

BASIC ELEMENTS OF FUNDAMENTAL RIGHTS DOCTRINE

I. Introduction

- 1) The legal implementation of the philosophical concept of human rights in the form of constitutional fundamental rights
 - The term *human rights* stands pre-eminently for the philosophical concept of pre-legal ("natural") human rights, which existed before the state. The common way to legally implement this concept is to create corresponding legal positions within the national legal order, called *fundamental rights* (= f.r.). In modern constitutional states they are anchored in the constitution. The f.r. are not identical to the "natural" human rights. They are created, shaped and granted by the state, can be repealed and are different in every state. In most states not all constitutional rights implement the idea of human rights and not all human rights have been transposed to constitutional rights. Therefore, when a national constitution uses the term "human rights" when talking about f.r. there is a risk of misunderstandings.
 - When human rights are guaranteed in international treaties, they are still called "human rights" but the words represent a legal term. These "human rights" are not the natural, pre-legal rights of the human being but also artificial rights. However, they pretend to be just a mirror of the natural rights and therefore are called like them. Since human rights treaties only have the function of a "second safety net" guaranteeing minimum standards, usually the standards of the national f.r. are higher.
- 2) Types and functions of fundamental rights
 - a) The various types of fundamental rights
 - note that the doctrine is partly different for each group of rights
 - civil and political, economic, social and cultural rights
 - individual and collective rights
 - rights of the citizen and rights of man [= of all human beings]
 - *freedom rights* (the most important rights), equality rights, personality rights, social rights, citizens' rights and justice
 - b) The various functions of fundamental rights
 - note that there is a different doctrine resulting in different requirements for each function of f.r.
 - f.r. as *defensive rights* (status negativus) - the most important function, easy to enforce by the courts
 - f.r. as positive rights (status positivus) - need to be implemented by legislation or government action
 - f.r. as participatory rights (status activus)
 - f.r. as *objective values* - to be taken into account by the legislator, the courts and the authorities
 - f.r. leading to state *duties of protection* - state must intervene to protect the citizen against private encroachments
- 3) Fundamental rights and fundamental rights doctrine
 - F.r. are formulated in the constitution but brought to fruition by the *jurisprudence* of the Constitutional Court and the *legal doctrine* that is building on it and on the works of legal scholars. Usually, building up an advanced f.r. regime requires a high degree of scientifically supported *judicial development of law*.
 - A *comparative approach* can help in this process because many concepts and ideas developed in countries with an advanced f.r. regime can be easily transferred and implemented with success.

II. Fundamental rights as directly binding law

- 1) Background: the imperative of effectiveness of law in the field of fundamental rights
 - The imperative of effectiveness of law, a basic element of the concept of the *rule of law*, also applies to f.r. These guaranteed rights are not political proclamations but binding law. They are not programmatic objectives (which a state may pursue or approximate to) but binding legal norms that must be implemented and enforced in practice effectively at all times in all areas of life without exceptions. No public institution and no field of law can escape them.
 - All legislation in all fields of law must comply with all f.r. Legislation is an important instrument to implement and protect them. But the legislator works slowly and cannot foresee all human rights problems, which are often caused by new economical, social, cultural, technical and nowadays even climatical developments. Therefore, the effectiveness of law requires that *all public institutions* are *directly bound* to the rights and are not allowed to wait for the solution of the legislator. This applies in particular to freedom and other defensive rights, which require the authorities to refrain from intervention (orders, prohibitions etc.). Constitutional history has frequently shown that such rights are not more than a joke if they are not directly binding. Only in the case of some particular social or cultural rights, which require special legislation in order to become operative, the authorities may invoke that they cannot fully implement the rights as long as the necessary law is missing.

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2) The primacy of the fundamental rights

- The primacy of the constitution over all other national law is one of the fundamentals of a modern constitutional state. It applies to all parts of the constitution, including the f.r. Any legislation or regulation in the state colliding with them is void or can be annulled - even if it has been passed by the people in a referendum.

3) The direct binding effect of the fundamental rights

a) The direct binding effect as constitutional norms

- In a modern constitutional state based on the primacy of the constitution and the rule of law (see for Indonesia art. 1(2, 3) of the Constitution), *all constitutional provisions* not explicitly arranging otherwise *are necessarily directly binding for all public institutions* in the state. Any legal document with a different approach could not be recognized as a "constitution". Consequently, not the assumption of the direct effect but any assertion of a missing or restricted direct effect of the f.r. must be proved and substantiated with precise reference to obvious regulation in specific constitutional provisions. As any modern constitution, the Indonesian Constitution does not contain such provisions. Concerning Germany, art. 1(3) of the Basic Law even provides explicitly, that the f.r. "shall bind the legislature, the executive and the judiciary as directly valid law".

b) The implications and the limits of the direct binding effect

- The f.r. address to *all* public institutions and are *directly applicable*. Where no law provides for detailed instructions, the courts or authorities must find their own legally consistent solutions. Otherwise not the legislator but they will be responsible for the violation of the rights. For example, if there is no law on public assemblies, they must allow them without such a law and take precautions to protect public security in their own responsibility according to their own criteria, which must be in line with the freedom of assembly. For this reason, good knowledge of f.r. is imperative for any judge or senior official.
- F.r. do not directly bind the citizen but there is an *indirect horizontal effect*: As constitutional values they must be taken into account and implemented in the making, application and enforcement of the law. For this purpose, the legislator usually employs *indefinite legal concepts* (e.g. "good faith", "bonos mores", "appropriate measures") that provide the courts and authorities with the necessary flexibility to find a solution that serves the purpose of the law in line with the constitution.

c) How to handle the direct binding effect in practice

aa) Being aware of the fundamental rights

- in particular: studying them - even as a judge or expert in another field than public law...

bb) Non-application of legal provisions that violate fundamental rights

- often a psychological challenge for loyal civil servants

cc) Interpretation of legal provisions "in the light of" fundamental rights

- avoiding their non-application by interpreting them in a way that they comply with these rights
- human rights friendly interpretation of indefinite legal concepts
- restrictive interpretation of terms that will lead to a restriction of human rights, extensive interpretation of terms that will lead to the protection of human rights
- note that in most cases of a f.r. violation the applied law is not unconstitutional but has been applied in an unconstitutional way!

dd) Judicial further development of law with regard to human rights

III. 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 of these rights
- therefore, the following part of this paper can be used as a check list!

1) The sphere/scope of protection

- Is the right in question concerned?
- If not, the right cannot be violated and the public institution does not need to justify its measure!

a) The personal sphere of protection

- Is the affected person protected by the right in question?
- note that most constitutions reserve some f.r. to national citizens

b) The material sphere of protection

- Is the restricted activity concerned protected by the right in question?
- here: delimitation between different f.r.

2) The interference/encroachment

- Is the right in question affected?

a) Acting of a public authority (→ not of a private person)

- acting of any public authority in the state (including local authorities)
- in case of a duty of protection, the acting can also consist in a failure to intervene against the attacks of private persons

b) Direct negative effect on the rights of the citizen

- note that the English terminology is heterogeneous ("interference"/"limitation"/"restriction"/"encroachment" etc.)

- 3) The illegality of the interference/encroachment (no justification by the right's limits)
- every right has its limits; usually they are determined in a special or general *limitation clause*
 - see for the fundamental rights in Indonesia art. 28J(2) of the Constitution
 - only an interference/encroachment that is not justified by the right's limits constitutes a *violation* of the right
- a) Interference/encroachment prescribed by law
- the necessity of a *legal basis*, in many countries of a statutory legal basis (*principle of statutory reservation*)
- b) Fulfillment of the preconditions set in the limitation clause
- in particular: pursuit of the right public interest
- c) Compliance with the "limits of limits"
- aa) Compliance with the ***principle of proportionality***
- the most important element of the rule of law and of fundamental rights doctrine
- aaa) Legitimate aim
- the pursuit of the right public interest
- bbb) Suitability
- the measure must be conducive to its purpose
 - caution: measures might be harsh but nevertheless suitable!
 - note that there is a margin of appreciation of the legislator, which the Constitutional Court must respect
- ccc) 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; consider possible alternatives to the measure!
 - note that a measure, which is not suitable, cannot be necessary!
 - note that there is a margin of appreciation of the legislator, which the Constitutional Court must respect
- ddd) Proportionality (in its strict sense)
- the burdens imposed must not be out of proportion to the aim in view
 - this requires a *thorough weighing* of the pursued public interest with the affected rights
 - in-depth reasoning, not stereotype argumentation please!
 - in some human/fundamental rights regimes not an independent requirement but an aspect of "necessity"
- bb) Compliance with other "limits of limits"
- in particular no infringement of the essence of the concerned right
 - example from German constitutional law: laws restricting f.r. must *apply generally* and not merely to a single case (cf. art. 19(1) BL)

IV. Practical case study

- see separate paper