

§ 7 Fundamental rights

I. Human and fundamental rights

- see special material from the course Human Rights Law at Universitas Gadjah Mada (Yogyakarta), 2023
- "*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 mirror 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 - created, shaped and granted by the state; different in every state; can be repealed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"; be aware of the risk of misunderstandings!

II. The fundamental rights guaranteed in the Basic Law (overview)

- see special material

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. 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 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) 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.!

- fundamental rights limit in particular criminal law - the definition of crimes, the ways and extent of punishment, standards for criminal procedure etc.
- fundamental rights also limit the possible binding nature of traditional values and customs and religions

V. The interpretation and application of ordinary law "in the light of" the fundamental rights

- avoiding fundamental rights violations by strictly interpreting and applying all ordinary law "in the light of" (= in compliance with) 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

VI. 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)

VII. 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*)

VIII. 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 [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 (doctrine of *reciprocal effect* [Wechselwirkungslehre]).

IX. The limitation of fundamental rights encroachments by the principle of proportionality

- the most important element of the rule of law (see Diagram.3) 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*)

X. Exercise in practical case-solving in the field of fundamental rights

- see case 1