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THE LIMITS OF JUDICIAL POWER IN ENGLAND AND GERMANY: A COMPARATIVE METHODOLOGICAL AND CONSTITUTIONAL PERSPECTIVE

Abstract:

The principle of legal certainty, the rule of law and the constitutional separation of powers are affected to a significant degree when judges engage in judicial law-making, i.e. when they restrict or extend the scope of application of an enactment beyond or against the possible semantic meanings of the statutory language. This paper assesses how far English and German judges go when they interpret national legislation. It adopts a comparative methodological and constitutional perspective. The border between permissible judicial law-making and impermissible judicial amendment of legislation is governed by “outer” methodological limits in judicial practice. This paper explores reasons that may explain the existing similarities and differences in these limits in England and Germany. By focusing on the methodological constraints of judicial law-making, the paper adds an underexplored aspect to the debate on converging / diverging statutory interpretation in civil law and common law jurisdictions. It also focuses on the often neglected relationship between statutory interpretation and constitutional law. The wider debate the paper feeds into is the debate about the proper degree and limits of judicial power in a legal system.

This paper argues that opposing default positions exist in English and German judicial practice in relation to the permissibility of judicial law-making. This is not only due to different underlying constitutional settings but also due to historical factors and tradition that affect judicial attitudes. The paper thus rejects the thesis that statutory interpretation in both countries is fundamentally uniform.

In the realms of rights-consistent judicial law-making and interpretation in conformity with an EU directive, this paper discerns contrasting trends in statutory interpretation in both jurisdictions. One effect of these trends is, however, a growing congruence not only in the general expression of outer interpretative limits but also in their application in individual cases in England and Germany. This convergence is based on judges’ common understanding of their constitutional role vis-à-vis the legislature. Changes in the UK constitutional framework can partly, but not fully, justify this convergent development. Another reason for the high level of convergence is that English courts have exceeded their judicial powers. The paper therefore argues that scholars have rightly criticised highest English courts for undermining constitutional doctrine with adventurous re-interpretations of legislation. As regards German judicial practice, the paper will challenge scholarly claims that German courts have extended the limits of the judicial function.

Keywords:

statutory interpretation, judicial law-making, rights-consistent interpretation, EU legal duty of conforming interpretation, English judicial practice, German judicial practice, convergence, divergence

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