

§ 4 General aspects of fundamental rights protection in the European Union

I. Why does the European Union need its own fundamental rights regime?

- because this *state-like supranational governing entity* exercises *public power on a large scale* like a state and therefore is a potential threat to human rights like a state
- because its member states, who have to execute its laws, risk to violate human rights and be held accountable before the ECtHR if there is no appropriate protection at Union level

II. The fundamental rights under European Union law in the parallelism of global, geo-regional and national human and fundamental rights regimes

1) The primary responsibility of the state for effective human rights protection

- a conclusive consequence of the sovereignty of the state

2) The plurality of human and fundamental rights regimes

- human rights are not only protected at state level but in a plurality of *human rights regimes* (in intern. human rights treaties) and *fundamental rights regimes* (in constitutions):
 - at the global level (→ UN human rights treaties)
 - at the pan-European level (→ European human rights treaties)
 - at European Union level (→ Charter of Fundamental Rights)
 - at the national level (→ fund. rights in national constitutions)
 - in Germany also at the regional level (→ fund. rights in Land constitutions)
- all these regimes operate parallelly

3) The reasons for the plurality of human and fundamental rights regimes

- the recurring insufficiency of the national human rights protection - the necessity of guarantees from outside the State
- intern. human rights treaties as instruments of "mutual insurance", a *second safety net*
- geo-regional fundamental rights regimes as expressions of identity of civilisations
- the need for own fundamental rights regimes for supranational powers

4) General aspects of the parallelism of human and fundamental rights regimes

a) Intensified protection through cumulative requirements

- they do not compete or collide but complement each other

b) Parallel operation without correlation or interference

- while h.r. treaties set minimum standards, standards in f.r. regimes should be higher

c) Mutual influence of interpretation

- "copy & paste" - very popular in this field!

d) Risk of conflicts in case of concepts obliging authorities to intervene

- e.g. prohibition clauses, rights with direct horizontal effect, positive obligations

5) The role of the Union's fundamental rights regime in this spectrum

- fits in like fund. rights in a state constitution: as *specific and primary mechanism* for the safeguard of human rights *in this specific organisation*
- reassuring, but cannot release the *state* from its *ultimate responsibility* for human rights on its territory
 - in the past, too weak human rights protection at Union level has triggered a vivid discussion about the limits of obedience to Union law
 - see the German Federal Constitutional Court's Solange I decision of 1974 (BVerfGE 37, 271), Solange II decision of 1986 (BVerfGE 73, 339) and Maastricht judgement of 1993 (BVerfGE 89, 155)

III. The architecture of the fundamental rights protection in the European Union

1) Primary instrument: the Charter of Fundamental Rights

- in its revised version of 2007, which is part of primary law (cf. art. 6(1) EU Treaty)

2) Fundamental rights outside the Charter of Fundamental Rights

a) Additional fundamental rights anchored in the Treaties

- prohibition of discrimination on grounds of nationality (art. 18 FEU Treaty)
- equal treatment of men and women (cf. art. 157 FEU Treaty)

b) Complementary fundamental rights as general principles of Union law (cf. art. 6(3) EU Treaty)

- the old regime of human rights protection, before the Charter became binding
- fundamental rights "discovered" as general principles of law by the ECJ
 - in the way of evaluative comparison of laws
 - inspired by the European Convention and its protocols (also future protocols) and the common constitutional traditions of the member states
- now only *auxiliary means to fill gaps* left by the Charter
 - can only complement but not weaken or relativise the Charter rights (→ art. 6(3) EU Treaty not a license for sabotage!)

IV. The future accession of the European Union to the European Convention of Human Rights

- the *need for a second safety net* - in a supranational union like in a state
- accession *legally required in art. 6(2) EU Treaty* but not implemented
- ECHR was amended to allow EU as non-state organisation accession
- first attempt failed because ECJ considered draft accession agreement incompatible with autonomy of EU law and the ECJ's monopoly of interpreting it (opinion 2/2013)
 - fierce criticism of scholars: ECJ jealous of ECtHR?
- new draft agreement in preparation but needs to take into account ECJ concerns and will be a serious intellectual and political challenge