

§ 4 The European free and democratic constitutional state (2): fundamental rights

I. The parallelism of pan-European, European Union, national and sub-national human and fundamental rights regimes in Europe

- a plurality of human/fundamental rights regimes protects the citizen in Europe:
 - the fundamental rights in the national constitution
 - the global human rights treaties
 - the European Convention on Human Rights and other European human rights treaties
 - the Charter of Fundamental Rights of the European Union
 - in Germany also the fundamental rights in the constitutions of the Länder
- the reasons:
 - intern. human rights treaties as "second safety net"
 - the necessity of an own fund. rights regime for the supranational European Union
- general aspects of this parallelism of human and fundamental rights regimes:
 - intensified protection through *cumulative requirements*
 - parallel operation without correlation or interference (with few exceptions)
 - mutual influence of interpretation

II. The importance of the jurisprudence of the European Court of Human Rights and the national constitutional courts for the development of fundamental rights doctrine in Europe

- most elements of fundamental rights doctrine are not laid down in the text of the constitution but need to be elaborated by jurisprudence
- several European constit. courts have developed a rich f.r. jurisprudence; that of the German Federal Constitutional Court has inspired other constit. courts in Europe and the world
- using the European Convention as a "living instrument", the European Court of Human Rights has also developed a sophisticated jurisprudence, which has strongly influenced the development of f.r. doctrine in Europe

III. Elements of general fundamental rights doctrine (overview)

1) Human and fundamental rights

- "human rights": the pre-legal (natural) rights of the human being (according to philosophical doctrine) and the rights guaranteed in human rights treaties (who reflect them)
- "fundamental rights": the legal positions created by the implementation of this doctrine into the (constitutional) law
- Note that the *divergent terminology in the Indonesian Constitution* causes considerable confusion!

2) **Fundamental rights as directly binding law**

- directly applicable norms addressing to all public institutions
 - public servants not allowed to execute orders or laws that contravene them
- enforcement a primary mission of the courts
- obligation to interpret ordinary law "in the light of" (in conformity with) them

3) Types of fundamental rights

- freedom rights, equality rights, social rights, rights concerning justice, rights related to human dignity and institutional guarantees
- rights of man (= of all human beings) and citizens' rights

4) Holders and addressees of fundamental rights

- some f.r. may be limited to some holders (e.g. citizens of the state)
- public institutions are usually not holders but addressees of f.r.
- f.r. do not bind the citizen directly (no direct horizontal effect)

5) Duties of protection

- state must not only respect f.r. but *intervene actively* to protect citizen against private encroachments

6) The dogmatic structure of (defensive) fundamental rights

a) Scope/sphere of protection

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

b) Encroachment/interference

- Is the right actually *affected*?

c) Fundamental rights' limits and limits of limits

- Is the encroachment/interference *justified* by the right's limits?
 - those are usually regulated in a *limitation clause*
- In particular: Does it respect the limits of limits?

IV. In particular: 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*)