

§ 2 The European Convention on Human Rights and other European human rights treaties

I. The pan-European human rights law - an achievement of the Council of Europe

- a pan-European international organisation with 47 member states specialised on the promotion of human rights, rule of law and democracy as European common fundamental values

II. The function of the European human rights law as a "second safety net"

- the necessity of international mechanisms providing protection as a second safety net in case of failure of the national protection of human rights (see infra, § 1 III.3)
- as a second safety net, European human rights law *only* defines *European minimum standards* considered imperative within the European civilisation; the *national standards* can and *must be higher*

III. The European Convention on Human Rights 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 - restrictive interpretation of the outdated, far-reaching limitation clauses, in particular of terms such as "necessary in a democratic society", "public order" or "morals"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?

IV. 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 human rights 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 the press, of arts and of science derived from art. 10 ECHR as parts of the freedom of expression
 - various rights concerning data protection and personal identity derived from art. 8 ECHR as parts of the right to respect for private life
- a strong point: central elements of the rule of law anchored as human rights
 - the right to liberty and security (art. 5), nulla poena sine lege (art. 7), ne bis in idem (art. 4 Prot. 7), the *right to an effective remedy* (art. 13), the *right to a fair trial* (art. 6) and others
 - abundant jurisprudence on these rights has shaped and consolidated rule of law in Europe

V. 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 the prevention of disorder or crime, for the protection of health or morals or the 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

VI. Central elements of human rights doctrine under the European Convention

1) The dogmatic structure of the Convention rights

- common distinction of three aspects (as in Germany, see infra, § 4 III.4):
 - 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)

2) The principle of proportionality (see also § 4 III.5)

- 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

3) Positive obligations

- state must provide *protection against unlawful private interference*

VII. The protection of the human rights by the European Court of Human Rights in Strasbourg

1) General aspects

- do not confuse with the European Court of Justice in Luxembourg!
- since 1998 a full-time court to which individuals can apply directly
- has delivered *more than 10.000 judgements*
- 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)
- can find that the Convention has been violated but cannot annul the attacked decision

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

- applicant must claim to be the 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 and then within a delay of 6 months (art. 35(1))
- Court can afford just satisfaction to the injured party (art. 41)

3) **New: advisory opinions on request of high courts and tribunals** (Prot. 16)

- non-binding advisory opinions on questions of principle (art. 1)
- request needs to be accepted (art. 2)

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

- assisted by the Council of Europe's Department for the Execution of Judgments of the European Court of Human Rights
- if a state refuses to abide a judgement, the Committee of Ministers may, after confirmation by the Court, consider appropriate political measures to be taken (art. 46(3, 4))

VIII. Other European human rights treaties and their control mechanisms

- *European Social Charter* (1961) and *Revised European Social Charter* (1996)
 - economic and social rights; states only obliged to take measures to promote their realisation
 - no individual complaints but collective complaints of NGOs (political procedure) under OP
- *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [ECPT]* (1987)
 - enhanced control mechanisms to prevent any torture (as prohibited under art. 3 ECHR):
 - visits of places of detention (also ad hoc visits) by delegations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)
- see also the *Framework Convention for the Protection of National Minorities* (1995) and the *Convention on Human Rights and Biomedicine* (1997)