed under international treaties. At the universal level, these rights are enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Its regional counterpart in Europe is the European Social Charter. More recently, economic and social rights have also been included in the Charter of Fundamental Rights of the European Union. While violations of the European Social Charter can become the subject of collective complaints that are adjudicated by the European Committee for Social Rights, an individual complaints procedure has only of late been brought on its way for the ICESCR. However, important doubts remain with respect to the enforcement of economic and social rights, particularly at the domestic level. On the one hand, they relate to the question of whether courts may legitimately pronounce themselves on economic and social issues and on the other hand, it is being argued that judges are not institutionally competent to do so.

The German legal system is a perfect mirror of the prevailing scepticism towards economic and social rights (*Chapter 2*). The Basic Law's catalogue of constitutionally guaranteed rights is practically silent on the matter of economic and social rights. Provincial constitutions as well as federal legislation, while containing provisions setting out certain social rights, do not recognise these provisions as enforceable indivual entitlements. After having demonstrated that economic and social rights are compatible with fundamental principles underlying the German Constitution, three options for recognising them as individual rights within the German legal system are presented. The first option is the explicit inclusion of at least some economic and social rights (the right to work, the right to social security and the right to education) in the Basic Law's catalogue of fundamental rights and freedoms. The direct enforceability of international instruments for the protection of economic and social rights presents itself as a second option and, thirdly, the realization of such rights by means of constitutional interpretation is being considered, notably through the evolution of the social state principle in combination with the right to the protection of human dignity.

II.

For comparative purposes, the second part of this thesis introduces two foreign constitutional orders which expressly provide for economic and social rights, beginning with the *Charte Québécoise*, the quasi-consti-

tutional human rights charter of the Canadian province of Québec (*Chapter 3*). While its equivalent at the national level, the *Canadian Charter of Rights and Freedoms*, is restricted to the guarantee of civil and political rights, the *Charte Québécoise* is unique in that it features a distinct chapter devoted to economic, social and cultural rights (articles 39 to 48). Contrary to all other rights set out in the charter, the rights in this chapter do not, however, enjoy supremacy over other provincial legislation. Furthermore, their scope is expressly limited to what is provided for by the law, meaning by other provincial legislation. Thus, these rights do not serve as a standard against which all other legislation is to be examined, but rather depend on that legislation in order to fill them with meaning. As a consequence, the Quebec judiciary is hesitant to infer any individual entitlements against the State from these provisions, treating them as general principles without tangible legal value. Only in exceptional cases have claimants succeeded to plead one of these rights in the absence of other legislation granting them what they desired. In recent years, the insignificance of the Quebec Charter's economic and social rights was challenged in the case of *Gosselin v. Quebec* (*Attorney General*) pertaining to the question of whether the amount of social welfare benefits for young welfare recipients respected the right to an acceptable standard of living (art. 45). While the majority of the Supreme Court's judges upheld the inferior status of the charter's social rights on appeal, the various opinions expressed in the judgment, as well as the assessment made by the judge of first instance, give valuable insights into the theoretical and methodological features of economic and social rights, which are further analysed in Part III of this thesis.

The focus then turns to the *Constitution of the Republic of South Africa* (*Chapter 4*) and the economic, social and cultural rights that are inscribed therein. After an introduction to the history of the South African Constitution – its underlying premises as laid down in the 1994 *Interim Constitution* and the creation of the South African Constitutional Court –, the unique certification process and the central characteristics of the final Constitution are explained. Especially the certification by the Constitutional Court has played a key role in the constitutionalisation of economic and social rights in South Africa, which was vividly contested in much the same rhetoric as has already been portrayed in *Chapter 1*. In the final Constitution, at least four sections (ss. 26-29) now cover a variety of rights of an economic, social or culture nature, guaranteeing access to housing, health care, food, water, social security and education. However, two of these provisions are expressly limited by the availability of resources and are subject to progressive realisa-

tion. The analysis then focuses on the Constitutional Court's interpretation of these rights, at the heart of which is a "trilogy" of leading cases: *Soobramoney*, *Grootboom* and *Treatment Action Campaign*. While *Grootboom* deals with the right to housing, the two other cases relate to the right to health. What transpires from them is a general acknowledgement by the Court that the economic and social rights contained in the South African Constitution are justiciable, meaning that courts are in a position to adjudge claims based on the respective constitutional provisions. The key methodological tool formulated by the Court in the context of these cases is the so-called *test of reasonableness* which has become the standard legal test employed by the Court in its subsequent jurisprudence on economic and social rights and which will be examined in detail in the comparative study undertaken in Part III of this thesis.

III.

The comparative appraisal of the two jurisdictions examined in the previous chapters – Québec and South Africa – begins with a general comparison of the status accorded to economic, social and cultural rights within the respective systems and of the form and wording chosen for their codification (*Chapter 5*). Based on the results thereof, certain broad conclusions are drawn with respect to the appropriate theoretical and methodological framework for economic, social and cultural rights in order to then verify whether the basic premises and elements for the application of these rights are compatible with German legal theory and methodology. From a theoretical perspective, this requires a closer look at whether rights necessarily translate into subjective guarantees (meaning that they entitle the individual to make a direct claim), or whether they may operate as purely objective standards (meaning that the State is legally obliged to act, but the individual may not force such action). Judging from the South African case law, the effective implementation of economic, social and cultural rights calls for combining, at least to some extent, both of these notions. However, such a conception is not alien to how the rights in the German Basic Law are applied and interpreted.

From a methodological point of view, the judicial decisions reviewed in Part II do not lend credibility to the argument that economic, social and cultural rights are limited to operating as positive entitlements. Rather, they may have negative as much as positive or participatory functions,

although the methodological elements needed to render them enforceable may vary for the different types of functions. However, all of these functions are familiar features of the Basic Law's rights, as interpreted by the German Constitutional Court.

At this point in the analysis, it can be concluded that there are no fundamental theoretical or methodological impediments to the recognition of economic, social and cultural rights in the German legal system. However, the question of their justiciability cannot be answered at an abstract level. Instead, justiciability is understood not as a prerequisite for the application of economic and social rights, but as the result of a rights challenge for which a legal solution can be found based on the applicable methodology.

The remainder of this thesis is thus dedicated to finding the methodological tools that are suitable for the adjudication of economic, social and cultural rights as individual constitutional entitlements. To this end, the study takes an in-depth look at the standard methodological criteria for rights adjudication under the German Basic Law and examines their suitability for assessing legal claims based on economic, social and cultural rights (*Chapter 6*).

As a first step, this calls for defining the *scope of protection* of these rights. While the key interests to be protected are readily discernible (e.g. health, housing), the difficulty lies in identifying what guarantees are entailed in relation to these interests. In order to capture all negative as well as positive obligations that may be engaged by economic, social and cultural rights, it is being proposed to define the scope of protection in terms of a duty of the State to ensure an appropriate (legal and social) framework for the enjoyment of these rights (*staatliche Einstandspflicht*). Under German constitutional law, this roughly corresponds to the protective dimension of fundamental rights.

Secondly, the cases analysed in C*hapters 3* and *4* allow us to verify whether the second element of the standard methodology – the requirement of an *interference* with the right concerned – can be utilized for claims based on economic, social and cultural rights. While all cases examined involve a burden for the holder of the right, this burden does not necessarily derive from State action, as is normally required for an interference. However, the absence of direct or indirect State action may be overcome by modifying the methodology so as to accept a sufficiently close connection between the burden suffered and the State's duty to ensure the conditions for the enjoyment of the protected right,

which makes it possible to conclude on the existence of an interference in cases like *Grootboom* and *Treatment Action Campaign*.

This leaves the issue of a justification of such an interference to be adressed, especially in so far as the positive obligations of the State are concerned. While the margin of appreciation accorded to the legislative and executive branches of the State somewhat lowers the threshold for justification of positive measures based on prognoses, the case law clearly reveals that there are limits to what this appreciation may be based on. For example, a wrong factual basis, a particularly severe violation of the right concerned or negative stereotyping may render the justification invalid. Secondly, what is often presumed to be an absolute barrier to the realisation of economic, social and cultural rights – the limited availability of resources – proves to be a very relative standard that does not necessarily play a role whenever such rights are adjudicated. When the question of the limitation or expansion of resources does arise, it needs to be balanced against other constitutionally protected interests, such as equality and the State's capability to function to the benefit of all. Finally, the analysis also shows that the progressive realisation of economic, social and cultural rights does not constitute a ground for justification other than in the context of limited resources.

While, as a final methodological step, rights adjudication regularly involves a proportionality check, this element significantly changes when we are faced with a State's omission to act in violation of its duty to ensure the enjoyment of a right (*Einstandspflicht*). Rather, the appropriate assessment in this context relies on the kind of criteria identified as key components of the South African *test of reasonableness*, which includes the consideration of minimum core obligations, equality aspects and the prohibition of regressive measures.

Whenever the assessment allows to conclude on a violation of an economic, social and cultural right, it will be up to the adjudicating court to remedy such a violation. Contrary to widespread belief, however, the appropriate remedy will rarely consist in the granting of resources to the claimant, even when dealing with positive claims. As shown by the case law, it is either through a declaratory order or through some type of supervisory mechanism (where provided for by domestic law) that the courts will oblige and ultimately force the competent authorities to act.

After having examined all elements of the common rights methodology, the last chapter of this thesis is dedicated to the general conclusions, from a theoretical and methodological perspective, which may be

drawn from this exercise and their consequences on the appreciation of economic and social rights under German law (*Chapter 7*).

Firstly, on a theoretical level, it is possible to affirm that the widely accepted theory of the non-justiciability of these rights is obsolete. In this respect, the study shows that the civil and political rights enshrined in the German Constitution comprise a number of justiciable social or economic guarantees. Rather than it being a question of justiciable or not, it can be said that the justiciability of claims in relation to economic and social rights is variable, depending on how much deference to the legislative and executive branches will be required in a given constellation. Secondly, the conception of economic and social rights as purely objective principles must be rejected. In fact, the objective and subjective components of rights do not exclude but complement each other, the subjective component taking precedence whenever the effectiveness of rights protection calls for it. Thirdly, while social and economic rights may not find much explicit textual reference in the German Basic Law, it cannot be denied that these rights have made their entrance from below, given that numerous typical contents have come to be recognised by the courts and will continue to give rise to new court challenges in the modern welfare state.

From a methodological point of view, it must first of all be made clear that economic and social rights are not to be equated with positive rights. Rather, economic and social rights are defined by their thematic scope and, just like civil and political rights, may operate as negative, positive or participatory rights. Insofar as positive claims are concerned, the methodological challenges involved occur as much in the context of economic and social rights as they do in the context of political and civil rights. Admittedly, meeting these challenges will necessitate certain adjustments to the standard methodological framework commonly used for negative claims. However, as demonstrated in the comparative analysis in the previous chapter, the difficulties that present themselves can be resolved and must be resolved, because rights methodology is not an end in itself, but is to serve the effectiveness of the substantial guarantees in question. In fact, the German Constitutional Court has already developed the key elements for a methodological adaptation that will allow the courts to adjudicate rights claims of a positive nature.

Finally, these findings demand a reevaluation of the options for the endorsement of economic and social rights in German law that have been examined in *Chapter 2* of this thesis. While all options present certain advantages, the conclusions drawn from the comparative analysis show that economic and social rights will best be protected when translated

into strong constitutional guarantees. However, while this appears to be the most effective and legitimate means of implementation, it also happens to be the most unlikely scenario, given the lack of political will for a constitutional amendment to that effect.

Annex

The study is supplemented by an appraisal of court decisions in relation to economic, social and cultural rights that have recently been handed down in the three examined jurisdictions. While dealing with very different questions, these cases exemplify some of the key issues identified in this thesis.

In Germany, the Constitutional Court pronounced itself on the constitutionality of the basic welfare rates introduced by the *Hartz IV* reform. It took this opportunity to develop a general methodological framework for the so-called right to the enjoyment of a minimum subsistence level. In the case at hand, the court found that while the amount provided for under the law was not evidently insufficient, the procedure chosen to calculate the applicable rates for children was flawed and infringed the constitutional right in question.

In South Africa, the Constitutional Court rendered its first judgment on the constitutional right to have access to sufficient water in what is commonly referred to as the *Phiri Water Case*. It held that the provision of 6 kiloliters of free water to every household was sufficient under the Constitution and that the installation of pre-paid water meters for any additional consumption did not infringe the right in question. While the Court formally confirms the validity of the *test of reasonableness*, its application of that test does not show consideration for the kind of criteria it had previously set out as important elements of the test. As a consequence, the *Phiri Water Case* is generally considered to be a setback for the justiciability of social rights in South Africa.

Finally, in Canada, the courts of the province of British Columbia decided that a city bylaw prohibiting homeless persons to erect temporary shelter in public spaces infringed the right to security of the person guaranteed under Art. 7 of the *Canadian Charter*. While not explicitly involving economic and social rights, the case touches upon homelessness and thus upon one of the key issues usually dealt with under this category of rights and, in that regard, gives valuable insight into the interdependence between the right to shelter and the right to security.