

§ 3 Introduction to comparative fundamental rights law

I. The anchoring of human rights as fundamental rights in the national constitution

- not the only but the the most effective way to implement the philosophical concept of the natural rights of the human being in the prevailing law
- usually in a separate chapter on "fundamental rights" at the beginning of the constitution (after the fundamental constitutional principles), sometimes at the end of the constitution
- some constitutions use the term "human rights", causing terminological confusion
 - the French Constitution of 1958 uses the term "libertés publiques"

II. Comparative general fundamental rights doctrine

- note that most of the following also applies to the human rights under the international h.r. treaties but with the difference that these rights do not enjoy constitutional status

1) Fundamental rights as binding law

a) Directly applicable norms addressed to all public institutions

- not just programmatic (political) principles but *directly binding constitutional norms* addressed to all holders of public power
 - 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 f.r. doctrine* so that nowadays there is no need for explicit regulation
- defensive rights, in particular freedom rights, must be respected by all public institutions under any circumstances without any exceptions; authorities and courts are not allowed to wait for a regulation by the legislator
 - example: the police must respect the freedom of assembly of demonstrators even if there is not yet a law on public demonstrations
- however, social rights and other rights requiring positive action usually need to be implemented by law or government activities to become fully effective
 - example: a right to health care needs a law regulating the modalities and responsibilities

b) Public servants not allowed to execute orders or laws that contravene fundamental rights

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

c) The avoidance of violations by interpreting ordinary law "in the light of" (in conformity with) the fundamental rights

- if there are several options to interpret or apply a law, the authorities must choose one that does not violate any fundamental right
 - example: fundamental rights-friendly interpretation of indefinite legal concepts (such as public order, public security, public morals, religious values etc.)
 - example: moderate use of wide discretionary powers (e.g. police powers)
- in most countries, in this case the law is considered constitutional and the *responsibility is shifted* from the legislator to the executive and judiciary who must show special consideration for the f.r. when they apply the law
 - this requires a thorough education of all officials in fundamental rights doctrine!

d) Fundamental rights as a limit to democracy

- democracy must be practiced in concordance with the f.r. - the will of the majority does not stand above the rights and freedoms of the human being

- e) **Fundamental rights as a limit to criminal law**
 - not only the making but also the application of criminal law must strictly respect f.r., in particular refrain from any unproportional restrictions
- f) **Fundamental rights as a limit to traditional values and the dominance of religion**
 - f.r. do not aim to preserve but to overcome traditional and religious rules if they are inhumane, hostile to freedom or intolerant
 - 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.

2) The holders and the addressees of the fundamental rights

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

3) The state's duty to protect against violations by private persons

- state must not only respect the rights but also intervene actively to protect them against private encroachments
 - example: policeman on the street *must* intervene when a woman threatened by rape cries for help
 - example: state must investigate and intervene in case of forced disappearance or human trafficking
 - example: state must intervene actively against acts of racism or religious intolerance
 - example: state must regulate data collection by private companies to protect the privacy of the customers
- the doctrine of *duties of protection* of the German Federal Constitutional Court
- see for the intern. human rights law the doctrine of *positive obligations* of the ECtHR and the UN concept of *responsibility to protect*
- while the general idea is widely recognised the details are still unclear

4) The dogmatic structure of freedom rights

- a general structure common to all defensive rights, deriving from their nature and determining the structure of the examination of a possible violation
- a) **The sphere/scope of protection**
 - Is the right in question (a protected activity of a protected person) *concerned*?
- b) **The 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 specific or general *limitation clause*
 - the limitation clause, in turn, must be interpreted narrowly in the light of the restricted right and its importance for freedom and democracy (doctrine of *reciprocal effect* [Wechselwirkungslehre])¹
 - Are the *limits of limits* (e.g. the principle of proportionality) respected?

¹ First developed by the German Federal Constitutional Court in its famous Lüth Decision of 1958 (BverfGE 7, 198) for the freedom of opinion but nowadays a generally recognized element of general f.r. doctrine.

5) **The limitation of restrictions by the principle of proportionality**

- the most important element of the rule of law and of human and fundamental rights doctrine
- categorical rejection of any claim of absoluteness for any objectives of the state
- philosophical foundations already in the Bible (Old Testament)
- structure of examination varies; see here the sophisticated German approach:
 - a) **Legitimate aim**
 - the pursuit of the right public interest
 - b) **Suitability**
 - the measure must be conducive to its purpose
 - c) **Necessity**
 - the measure must be the least intrusive act of intervention that is equally conducive (no milder alternative)
 - often the crucial point in the examination of a case
 - d) **Proportionality (in its strict sense)**
 - the burdens imposed must not be out of proportion to the aim in view (requires thorough balancing)

III. **The enforcement of fundamental rights by the courts and constitutional courts**

- the effective enforcement of h.r. and f.r. is the *primary mission of the courts*
 - effective legal protection and enforcement of all law are key requirements of the rule of law
 - if the courts are actually independent and perform their function effectively (reliably, timely, without bias or corruption), there is no need for special h.r. institutions in the country
- in addition, the constitutional court protects the fundamental rights
 - by the way of *abstract constitutional review* of laws (case-independent, on application of state institutions or a quorum of members of parliament)
 - by the way of *concrete constitutional review* of laws (on judicial referral by a court which considers a law unconstitutional which is decisive for a pending case, common in Europe)
 - by hearing individual *constitutoinal complaints* of citizens alleging that their f.r. have been violated (common in Europe, often limited to complaints against laws)