

concerning § 2 of the workshop

Introduction to fundamental rights and fundamental rights doctrine in Germany

Art. 1 Basic Law¹

- (1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.
- (2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace and of justice in the world
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly valid [applicable] law.

I. Why study fundamental rights in Germany?

- Germany is the country that has committed the most serious human rights violations in its history.
- Today Germany is one of the countries with the most highly developed fundamental rights protection.
- The German Federal Constitutional Court [Bundesverfassungsgericht] and the German fundamental rights doctrine are a model for legal development in numerous countries in the world.

II. Fundamental rights and human dignity (art. 1(1, 2) BL)

- In response to the horror of the Third Reich, art. 1(1) of the Basic Law for the Federal Republic of Germany (= BL) raises human dignity not only as a fundamental right but also as the *highest, inviolable constitutional value*, from which most of the fundamental rights can be deduced. This goes hand in hand with the commitment to human rights as the basis of every human community (Art. 1(2) BL).
- "Human dignity" is the self-determination of the human being in freedom and equality, under social respect and esteem as human being. Above all, the human being must never be degraded to an object.

III. Fundamental rights as directly binding law (art. 1(3) BL)

- Every German official (police officer, civil servant, judge - even a university lecturer) is *directly bound to the fundamental rights*, without any need for intermediary legal regulation. So he must know them!
- The fundamental rights have a *strong influence on every field of law*. The citizen himself is not directly bound to them. However, they have to be taken into account in legislation and jurisprudence as part of the *objective system of values* of the constitution; this often amounts to an indirect binding effect on the citizen.
- The *protection* of fundamental rights *resides with the courts* in the context of general legal protection. Special human rights institutions (ombudsmen, human rights commissions, human rights courts etc.) are unnecessary and would be perceived in Germany as a sign of failure of the state. A state with a functioning court system, where the courts take their responsibility for the rule of law and an efficient fundamental rights protection seriously, does not need such special institutions.
- The Federal Constitutional Court also protects the fundamental rights, namely in the context of *abstract or concrete constitutional review* and subsidiarily of individual *constitutional complaints* [Verfassungsbeschwerden], which any person may file after exhaustion of legal remedies, claiming that one of his fundamental rights has been infringed by public authority (art. 93(1) no. 4a BL).

IV. Types and functions of fundamental rights

- The Basic Law recognizes, as most modern fundamental rights catalogues, many different fundamental rights whose spheres (scopes) of protection and limits are formulated individually. The most important are the *civil rights and liberties* (and other defensive rights), for which a *sophisticated fundamental rights doctrine* has emerged. Besides, there are equality rights (with a separate doctrine), rights of justice, rights concerning marriage and family and other fundamental rights, such as the right to asylum (see overview in special material). However, the Basic Law does not know social rights but instead a principle of the social state [Sozialstaatsprinzip].
- For the freedom of the individual the *general freedom of action* (art. 2(1) BL) is important. This is indeed the comprehensive freedom to do (or not to do) whatever you want, but this freedom can easily be restricted in the public interest.

¹ Underlined text passages contain links to additional Internet resources. These can be called up directly in the PDF file for this introduction (downloadable on my website).

- Concerning the functions, fundamental rights are *primarily defensive rights*, protecting the citizen against encroachments by public authorities. This is the so-called *status negativus*, easy to enforce by the courts. However, the fundamental rights can also oblige the authorities to take an active approach (*status positivus*, positive obligations). In particular, the state must intervene to protect the citizen against private encroachments (*duties of protection* [grundrechtliche Schutzpflichten]). The details are still controversial. Moreover, there are *participatory rights* (*status activus*, e.g. the right to vote and to stand as a candidate). Furthermore, the fundamental rights represent *objective constitutional values* that must always be taken into account in any field of law.

VI. The dogmatic structure of (defensive) fundamental rights: sphere [scope] of protection, limits and limits of limits of fundamental rights

- The *rational and precise examination of possible fundamental rights violations* represents the core of the German fundamental rights doctrine. There is a general structure common to all defensive rights, deriving from their nature and determining the structure of the examination. A defensive right (e.g. a liberty) is violated, if (1.) a measure of public authority encroaches on [interferes with] the *sphere [scope] of protection* of the right (that means the right is affected) and (2.) this *encroachment [interference]* is not constitutionally justified by the fundamental rights *limits*. Regarding the sphere of protection, both the personnel sphere (a protected person, for some rights only German citizens) and the material sphere (a protected activity) must be concerned.
- For most fundamental rights, *specific limitation clauses* provide for *restrictions by or on the basis of statutory law* and regulate some conditions. Fundamental rights guaranteed without such a reservation can only be restricted in case of a collision with other fundamental rights or constitutional values.
- Any encroachment/interference must not only comply with the requirements set in the specific limitation clause but also respect the so-called *limits of limits [Schranken-Schranken]*. In no case may the essence of the right be affected (art. 19(2) BL). The most important limit of limits is the ***principle of proportionality***, the most important principle of law at all in any state based on the rule of law. It requires that any encroachment on [interference with] a fundamental right (1.) serves a *legitimate aim*, (2.) is *suitable* (conducive) to achieve this aim, (3.) is *necessary* to achieve this aim (the measure must be the least intrusive act of intervention that is equally conducive) and (4.) is *proportional in the strict sense* (the burden imposed on the citizen must not be out of proportion to the aim in view). The latter requires thorough *balancing*. The compliance with these requirements is thoroughly examined by the courts in the case of judicial resp. constitutional review.