

Human and Fundamental Rights as Directly Binding Law

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I. How it all began

- 1776: Virginia Bill of Rights²: first positivization of fundamental rights in human history
- 1791: French Déclaration des droits de l'homme et du citoyen of 1789 becomes part of first French Constitution
- 1803: U.S. Supreme Court, decision Marbury vs. Madison: first judicial confirmation of the primacy of the constitution (→ constitution as "supreme law of the land")
- 1948: Universal Declaration of Human Rights: a political but not legally binding commitment of the UN member states to human rights
- 1949: Basic Law of the Federal Republic of Germany: "fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law"
- 1966: ICCPR and ICESCR: two comprehensive global human rights treaties
- 1994 - 2015: Republic of Kazakhstan ratifies most global human rights treaties

II. On terminology: the distinction between human and fundamental rights

- two similar but different kinds of subjective (personal) rights sometimes confused
- "*human rights*" (1): 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
- "*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 - created, shaped and granted by the state; different in every state; can be repealed
 - enforceable before the courts
- "*constitutional rights*": f.r. guaranteed in the constitution
- "*human rights*" (2): the *rights guaranteed in international human rights treaties*
 - also enforceable before the courts
 - supposedly confined to mirror the natural rights everyone already has
 - function as a "second safety net" in case of a failure of the state
 - standards of national fund. rights should be higher and reference to human rights treaties not necessary
- some Asian constitutions cause confusion by calling their fund. rights "*human rights*"
 - be aware of the risk of misunderstandings!

III. The legal character of human and fundamental rights

- not just political (programmatic) principles but *binding law*
- fundamental rights provisions not less binding than other constitutional law
- human rights provisions in treaties binding under the law of international treaties
 - see art. 26 of the Vienna Convention on the Law of Treaties: "Pacta sunt servanda."
- *not* legally binding: the *Universal Declaration of Human Rights* of 1948
 - only a political resolution, serving as "soft law" as an aid to interpretation of the h.r. treaties

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² Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

IV. The primacy of human and fundamental rights

1) The primacy of fundamental rights as part of the constitution

- the primacy of the constitution - a key concept of the modern constitutional state
 - first established in 1803 by U.S. Supreme Court, Marbury v. Madison
 - for a long time disputed (in Germany even in the late 19th century)
 - since end of World War II universally recognised in constitutional law & theory
- primacy of all provisions in the constitution, incl. those on fundamental rights
- primacy in validity: conflicting domestic law is void
- primacy also over moral and religious norms, customs and traditions

2) The primacy of human rights under human rights treaties

- in states following the *monist approach* (e.g. France, Kazakhstan): primacy over domestic statutory law but usually not the national constitution
 - see art. 4(3) phrase 1 of the Constitution of Kazakhstan: "Республика бекіткен халықаралық шарттардың Республика заңдарынан басымдығы болады." / "Международные договоры, ратифицированные Республикой, имеют приоритет перед ее законами."
- in states following the *dualist approach* (e.g. Germany, USA): after the necessary transformation by domestic legislation only *status of domestic statutory law*, but domestic law must be interpreted in conformity with human rights to avoid conflicts

V. The direct applicability of human and fundamental rights

1) Directly applicable norms addressing to all public institutions

- authorities and courts *not allowed to wait for a regulation by the legislator* but directly obliged to respect human and fundamental rights
 - where concretisation in a law is missing, they must concretise the rights' scope & limits in own responsibility
- for the fundamental rights, this basic idea was first explicitly regulated in 1949 in art. 1(3) of the German Basic Law but has become a *key common acquis of general fundamental rights doctrine* so that nowadays there is no need for explicit regulation
- for the human rights, it results from the rules on self-executing treaties
- *defensive rights* (in particular freedom rights) must be *respected* by the authorities and courts under all circumstances, with or without a specific law
 - example: they must allow and regulate demonstrations even without a law on public assemblies
- in case of *social rights* and other rights that necessitate implementation by legislation or government activities, prior to these steps, authorities and courts can only be obliged to *refrain from activities that would deteriorate* the situation
 - example: the court cannot issue orders to enforce a right to accommodation or health care if the law organising the necessary environment is still missing

2) The prohibition of public servants from executing orders or laws that contravene fundamental rights

- public servants are bound by the constitution and the law - *orders of superiors cannot excuse* human or fundamental rights violations!
- public servants not allowed to execute laws that evidently violate fundamental rights
 - if necessary, the public servant must refuse execution, inform his superiors and add a well-reasoned notice to the files
 - since the legal assessment can be difficult, this only applies where the violation would be evident and not insignificant
- public servants must avoid to violate human rights treaties by interpreting & applying the domestic law "in line" with them (see infra, VI.) and, where impossible, refusing execution

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

- effective legal protection and enforcement of all rights of the citizen are *key requirements of the rule of law*; due to separation of powers, this is principally the task of the courts
- where courts consider a legal provision unconstitutional that is decisive in the given case, they must in many states suspend the proceedings and refer the law to the constit. court for concrete constitutional review
 - practically important because often some details prove unconstitutional in a special context and this could not be foreseen in the making of the law
- if courts perform their function effectively, no need for ombudsmen, human rights commissions or other special human rights protection institutions
- *judges need thorough training* in intern. h.r. law and national f.r. doctrine

4) No direct binding effect on the citizen

- with few exceptions, human/fundamental rights are only addressed to those who exercise public power; they do not bind the citizen (no direct horizontal effect)
- however, they 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 interpretation and application of ordinary law "in the light of" the fundamental rights

- fundamental rights violations must be avoided by strictly interpreting & applying all ordinary law "in the light of" (= in conformity with) the fundamental rights
- in principle, the same can and therefore must apply to avoid the violation of human rights
- among several options of interpreting a law, authorities and courts *must* choose one that does not violate human or fundamental right
 - in this case the law as such is considered compliant and the *responsibility* is *shifted* from the legislator to the executive and judiciary
 - this raises the responsibility of the individual officer who may need to take decisions that the legislator refused to take
 - in administrative law, in particular compliant *interpretation of indefinite legal concepts*
 - such as "public order/public policy", "public interest", "reliability", "reasonable"
 - in private law, in particular compliant *interpretation of general clauses*
 - e.g. clauses on "good faith" or "common decency"
 - problem: Who is the final arbiter - the civil court or the Constitutional Court? The sensitive relationship between constitutional jurisdiction and specialised jurisdiction
 - in criminal law, in particular *narrow interpretation of criminal offences*
 - to preserve the freedom of the citizens
- authorities and courts must make *moderate use of wide discretionary powers*
 - always taking into account the significance of the human and fundamental rights
 - in particular no violation of the principle of proportionality (see infra, VII.3)
 - in particular no measures affecting the essence of a right (see for Germany art. 19(2) BL)
- inevitable consequence: the *need for decent knowledge of human and fundamental rights doctrine for every lawyer*
 - you cannot be anymore a qualified expert in any field of law without knowing well the relevant human and fundamental rights and the respective jurisprudence and doctrine
 - your knowledge may be targeted but must include the understanding of the structures, dogmatic concepts and mechanisms in human and fundamental rights law

VII. Annex: The dogmatic structure of (defensive) fundamental rights

- a general structure common to all defensive rights, deriving from their nature, determining the structure of the examination of their violation in Germany and other constitutional states
- can serve as reference for the examination of human rights violations too

1) Scope/sphere of protection [Schutzbereich]

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

2) Encroachment/interference [Eingriff]

- Is the right actually *affected*?

3) Fundamental rights' limits [Schranken] and limits of limits [Schranken-Schranken]

- 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 (German doctrine of *reciprocal effect* [Wechselwirkungslehre])
- Does the encroachment/interference respect the so-called "limits of limits"?
 - in particular: no encroachment on the *essence* of the right
 - in particular: no violation of the *principle of proportionality*
 - the most important sub-principle of the rule of law and element 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
 - be *proportional in the strict sense* to the aim
(not impose a burden out of proportion; requires thorough *balancing*)