

§ 3 European human rights law

I. The role of the Council of Europe to promote the protection of human rights

- pan-European organisation for promotion of democracy, human rights and rule of law
- has prepared the European Convention and numerous other European human rights treaties
- with own *Commissioner for Human Rights*
- with influential expert group *Venice Commission* (European Commission for Democracy through Law) supporting by advice the development of the free and democratic constitutional order in the member states

II. The European Convention on Human Rights (ECHR)

1) Wording and reality: the European Convention as a "living instrument"

- the development to a powerful human rights regime far beyond its wording in the jurisprudence of the European Court of Human Rights
 - generous interpretation of the definitions of the spheres of protection of the rights, closing gaps and partially compensating for rights missing in the Convention
 - restrictive interpretation of the outdated, far-reaching limitation clauses, in particular of terms such as "necessary in a democratic society", "public order" or "morals"
 - a consistent, sophisticated human rights doctrine that influences the fundamental rights doctrine in the European countries
- the approximation of the ECHR standards to those of the constitutional fundamental rights regimes - is the Convention still a "second safety net"?
- the constant modernisation of the doctrine with regard to new trends and developments
 - a risk of reversal in times of public intolerance, populism and authoritarianism?

2) The rights guaranteed in the European Convention and its protocols

- see separate *list of rights and prohibitions*
- the originary limitation of the ECHR to some of the most important classical human rights
- the successive but unsystematic enlargement of the h.r. catalogue by the Protocols
- the still missing rights and their partial compensation in the jurisprudence
 - no freedom of occupation, no general right to equality...
 - freedoms of press, arts and science derived from art. 10 as parts of freedom of expression
 - various rights concerning data protection and personal identity derived from art. 8 as parts of the right to respect for private life
- a strong point: central elements of the rule of law anchored as human rights
 - right to liberty and security (art. 5), *nulla poena sine lege* (art. 7), *ne bis in idem* (art. 4 Prot. 7), *right to an effective remedy* (art. 13), *right to a fair trial* (art. 6) and others
 - abundant jurisprudence on these rights shaped and consolidated rule of law in Europe

3) The specific limitation clauses in the European Convention and its protocols

- note: not the formulation of the rights but of their limits is decisive for their protection!
- the necessity of specific limitation clauses for a sophisticated, differentiated h.r. protection
- many freedoms may only be subjected to restrictions that are
 - prescribed by law (not necessarily statutory law) and
 - necessary in a democratic society (with pluralism, tolerance, openness etc.)
 - in the interests of national security or public safety, for prevention of disorder or crime, protection of health or morals or protection of the rights and freedoms of others

- **problem:** human rights restrictions for the *protection of morals*?
 - incompatible with the modern understanding of law and human rights
 - in a free and democratic state based on the rule of law, the enforcement of morality is *not a legitimate mission of the state* but the task of society

4) **Central elements of human rights doctrine under the European Convention**

a) **The dogmatic structure of the Convention rights**

- common distinction of three aspects:
 - sphere/scope of protection (usually defined in sect. 1 of the relevant norm)
 - restriction/interference
 - justification by the right's limits (in art. 15 - 17 and the specific limitation clause)

b) **The principle of proportionality as "limit of limits"**

- a limit to any restriction/interference, implied by the requirement "necessary in a democratic society" but also applicable as a general principle
- the measure must pursue a *legitimate aim* and be *suitable, necessary* and *adequate* (proportional in the strict sense) for the pursuit of this aim

c) **Positive obligations**

- state must provide *protection against unlawful private interference*

III. **The European Court of Human Rights**

1) **The European Court of Human Rights as treaty-body of the European Convention**

- do not confuse with the European Court of Justice in Luxembourg!
- an international court, whose decisions are legally binding
 - since 1998 a full-time court to which individuals can apply directly
 - has delivered *more than 10.000 judgements*
 - can find that the Convention has been violated but cannot annul the attacked decision
- jurisdiction: on *interstate complaints* (art. 33) and *individual complaints* (art. 34) and to give *opinions* (art. 47)
 - new: *advisory opinions* on request of high courts and tribunals (Prot. 16)

2) **Composition and structure**

- 47 judges (one per state), elected for a term of 9 years
- sits in various formations (art. 26 ff.); cases raising new legal questions are decided by *Chambers* of 7 judges (art. 29, exceptionally with remedy of referral to the Grand Chamber, art. 43) or exceptionally by a *Grand Chamber* of 17 judges (art. 30)

3) **Individual complaints to the Court** (art. 34 ff. ECHR)

- applicant must claim to be victim of a violation of a Convention right (art. 34)
 - must be personally and directly concerned
 - must have suffered a significant disadvantage (art. 35(3) lit. b)
 - application must not be manifestly ill-founded or abusive (art. 35(3) lit. a)
- case must not have been submitted to another procedure of international investigation or settlement (treaty bodies, arbitration etc.) (art. 35(2) lit. b))
- only after all domestic remedies have been exhausted, within 6 months (art. 35(1))
- Court can afford just satisfaction (compensation) to the injured party (art. 41)

4) The supervision of the execution of the judgements by the Council of Europe's Committee of Ministers (art. 46 ECHR)

- if state refuses to abide, Committee of Ministers may, after confirmation by the Court, consider appropriate political measures (art. 46(3, 4))

IV. European human rights treaties on special subjects

1) The European Social Charter

- economic and social rights
- original version of 1961 and revised version of 1996 with improved control mechanism

2) The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)

- enhanced control mechanisms, including ad hoc visits of places of detention

3) Others

V. Excursus: Fundamental rights in European Union Law

- a specific f.r. regime for the EU, necessary because EU exercises on a large scale supra-national public power

1) The Charter of Fundamental Rights of the European Union

- part of EU primary law (cf. art. 6(1) EU Treaty)
- member states only bound when implementing or executing EU law or interfering with the economic fundamental freedoms
- one of the *most modern f.r. catalogues in the world* with many *innovative approaches*
 - contemporary and precise wording
 - clear structure based on innovative classification of the rights
 - rights modelled on ECHR and other h.r. treaties, advanced national constitutions and ECJ jurisprudence, taking into account newest developments in the field
 - *anti-neoliberal approach* (social rights, horizontal effect, business restrictions etc.)
 - innovative: fundamental restrictions of biomedicine (art. 3(2)), freedom to conduct a business (art. 16), cultural, religious and linguistic diversity (art. 22), rights of the child and of the elderly (art. 24, 25)
- substandard system of f.r. limits with undifferentiated general limitation clause for most rights and transfer of archaic limits from ECHR to corresponding Charter rights (art. 52)

2) Complementing other fundamental rights norms

- esp. possible complementary f.r. as general principles of Union law (art. 6(3) EU Treaty)

3) The future accession of the European Union to the European Convention

- cf. art. 6(2) EU Treaty; first attempt failed, but still planned