

## § 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*)