

§ 2 Human and fundamental rights as binding law

I. The direct applicability of human and fundamental rights

- 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 often can and must be avoided by *interpreting the law "in the light of"* (*in conformity with*) *the human and fundamental rights*
 - among several options of interpreting or applying a law, authorities must choose one that does not violate any human or fundamental rights
 - thus, within the state often the responsibility is shifted from the legislator to the executive and judiciary
 - examples: interpretation of indefinite legal concepts, use of wide discretionary powers
 - this requires thorough education of all officials in the fields of international human rights and national fundamental rights doctrine

II. The holders and the addressees of human and fundamental rights

- rights of all human beings and rights reserved to citizens
- rights reserved to natural persons and rights open for legal persons
- with few exceptions, human/fundamental rights are addressed to public institutions only; they do not bind the citizen but must be taken into account by the legislator when making the law and by the courts when interpreting and applying it (*indirect horizontal effect*)

III. The responsibility for the protection of the human and fundamental rights

1) The effective enforcement of human and fundamental rights as a primary mission of the courts

- effective legal protection and enforcement of all rights of the citizen are key requirements of the rule of law; due to separation of powers, this is principally the task of the courts
- judges need thorough training in intern. h.r. law and national f.r. doctrine

2) The additional contribution to a better implementation and protection by national ombudsmen, human rights commissions and other specialised institutions

- a variety of specialised human rights protection institutions with monitory and advisory functions but without own legal powers in many states
- if the courts are actually independent and perform their function effectively (reliably, timely, sophisticatedly and without bias or corruption), there is no need for such institutions

3) Preview: the insufficiency of the international human rights mechanisms for an effective protection of human rights

- often bureaucratic, highly politicised, obstructed by the collaboration of representatives of severe human rights violators and/or insufficient powers
- exception: international human rights courts

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

- state must not only respect the rights but also intervene actively to protect them against private encroachments
 - example: state must investigate and intervene in case of forced disappearance or human trafficking
 - example: 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

V. The dogmatic structure of (defensive) human and fundamental rights, in particular the limits of rights and the limitation of restrictions by the principle of proportionality

- 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, limits and limits of limits of human and fundamental rights**
 - 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 limits of the rights under global, geo-regional and national law**
 - not the proclamation of the rights but the definition of their limits is decisive!
 - specific and general limitation clauses in human rights treaties and constitutions
 - classical and controversial grounds for the justification of human and fundamental rights restrictions
 - 3) 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*)