

§ 4 Fundamental rights in the European countries: the example of Germany

I. Historical background

- little impact of the fundamental rights under the Weimarer Constitution of 1919
- worst human rights violations in history of mankind committed by Germany 1933 - 1945
- commitment to build up an exemplary free and democratic order after 1945

II. German fundamental rights doctrine as a source of inspiration for the development of constitutional law in European and non-European countries

- a model for the development of modern f.r. regimes in Spain and Portugal in the seventies and in most central and East European countries in the nineties
- the influence of German concepts on the f.r. doctrine in East Asia (Taiwan, South Korea etc.)
- the German Federal Constitutional Court as a model for the introduction of constitutional jurisdiction in Europe and other parts of the world

III. Central elements of the German fundamental rights doctrine

1) Fundamental rights as directly binding law (art. 1(3) BL)

- *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 not allowed to wait for a solution of the legislator
- public servants not allowed to execute a law that violates f.r.
- violations can often be avoided by *interpreting the ordinary law "in the light of" the f.r.*

2) Functions of the fundamental rights

- note that for each function there is a different doctrine!
- f.r. as *defensive rights* (status negativus, easy to enforce by the courts)
- f.r. as *positive rights* (status positivus, requires legislation or government action)
- f.r. as *participatory rights* (status activus)
- f.r. as *objective values* (that must always be taken into account)
- f.r. implicate *duties of protection* (state must intervene to protect citizen against private encroachments)

3) The horizontal effect of the fundamental rights

- f.r. 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)

4) The dogmatic structure of (defensive) fundamental rights

- a general structure common to all defensive rights, deriving from their nature and determining the structure of the examination of a possible violation
 - a) The sphere/scope of protection**
 - Is the right in question *concerned*?
 - the personal and the material sphere of protection
 - b) The encroachment/interference**
 - Is the right in question *affected*?

- c) **The illegality of the encroachment/interference (no justification by the right's *limits*)**
 - aa) Encroachment/interference prescribed by statutory law (→ legal basis)
 - bb) Fulfillment of the preconditions set in the limitation clause
 - cc) Compliance with the *limits of limits*
 - in particular proportionality, no infringement of the essence of the right

5) **The advanced doctrine of the principle of proportionality**

- the most important element of the rule of law and of fundamental rights doctrine
- a) **Legitimate aim**
 - the pursuit of the right public interest
- b) **Suitability**
 - the measure must be conducive to its purpose
- c) **Necessity**
 - the measure must be the least intrusive act of intervention that is equally conducive
 - often the crucial point in the examination of a case
- d) **Proportionality (in its strict sense)**
 - the burdens imposed must not be out of proportion to the aim in view (requires thorough balancing)

IV. **The protection of the fundamental rights by the Federal Constitutional Court**

1) **Abstract and concrete constitutional review of laws**

- on application of the Federal Government, a Land government or ¼ of the Members of the German Bundestag (art. 93(1) no. 2 BL)
- on application of a court which concludes in a concrete case that a law on whose validity its decision depends is unconstitutional (art. 100(1) BL)

2) **The remedy of (individual) constitutional complaint** (art.93(1) no. 4a BL)

- after exhausting all remedies, citizen can file a constitutional complaint *against any act of public authority*, alleging that it has infringed one of his f.r.
- the high number of 5.000 to 6.000 complaints per year has caused a severe burden for the Federal Constitutional Court but also led to a comprehensive, cohesive and sophisticated fundamental rights jurisprudence often adopted by other constitutional courts