

# § 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  - created, shaped and granted by the state; different in every state; can be repealed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 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*)