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INDIVIDUAL RIGHTS IN GERMAN PUBLIC LAW

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1. The fundamental distinction between “objective” law and “subjective” individual rights

In order to talk about individual rights, I have first to introduce you to a fundamental element of the German legal thinking. This element is a distinction. The distinction between the so called “objective” law and the so called “subjective” (= individual) rights. This distinction has consequences not only for the understanding of the substantive law but dominates also the structure of procedural law.

It is important to note that while being dualistic, the distinction does not create two utterly separated legal spheres. On the contrary: any individual right is based on a statute being part of a valid law. This is well known in civil law: for instance, the German civil code is German *law*, of course, and, at the same time, it establishes various *individual rights*, like ownership or contractual rights.

Generally spoken, law *always* obliges its addressees to abide by certain behaviour. In case of property law, for instance, third parties are instructed not to interfere with a person’s private property. In addition to the establishment of such “objective” instructions, law in *some* cases entitles individuals with the legal power to enforce the established obligations. In case of property law it grants the ownership as an individual right, entitling the owner to order third parties to forbear interference with his property. If someone disregards such an order, the owner has the right to bring the matter to court.

With public law the idea is basically the same. Public authorities are obliged to follow certain legal procedures when dealing with an individual and to respect limits of their competence and the principle of proportionality. That’s the objective law as we call it. Now the question arises whether the concerned individual has the right to enforce these obligations. Here some particularities are to be considered.

2. Functions of individual rights in public law

a) One of the main purposes of public law is to involve public authorities in the resolution of a given conflict. Its resolution is not put at the citizens’ discretion. Subsequently, the concerned individual is in no need of any legal power to enforce the legal instructions in question. Administration is supposed to do it for him.

This of course can not be the whole story. Otherwise the legal system would not be treating its citizens as persons, but as mere objects. This would not be in alignment with the concept of the modern constitutional state. The modern constitutional state treats citizens as individuals and endows them with individual rights – the most prominent of which are the fundamental rights as laid down in Articles 1 thru 19 of the German Federal Constitution. Thus, in public law, too, citizens are sometimes endowed with the legal power to force administration to adhere to the rules of law.

b) Some legal systems, as the French, conceptualize administrative courts as universal watchdogs over the government. Not so in Germany: Administrative judicial remedy is centred on the protection of individual rights. In other words, a complaint would only be admitted to an administrative court if the plaintiff can claim the violation of one of his individual rights. So, besides being an expression of the state’s appreciation

of your individuality as a person, another major function of individual rights in German public law is to give you access to legal protection against the state – a protection which is given only *if* an individual right applies.

c) To complete this chapter let me clarify that the legal power to force administration to adhere to rules and regulations is an element of *substantive* law and thus not to be identified with the access to court. Access to court is governed by the respective procedural law, in general the Code of Administrative Court Procedure. According to its rules the existence of a substantive individual right is a prerequisite of court access. Common law talks of the requirement of standing in this respect. The petitioner must establish that his rights have been infringed by the administrative act or by its refusal or omission. The infringed right must be an individual right or as we call it a legally protected interest. He cannot approach the court to enforce the rights of someone else nor can he claim a violation of political, social or economic interests not protected by law. Thus the German legal system bars citizens from turning *themselves* into advocates of public interests. We shall see next, however, that the *legal system* itself may turn citizens into such advocates.

3. The understanding of individual rights in public law

Earlier attempts in defining the concept of individual rights in public law started from the *intent* or the *interests* of the individual. One former theory referred to the legal power to pursue one's intent, another to the legal power to pursue one's interest. The two theories eventually merged into a "combination theory". "Individual right" was then defined as "a protection of interest, endowing the individual's intent with legal power". But all these approaches are flawed. The legislator is free to entitle an individual to pursue *public* interests, too. You will find an example of that in the statute on public access to environmental information, based on a European directive. There need not be a personal interest to hold a right to access this kind of information. The individual is thus made an instrument of enforcing the law. So here we have one of the first cases where the *legal system itself* turns citizens into advocates of public interest. Since 1988, I have therefore pled for an open approach, defining individual rights in public law as the legal power to force administration to adhere to the regulations binding it. Some German scholars have adopted this new approach but it doesn't yet represent the majority's view.

4. The identification of an individual right in public law

One of the problems of the concept of individual rights in public law is the difficulty to identify them. That may sound odd, but indeed, there are very few cases of statutory law explicitly stating the existence of individual rights. Therefore, statutes require interpretation as to whether they grant individual rights or not. Again, there are competing theories of how to approach this question. The "protective rule"-theory is predominant.

According to this theory, public law grants an individual right if legal interpretation indicates the following elements to be present:

- Applicable law states a particular obligation
- That obligation does not solely serve public interests, but individual ones as well and
- The addressees are granted the legal power to enforce those interests against the administration

I do not adhere to this theory which is based on the distinction between public and private interests. To my understanding solely “public interests” do not exist. There are no interests of a collective which are not at the same time the interests of its individual members. Thus in the end the entire legal system serves private interests. In addition to this theoretical objection the requirement of a statute serving private interests is also in practice not easy to verify. Courts used to consider if the statute in question itself limits the number of beneficiaries. For example, if a statute protects “neighbours” of an industrial plant from emissions, the number of beneficiaries is restricted by space. But where exactly to draw the line is an intricate question. Are French farmers who had to plough their fields under because of radioactive fallout from Chernobyl to be considered legal neighbours of Chernobyl because they were so deeply affected by it? Such questions cannot reasonably be answered, thus the courts meanwhile abandoned this line of reasoning.

Because of theoretical flaws and practical problems I suggest modifying the protective rule theory and drop the element of personal interest: In my opinion, public law grants an individual right if:

- The statute seeks to protect a *legal* interest – the question whether private or public is insignificant
- The protective nature of the statute is not accidental and
- Certain addressees are granted the legal power to enforce those interests against the administration.

5. Fundamental Constitutional Rights and individual rights in public law

A particularly tough question is the relation between the fundamental individual rights as granted in the constitution and the individual rights emerging from administrative law. Can they both apply at the same time?

Well, usually not. It is the legislator’s call to delineate the exact parting lines of conflicting Fundamental Constitutional Rights. For instance, the Constitution grants property rights and at the same time gives protection to human health. What it does not tell us is how exactly to weigh a company’s right to freely choose production processes against the necessity to protect neighbours from dangerous emissions. The legislator has to decide about the emission control and also about the establishment of individual rights to enforce it. Once a respective statute is created, the reference to the constitutional rights in question is blocked.

However, if the wording of the respective administrative law gives room for doubt, the fact that the emission control serves to mediate a conflict of constitutionally protected individual interests provides a guideline for interpretation. If administrative law is meant to resolve a conflict of interests based on fundamental constitutional rights the existence of an individual right is to be assumed. Thus the constitutional rights have what we call an “internal effect” for the understanding of administrative law.

This wording suggests that there could be “external effects”, too. And indeed, there are. This refers to cases where legislation did not decide about the establishment of individual rights. In such a situation administration is directly bound by the fundamental rights of the Constitution. So if there are no statutes at all, administration must directly apply the constitution. If there *is* a statute, however, which does not grant an effective protection for the fundamental human rights – for instance, altogether neglecting health issues in the former example –, administration’s duty to obey the law does *not* allow for the direct application of constitutional rights, disregarding the statute in question. Instead, the respective act has to be brought before the Constitutional Court. If the violation of fundamental rights renders the statute unconstitutional, only the Constitutional Court has the power to declare it void.

6. An example from environmental law

The German Federal Emission Control Act provides for a good example. Among others, the act defines two major obligations of the owner of an industrial plant. Firstly to avert a danger from the plant to neighbours and the public and secondly to take precautionary measures to prevent further risks. “Danger” in German law means a relevant likelihood of damage to a legal interest. The fact that neighbours are explicitly mentioned as beneficiaries of the first obligation allow for the assumption that the Act grants these addressees the legal power to enforce their interests – like health or property rights. If the owner does not avert relevant dangers and the authorities fail to enforce this obligation, neighbours can press charges against the administration.

What about precautionary measures? According to the Ruling of our Federal Administrative Court they only protect the general public, not any individual. Thus, with no particular beneficiaries specified, the Court did not assume an individual right corresponding to the obligation for precautionary measures. If authorities fail to enforce this obligation, neighbours have no title to access administrative jurisdiction.

I challenge that ruling. It lacks understanding of the nature of contemporary technological threats. Nowadays various sources of potential damage aggregate in a way that makes it almost impossible to determine liability. Different sources of risk each below the threshold of a “danger” create negative synergies which pose a relevant threat to the environment or to human health. Legal protection shouldn’t end in these cases as long as there is a plausible reason for concern.

7. Individual rights in public law and the Law of the European Communities

The national and the European legal systems are deeply entwined. Community law itself grants individual rights to EU’s citizens, first of which are the European fundamental rights as stated in the European Charter which is not formally in force yet but already referred to by the European Courts. It also forces member states to establish individual rights in public law even if inconsistent with the national legal understanding.

a) For a European citizen to challenge community acts, it is sufficient to refer to a European statute which in fact protects individual interests. One may refer to such a statute if an act in some way interferes with such interests and the act concerns the plaintiff individually. Thus, on the European level an individual right is not required for court access.

b) European law may provide the legal power to challenge national acts, too. European law obliges the member states to effectively realise its instructions through the means of national law. In many cases, transforming such instructions in “objective” national law alone will not prove effective. Often European directives call for the establishment of individual rights to ensure their full application. “Regulations and directives meant to protect health, consumers or the environment eventually serve to protect the individual members of a community”, says the European Court of Justice. Therefore, individuals are entitled to enforce the respective European statutes. However, plaintiffs are required to be personally concerned by the legal violation in question. For example, there need to be potential effects on their health or property. In general, the European Court of Justice follows a very lenient approach. Its apparent intention is to activate European citizens as advocates of the member states’ compliance with European law.

8. In comparison: Administrative judicial remedy in Great Britain and France

Let me conclude with a few words on the British and French system of administrative judicial remedy. In Britain, the right of action – meaning access to court – depends on the existence of a sufficient interest in the matter. So what Germany and Britain have in common is the exclusion of popular action – not just any person is entitled to bring administrative violations to court. What separates them is the German requirement of a *legally* based individual right. In Britain, any “interest” does the job. And British courts treat this low requirement even more lenient. They take into consideration the public interest in the termination of the violation. For instance, a tax payer was cleared to press charges against British payments to the European Union – unthinkable in Germany. The general idea behind this leniency is – quote – “to call the attention of the court to an apparent misuse of public power” – end of quote –, says the British High Court of Justice. So, what seems to be a rare exception in Germany still – to turn citizens into advocates of public interest – is what the British system is all about, making the concept of “individual rights” obsolete.

The French system comes very close to that. Administrative judicial remedy’s objective is an impartial supervision over administration. The right of action does not require any individual right, but only a “legal position” being particular to the plaintiff. For instance, the owner of a youth hostel was cleared to press charges against the shortening of school holidays – very odd to a German scholar of administrative law. So is the complaint of a civil servant, his colleague’s promotion could jeopardize his own future career. Generally, “individual rights” are rather uncommon to French administrative law. Even the Constitutional fundamental Rights are not fully construed as individual rights, as there is no constitutional complaint. As an exception, there *are* miscellaneous *droits subjectifs*, but those are restricted to explicit contractual or statutory definition.

9. Conclusion

So, what’s the bottom line here? In Europe, the German differentiation of “law” and “individual rights” is rather unique. Only Austria follows a similar approach. European law takes an intermediate stance, requiring at least some interest to press charges. Of course, the respective objectives differ decisively. Whereas the German legal system tries to restrict the right of action in order to keep administration and judicature functional, the European Communities rather need to worry about noncompliance remaining unobserved. The communities do not have a direct hold on national administrations in the sense of an effective disciplinary supervision. Thus, they *need* the citizen to “report” violations by bringing them to the national administrative courts.

Today as I mentioned an assimilation process has commenced – German public law now knows individual rights beyond the protection of private interests, so perhaps in some distant future the two systems will converge.