

§ 8 General fundamental rights doctrine

I. Human and fundamental rights

- see special material from the course Human Rights Law
- "*human rights*": the pre-legal ("*natural*") *rights* of every human being deriving from natural law (according to a philosophical doctrine dating from the era of enlightenment)
 - state can neither create nor abolish nor regulate them but must respect and protect them
 - term also used for *rights guaranteed in human rights treaties* (who pretend to be just a mirror of the natural rights)
- "*fundamental rights*": *legal positions* created by the implementation of this doctrine into law
 - created, shaped and granted by the state; different in every state; can be repealed
- "*constitutional rights*": f.r. guaranteed in the constitution
- some constitutions cause confusion by calling the f.r. "human rights"
 - e.g. Chapter XA of the Indonesian Const. of 1945

II. Fundamental rights as directly binding law

1) Fundamental rights as directly applicable norms addressing to all public institutions

- like all constitutional norms, f.r. are directly binding law; they must be respected by all authorities and courts without waiting for a regulation by the the legislator
 - first explicitly regulated in 1949 in art. 1(3) of the German Basic Law, this basic idea has become a *key common acquis of general fundamental rights doctrine* so that nowadays there is no need for explicit regulation

2) The prohibition of public servants to execute orders or laws that contravene fundamental rights

- public servants are bound by constitution and law - orders of superiors cannot excuse the violation of f.r.!

3) The effective enforcement of the fundamental rights as a primary mission of the courts

- a key requirement of the rule of law
- if courts perform their function effectively, no need for ombudsmen, human rights commissions or other special human rights protection institutions

4) The avoidance of violations by interpreting ordinary law "in the light of" the fundamental rights

- among several options of interpreting or applying a law, authorities must choose one that does not violate any f.r.
- in most countries, in this case the law is considered constitutional (not "conditionally const."); thus, the *responsibility is shifted* from the legislator to the executive and judiciary
- examples: interpretation of indefinite legal concepts, use of wide discretionary powers
- requires thorough education of all officials in the field of f.r. and f.r. doctrine

5) Fundamental rights as a limit to democracy

- democracy must be practiced in conformity with f.r. - the will of the majority cannot legitimise the violation of f.r.!

6) Fundamental rights as a limit to criminal law

- criminal law must respect f.r. rights, in particular refrain from unproportional restrictions

7) Fundamental rights as a limit to traditional values and the dominance of religion

- traditional values can only apply to the extent that they are compatible with the f.r.
- fundamental rights stand above religious rules and dogmas - not religion above f.r.

III. Types of fundamental rights

- see for the most up-to-date categorisation the EU Charter of Fundamental Rights
- freedom rights, equality rights, social rights, rights concerning justice, rights related to human dignity and other rights
- rights of man and citizens' rights
- fundamental rights and institutional guarantees

IV. Functions of fundamental rights, duties of protection

- note that in advanced constitutional states for each function there is a different doctrine!
- f.r. as *defensive rights* (status negativus, easy to enforce by the courts)
- f.r. as *positive rights* (status positivus, requires legislation or government action)
- f.r. as *participatory rights* (status activus)
- f.r. as *objective values* (that must always be taken into account)
- f.r. implicate *duties of protection* (state must intervene actively to protect citizen against private encroachments)

V. Holders and addressees of fundamental rights

- some f.r. may be limited to some holders (e.g. citizens of the state, natural persons)
- public institutions are usually not holders but addressees of f.r.
- f.r. do not bind the citizen but must be taken into account by the legislator when making the law and by the courts when interpreting and applying it (*indirect horizontal effect*)

VI. The dogmatic structure of (defensive) fundamental rights

- a general structure common to all defensive rights, deriving from their nature and determining in some advanced constitutional states the structure of the examination of a possible violation

1) Scope/sphere of protection

- Is the right in question (a protected activity of a protected person) *concerned*?

2) Encroachment/interference

- Is the right actually *affected*?

3) Fundamental rights' limits and limits of limits

- Is the encroachment/interference *justified* by the right's limits?
 - those are usually regulated in a *specific or general limitation clause*
 - the limitation clause, in turn, must be interpreted narrowly in the light of the restricted right, to preserve freedom (doctrine of *reciprocal effect* [Wechselwirkungslehre]).

VII. The limitation of fundamental rights encroachments by the principle of proportionality

- the most important element of the rule of law (see Diagram 2) and of f.r. doctrine
- any encroachment/interference must pursue a *legitimate aim*, be *suitable* to pursue that aim, be *necessary* to achieve the pursued aim and be *proportional in the strict sense* (not impose a burden out of proportion to the aim; this requires thorough *balancing*)