

§ 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 f.r. 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

- f.r. only protect effectively if there is a developed f.r. doctrine
- most elements of f.r. doctrine are not expressly regulated in the text of the constitution but need to be elaborated by jurisprudence
- European constitutional courts have developed a rich f.r. doctrine; 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 f.r. doctrine in Europe

III. Elements of general fundamental rights doctrine (overview)

1) The distinction between human and fundamental rights

- "human rights" are the pre-legal (natural) rights of the human being (according to philosophical doctrine) and the rights guaranteed in human rights treaties (who just reflect them)
- "fundamental rights" are the legal positions created by the implementation of this doctrine in constitutional law
- note that the *divergent terminology in the Indonesian Constitution* sometimes causes confusion!

2) Fundamental rights are directly binding law

- directly applicable norms addressing to all public institutions
 - public servants are not allowed to execute any orders or laws that contravene them
- enforcement a primary mission of the courts
- ordinary law must always be interpreted "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

- the state must not only respect f.r. but also *intervene actively* to protect them 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*
- Does it respect the *limits of limits*?
 - most important limit of limits: the ***principle of proportionality*** (see → Diagram 2): any encroachment/interference must
 - pursue a *legitimate aim*,
 - be *suitable* to pursue this aim,
 - be *necessary* to pursue this aim and
 - be *proportional in the strict sense* (not impose a burden out of proportion to the aim; this requires thorough *balancing*)