State Duties of Protection and Fundamental Rights

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Summary

Duties of protection are duties of the state to protect certain legal interests of its citizens. They cover the interests of life, health, freedom and property and also protect some other interests and certain constitutionally recognised institutions. State duties of protection must be considered in connection with fundamental rights. The foundations of modern constitutionalism and attendant procedures are essential to develop guidelines for a constructive critique of the jurisprudence of the Constitutional Court. This is done with reference to the recent history of France, Germany and England. The historical excursus reveals that a single theory underlies the variety of constitutional states. The development of the constitutional state gave rise to the significance of the preservation of freedom through the maintenance of law and the separation of powers. This has given rise to various legal devices, based also in part on experience with moderate rule and earlier theories of the imperium limitatum.

A textual analysis of the German Basic Law is undertaken to determine whether and how the duties of protection are expressly created. Furthermore, the duties that have been discovered in the Basic Law by the Federal Constitutional Court are considered. These duties include the protection of human life and health, personal freedom, the right to autonomous development of one's personality, freedom of science, research and teaching, marriage and the family, children, mothers, professional freedom, property and the protection of German nationals against foreign states. Finally the justification of such duties and the constitutional control of the manner of protection are considered.

In a final section a critique of relevant constitutional jurisprudence is undertaken. It is argued that claims to protection cannot be directly binding law. They presuppose legislation. If statutory protection is connected with infringements of third-party fundamental rights, the principle of proportionality can be adopted to test whether the
protection is effective. Insofar as protection can be achieved without infringements of rights, one must attempt to test the effectiveness of protection by some other means. Where the legislature omits to protect at all, the court should limit itself to establishing the existence of a duty and to querying its non-fulfilment. The Court may not pass protective regulations or impose a duty to pass specific regulations. Where general statutory norms apply, protective duties can be realised through the so-called indirect third-party effect of fundamental rights. In its reaching its decision, the German Federal Constitutional Court is responsible for preserving the political discretion of the legislature in protecting interests and remembering the structural distinction between "hard" defensive rights and "soft" protective duties in order to prevent the erosion of the directly binding nature of defensive rights.