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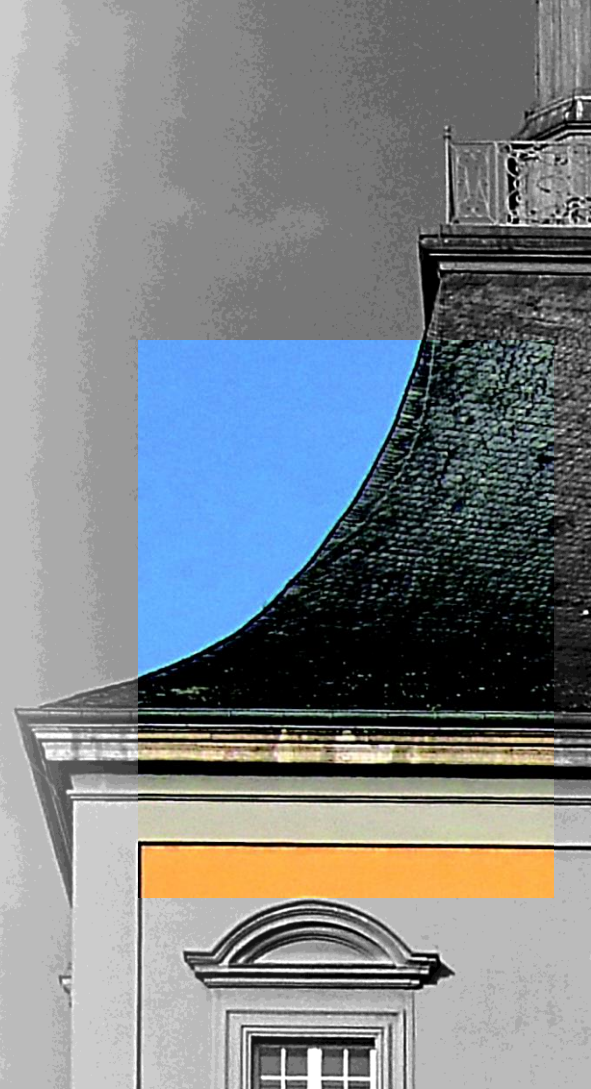
UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

THE STATUS OF INTERNATIONAL LAW IN THE DOMESTIC LEGAL ORDERS

PROF. DR. DDR. HC. MATTHIAS HERDEGEN

THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON CONSTITUTIONAL DEMOCRACY IN AFRICA
– WORKSHOP IN WINDHOEK, 6-8 MARCH 2019



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I. POSSIBLE APPROACHES

1. Dualism

• SADC Tribunal, Mike Campell v. Republic of Zimbabwe (no direct effect of the judgement on discriminatory expropriation measures)

2. Monist tendencies

• Inter-American Court of Human Rights

- nullity of criminal judgments: Castillo Petruzzi v. Peru

- nullity of amnesty legislation, Barrios Alto v. Peru

• Orders to take specific action (e.g. European Court of Human Rights: release of a prisoner; IACtHR: obligation of States to amend constitution, e.g. the constitution Dominican Republic as to the nationality of children of illegal immigrants)

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II. AFFINITY TO INTERNATIONAL LAW AS A CONSTITUTIONAL PRINCIPLE

1. International law as “normative reserve” in post-dictatorial/ post-colonial / post-conflict constitutions

- Namibian Constitution, Art. 96:

“The State shall endeavour to ensure that in its international relations it: […]

(c) creates and maintains just and mutually beneficial relations among nations;

(d) fosters respect for international law and treaty obligations;

(e) encourages the settlement of international disputes by peaceful means.”

- Art. 99: Promotion of foreign investment as constitutional objective

- Art. 144: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

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II. AFFINITY TO INTERNATIONAL LAW AS A CONSTITUTIONAL PRINCIPLE

High Court, Government of the Republic of Namibia & Another v. Cultura 2000 & Another:

"It is manifest that the constitutional jurisprudence of a free and independent Namibia is premised on the values of a broad and universalist human rights culture which has began to emerge in substantial areas of the world in recent times. Article 144 of the Constitution sought to give expression to the intention of the Constitution to make Namibia part of the international community."

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II. AFFINITY TO INTERNATIONAL LAW AS A CONSTITUTIONAL PRINCIPLE

2. German Basic Law

- Preamble; Art 1:

"(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world";

Arts. 9 (2), 25, 26, 59 GG

- The principle of receptivity to international law (Völkerrechtsfreundlichkeit) applies with constitutional rank

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II. AFFINITY TO INTERNATIONAL LAW AS A CONSTITUTIONAL PRINCIPLE

„The principle of international law friendliness has constitutional rank. It flows from a comprehensive perspective of those constitutional norms which govern the relation of Germany to the international community of States (see Herdegen, Völkerrecht, 13. Aufl. 2014, § 22 para. 9 f.; Payandeh, JöR 57 [2009], S. 465 <470 ff.>). […] Those norms embody a constitutional decision for a cooperation between States which is based on respect for and strengthening an international law […] and require all branches of the State to counteract a discrepancy between international law and domestic law and to avoid an international responsibility of Germany resulting from a violation of international law […].“

(BVerfGE 141, 1, para. 65).

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II. AFFINITY TO INTERNATIONAL LAW AS A CONSTITUTIONAL PRINCIPLE

- Three implications:

  (1) Obligations of all Germen authorities to comply with international obligations;

  (2) German legislator must ensure that violations of international law by German authorities can be remedied;

  (3) German authorities may be obligated to apply and enforce international law within their jurisdiction, when other States violate international norms (BVerfGE 141, 1 para. 70)

- Swiss Federal Court BGE 142 II 35

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III. INCORPORATION OF GENERAL PRINCIPLES OF INTERNATIONAL LAW

1. German Basic Law

• Art. 1(2); Art. 25 GG: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."

Intermediate rank between Constitution and federal legislation. Verifying jurisdiction of Federal Constitutional Court, Art. 100(2) GG

• Controversies: German participation in the humanitarian intervention in the Kosovo conflict (1999); recognition of new interim President of Venezuela (2019)

2. Swiss Constitution, Art. 193(4):

• Constitutional amendments must conform to peremptory norms of internal law (*ius cogens*)

3. Colombia, Constitutional Court:

• Incorporation of international humanitarian law into "constitutional block"

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IV. INCORPORATION OF TREATIES

1. Germany, Art. 59 (2) GG; legislative assent determines rank of treaty in domestic law; see also Namibian Constitution, Art. 63 (2)(e)

2. Cf. Dutch/French constitution

3. British model: parallel legislation incorporating contents of international treaties

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V. THE PRINCIPLE OF HARMONIOUS INTERPRETATION AND ITS LIMITS

1. German case-law: interpretation of domestic law in accordance with international obligations

- „The principle of the receptivity to international law […] serves a parameter of interpretation of fundamental rights and the principles embodying the rule of law as well as the ordinary law. It requires to interpret national laws as far as possible in a way which avoids a conflict with international obligations of the Federal Republic." (BVerfGE 141, 1, para. 71)

- Harmonious interpretation applies only within methodological standards (BVerfGE 107, 307, 329; 128, 326; 371)

- Consideration of international case-law the in the light of legal-cultural context (BVerfG, 12 june, 2018, 2 BvR 1738/12 et al., 12 june, 2018, 2 BvR 1738/12 et al., NJW 2018, 2695 para 132).

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V. THE PRINCIPLE OF HARMONIOUS INTERPRETATION AND ITS LIMITS

2. Possibility of “treaty override” (BVerfGE 141, 1; Art. 144 of the Namibian Constitution)

3. Guiding function of rulings of international courts (BVerfG, 2 BvR 2115/01 *et al.*, NJW 2007, 499 paras. 58 ff., BVerfG, 2 BvR 2115/01 *et al.*, NJW 2007, 499)

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VI. INDIVIDUAL RIGHTS FLOWING FROM INTERNATIONAL LAW IN THE DOMESTIC LEGAL ORDER

Right to consular assistance in criminal proceedings under Art. 36(1) of the Vienna Convention on Consular Relations part of the Rechtsstaatsprinzip (BVerfG, 2 BvR 2115/01 *et al.*, NJW 2007, 499 para. 45) and subjective right (ibid. para 65)

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VII. HUMAN RIGHTS TREATIES A QUASI-CONSTITUTIONAL LAW

1. Interpretation of fundamental rights in the light of human rights treaties (Spain, Latin-American countries)

2. Deference to European Convention on Human Rights under the German Basic Law

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VII. HUMAN RIGHTS TREATIES A QUASI-CONSTITUTIONAL LAW

"Reliance on the European Convention on Human Rights and the judgments of the European Court of Human Rights beyond a specific case as guidance for the interpretation serves to give maximum effect to the guaranties of the Human Rights Convention in the Federal Republic of Germany and to avoid judgments against the Federal Republic of Germany (BVerfGE 128, 326 <369>). The focus of the Basic Law on human rights notably finds expression in the recognition of inviolable and inalienable human rights in Art. 1(2) GG. The Basic Law, in its Art. 1(2) accords particular protection to the core of human rights. This norm is, in conjunction with Art. 59(2) GG [the norm governing parliamentary assent to treaties] the basis for the constitutional obligation to consider the European Convention on Human Rights as a criterion of interpretation including of the German fundamental rights. Whilst Art. 1(2) GG does not vest the European Convention on Human Rights directly with constitutional rank, it is more than a mere programmatic provision, as it enshrines a maxim for interpreting the Basic Law and clarifies that its fundamental rights also are an expression of universal human rights and embody these rights as a minimum standard (see. BVerfGE 74, 358 <370>; 111, 307 <329>; 128, 326 <369>; Dreier, in: Dreier, GG, Bd. 1, 3. Aufl. 2013, Art. 1 Abs. 2 para. 21; Herdegen, in: Maunz/Dürig, GG, Art. 1 Abs. 2 para. 47 <March 2006>; Giegerich, in: Dörr/Grote/Marauhn, EMRK/GG, Bd. I, 2. Aufl. 2013, Ch. 2 para. 71 ff.)."

(BVerfG, 2 BvR 1738/12 et al., NJW 2018, 2695 para. 130)

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VII. HUMAN RIGHTS TREATIES A QUASI-CONSTITUTIONAL LAW

Deferential approach limited by basic principles of the Basic Law (on the prohibition for civil servants to go on strike BVerfG, 2 BvR 1738/12 *et al.*, NJW 2018, 2695 paras. 133, 172)

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CONCLUSION

- Complex balance between constitutional autonomy and compliance with international obligations
- Evolutive treaty interpretation as challenge to democratic legitimacy; see Swiss referendum defeating motion on “National Law above foreign judges“

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Prof. Dr. DDr. Matthias Herdegen

Rheinische Friedrich-Wilhelms-Universität Bonn,
Germany