

§ 2 Focusing on the essential: human and fundamental rights as binding law

I. Human and fundamental rights as directly applicable law

- defensive rights (in particular freedom rights) are *directly applicable legal norms* that *address to all public institutions* and must be implemented and enforced in practice under any circumstances without any exceptions
 - authorities and courts are not allowed to wait for a regulation by the the legislator
 - public servants are not allowed to execute and judges not allowed to apply a law that violates human or fundamental rights
- however, social rights and other rights requiring certain policies usually need to be implemented by law or government activities to become practically effective
- violations can often be avoided by *interpreting the law "in the light of"* (*in conformity with*) *the human and fundamental rights*

II. The effective enforcement of the human and fundamental rights as a primary mission of the courts

- effective legal protection and enforcement of all law are key requirements of the rule of law
- if the courts are actually independent and perform their function effectively (reliably, timely and without bias or corruption), there is no need for ombudsmen, human rights commissions or other special human rights protection institutions

III. The state's duty of protection against violations by private persons

- the state must not only respect the rights of the citizen but also intervene actively to protect them against private encroachments
 - example: the state must investigate and intervene in case of forced disappearance or human trafficking
 - example: the state must intervene actively against acts of racism or religious intolerance
- the doctrine of *positive obligations* of the European Court of Human Rights
- the doctrine of *duties of protection* of the German Federal Constitutional Court

IV. The dogmatic structure of (defensive) human and fundamental rights

- a general structure common to all defensive rights, deriving from their nature and determining in advanced legal systems the structure of the examination of a possible violation

1) Scope/sphere of protection, encroachment/interference, fundamental rights' limits and limits of limits

- the scope/sphere of protection: is the right in question *concerned*?
- the encroachment/interference: is the right actually *affected*?
- the (il)legality of the encroachment/interference: is it justified by the right's *limits*?
 - in particular: does it comply with the *limits of limits*?

2) In particular: the principle of proportionality as a limit to all restrictions

- the most important element of the rule of law and of human/fundamental rights doctrine
- philosophical foundations already in the Bible (Old Testament)

- any restrictions of human/fundamental rights must
 - pursue a *legitimate aim*
 - be *suitable* to pursue that aim
 - be *necessary* to achieve the pursued aim
 - be *proportional in the strict sense* (not impose a burden out of proportion to the aim; this requires thorough *balancing*)