

HUMAN RIGHTS NORMS AND MECHANISMS II:
HUMAN AND FUNDAMENTAL RIGHTS REGIMES IN EUROPE

concerning § 1 IV Overview of the human and fundamental rights regimes applicable in Europe

Who said it would be easy?

An overview of the human and fundamental rights norms a public servant must always bear in mind - the example of Germany

Imagine that you are working as an official for a local public authority in Germany. Life may be quiet and comfortable and the job will be interesting. However, whenever you are considering to take a decision that may affect the freedom or other human rights of somebody (e.g. you want to prohibit or regulate certain activities of the citizen), you need to bear in mind *all (!)* the following human and fundamental rights norms:

I. The fundamental rights guaranteed in the national constitution (the Basic Law for the Federal Republic of Germany)

In every modern constitutional state, as a matter of course, all public authorities are bound to the *fundamental rights* guaranteed in the national constitution *as directly binding law*. In Germany, this is expressly regulated in art. 1(3) BL. All public authorities must conform all activities with the fundamental rights even if for some activities there is no specific law regulating how to do this. If your decision violates any of these rights the citizen may take remedies and the higher administrative authority (in objection proceedings) or the administrative court (in administrative court proceedings) will annul your decision. Furthermore, after all remedies have been exhausted, the citizen may lodge a constitutional complaint (individual complaint) before the Federal Constitutional Court.

Note that if your decisions are annulled frequently for violation of human or fundamental rights this will have a strong impact on your personal career! You should also be aware of the fact that in a modern constitutional state based on the rule of law lawyers are well-trained in filing remedies and well-educated in fundamental rights doctrine. They will love making money with fighting your decisions if you ignore the citizen's fundamental rights!

II. The fundamental rights guaranteed in the Land constitution

In addition, in the relevant Land (federated state) all Land authorities and local authorities (but not the federal authorities located in the Land) are bound to the fundamental rights guaranteed in the Land constitution as directly applicable law. If your decision violates any of these rights the citizen may also take remedies and the higher administrative authority or the administrative court will annul your decision. After all remedies have been exhausted, in some Länders the citizen may also lodge a constitutional complaint to the Land constitutional court.

III. The fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union

Whenever a public authority in a EU member state executes European Union law (or domestic law implementing a EU directive) or interferes with the economic fundamental freedoms of the Union's citizens under Union law, it must also respect the fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union. Such cases are frequent, since Union law and national law are strongly interconnected. In case of a remedy the higher administrative authority and the administrative court will also review the compliance of your decision with these rights. If the court is not sure how to interpret the Charter of Fundamental Rights correctly and the question is decisive for the case, it may refer the question to the European Court of Justice in Luxembourg and ask for a preliminary ruling; the court of last instance is even obliged to do so. Furthermore, in case of serious or frequent violations of Charter rights the European Commission may bring an action for failure to fulfil obligations against the member state before the European Court of Justice.

IV. The human rights guaranteed in the European Convention on Human Rights and other European human rights treaties

In addition to the the national and European fundamental rights the public authorities must conform their decisions with the human rights norms in the European Convention on Human Rights and its protocols and other European human rights treaties. In Germany (as a dualist country) these treaties only have the status of ordinary statutory law but all other law must, as far as possible, be interpreted in line with them. In France (and other monist countries) they have a status higher than statutory law and in Austria the Convention has the status of constitutional law. In case of a remedy the higher administrative authority and the administrative court will also review the compliance of your decision with these rights. After all remedies have been exhausted, the citizen may also defend his rights under the Convention by an individual complaint directly to the European Court of Human Rights in Strasbourg.

V. The human rights guaranteed in universal human rights treaties

In addition to the national and European fundamental and human rights the public authorities must bear in mind the human rights norms in the ICCPR, ICESCR, CAT, ICERD, CEDAW, CRC and other universal human rights treaties. In Germany these treaties only have the status of ordinary statutory law but other law must be interpreted in line with them. In objection proceedings or administrative court proceedings the universal human rights will also serve as a standard of review. Some treaties, e.g. the First Optional Protocol to the ICCPR, even allow an individual complaint to a treaty body. However, since the standards of the universal human rights treaties are lower than those of the European human rights treaties, the German citizens prefer to lodge a complaint to the European Court of Human Rights.

VI. The Universal Declaration of Human Rights?

The UDHR, which has been adopted by a resolution of the UN General Assembly, does *not* constitute *binding law* but just "soft law". It cannot bind public authorities directly. However, as "soft law", the UDHR plays a certain role in the interpretation of treaties, laws and constitutions. Furthermore, human rights organisations love to base their political reasoning on this document. Therefore, for an official in Germany, it is recommended not to ignore it - not for legal but for political reasons.

How can a public servant in Germany keep all these human and fundamental rights norms in mind? In practice, it is less complicated than in theory: First, you need to *learn, understand and not forget!* You cannot be a good public servant (or a good lawyer) without a profound knowledge of human and fundamental rights! Second, *concentrate on the regime with the highest standards* (usually the national constitution but in some countries the European Convention). If you make sure that these standards are met the risk of a violation of others is rather small. However, concerning some rights and aspects (e.g. some innovative rights in the Charter of Fundamental Rights), the relevant rights may be missing in one regime or the standards will be more developed in another. For a professional public servant it is recommended to focus in particular on these rights and aspects, as far as they are relevant in his field of work, to always conform with the highest standards and to keep his knowledge up to date.