

Summer School with Moot Court 2014 in Hạ Long

Protection of Human Rights and Fundamental Rights

The radiation of Fundamental Rights into the Civil Law System

Fundamental Rights (Definition)

- basic rights granted by the state to the individual
- legal protection within the context of a national legal system

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List of important Fundamental Rights:

- right to liberty
- right to self-determination
- right to freedom of movement
- right to freedom of expression
- special protection of marriage and family

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Fundamental Rights serve as a shield
against state interference (*status negativus*)

Example 1:

A wants to publish an article. The Ministry of Interior Affairs censors a paragraph because the minister disapproves of A's opinion. A may rely on the freedom of expression to have his article published unabridged.

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Civil Law

(various definitions):

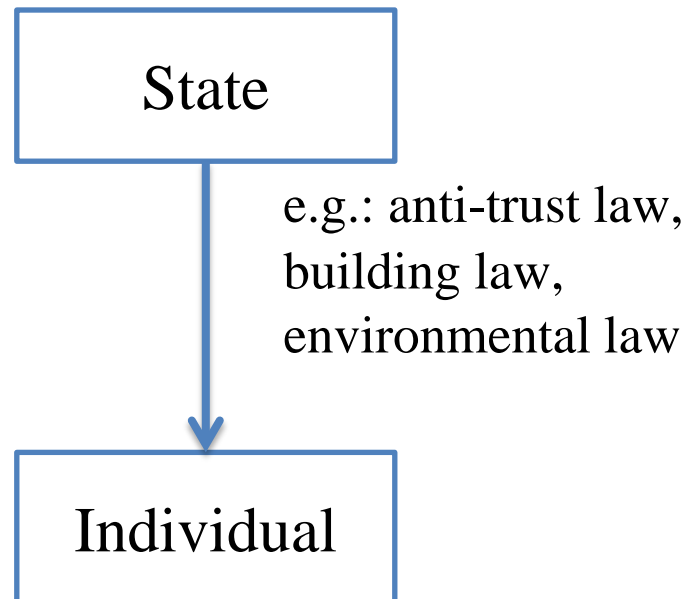
- as opposed to Common Law
- as opposed to Public law

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Public law:



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Civil or Private law:



e.g.: contract law, torts, company law

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Key Question

To what extent do fundamental rights
take effect in legal relationships
between individuals?

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**Fundamental Rights have no direct effect
in legal relationships among individuals.**

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Contract Law

Example 2 (revisited and amended):

A wants to publish an article. The chief editor censors a paragraph because he disapproves of A's opinion.

May A rely on the freedom of thought to have his article published unabridged?

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Contract Law

- relationship between individuals based on equality
- freedom of contract
- freedom of scope

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Example 2

- Scope of employment contract of A
- Authority to give directives
- Right to freedom of thought not applicable

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Limits to freedom of contract:

- special protective rules (consumer contracts, labour contracts, lease contracts)
- principles of equity (fair conduct)

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Principles of equity

- general clauses
- wide discretion of the courts
- equity in the light of the fundamental rights (indirect effect)

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Contract Law

Example 3:

Lawyer A sells his office to lawyer B. They agree that A shall not open another office in town (so called *competition clause*).

Discuss!

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Law of Torts

General Rule:

He who violates an absolute right (property, health, freedom, life or a **similar right**) of another person intentionally or negligently is liable for damages.

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Law of Torts

Similar Rights:

- similar nature of an absolute right
- in the light of the fundamental rights (indirect effect)

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Law of Torts

Example 4:

Reporter A is revealing details about the recovery of actress B from a serious disease she wanted to keep secret.

B is suing A for damages.

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Law of Torts

Violation of an absolute right:

➡ indirect effect of fundamental right of self-determination (right of intimacy)

➡ however: What other fundamental right is involved?

Freedom of the press

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Law of Torts

Violation of an absolute right:

- the right of self-determination (protection of private life) vs.
- freedom of the press

Balancing exercise by the courts (distinction between unknown person and celebrity)

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Law of Torts

Example 5:

Reporter A is printing pictures of the King of the Netherlands and his family dining in a restaurant.

The King applies for a court injunction to stop A publishing theses pictures.

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BGB (Civil Code)

Section 823

Liability in damages

(1) Anyone intentionally or negligently trespassing, contrary to law, on the life, body, health, freedom, property or **any other right** of another party shall be liable for the damage thus incurred to that other party.

(2) The same duty affects anyone **breaching a law aiming to protect another party**. If, according to the contents of such law, a breach thereof is also possible without culpability, then liability in damages only occurs in case of culpability.

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BGB (Civil Code)

Section 1004

Claim for removal and injunction

(1) If the ownership is interfered with by removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

(2) The claim is excluded if the owner is obliged to tolerate the interference.

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Kunsturhebergesetz (Copyright Arts Domain Act)

§ 22 Images can only be disseminated with the express approval of the person concerned.

Bildnisse dürfen nur mit Einwilligung des Abgebildeten verbreitet oder öffentlich zur Schau gestellt werden. Die Einwilligung gilt im Zweifel als erteilt, wenn der Abgebildete dafür, daß er sich abbilden ließ, eine Entlohnung erhielt. Nach dem Tode des Abgebildeten bedarf es bis zum Ablaufe von 10 Jahren der Einwilligung der Angehörigen des Abgebildeten. Angehörige im Sinne dieses Gesetzes sind der überlebende Ehegatte oder Lebenspartner und die Kinder des Abgebildeten und, wenn weder ein Ehegatte oder Lebenspartner noch Kinder vorhanden sind, die Eltern des Abgebildeten.

§ 23 An exception applies particularly where the images portray an aspect of contemporary society

(1) Ohne die nach § 22 erforderliche Einwilligung dürfen verbreitet und zur Schau gestellt werden:

1. Bildnisse aus dem Bereiche der Zeitgeschichte;
2. Bilder, auf denen die Personen nur als Beiwerk neben einer Landschaft oder sonstigen Örtlichkeit erscheinen;
3. Bilder von Versammlungen, Aufzügen und ähnlichen Vorgängen, an denen die dargestellten Personen teilgenommen haben;
4. Bildnisse, die nicht auf Bestellung angefertigt sind, sofern die Verbreitung oder Schaustellung einem höheren Interesse der Kunst dient.

unless that publication does interfere with a legitimate interest of the person concerned.

(2) Die Befugnis erstreckt sich jedoch nicht auf eine Verbreitung und Schaustellung, durch die ein berechtigtes Interesse des Abgebildeten oder, falls dieser verstorben ist, seiner Angehörigen verletzt wird.

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§ 823 (1) + (2) BGB - damages

- general personal right (similar right) includes the right to one's own picture
- the right to one's own picture is protected by §§ 22, 23 Arts Domain Act (protective provision)

§ 1004 (1) BGB – removal and injunction

- absolute rights protected by § 823 (1) BGB give rise to a claim to removal and an injunction

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Section 22 and 23 Copyright Arts Domain Act

- the right of self-determination, Art. 2 (1) Basic Law (legitimate interest in protection of personal images) vs.
- freedom of the press, Art. 5 (1) Basic Law (figure of contemporary society *par excellence*)

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Fair Balance

- Balancing exercise between the public's interest in being informed and the legitimate interests of the person concerned
- Margin of appreciation (discretion) of the courts

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Balancing Exercise

Example 6:

An unidentified individual initiates a shit storm against V on a social media platform. The owner of the platform as well as the attorney of state deny V's request to identify the tortfeasor.

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Claim against the platform owner

for publishing a defamatory advertisement
without verifying the identity of the sender:

§ 823 (1) + (2) BGB - damages

- general personal right (similar right) includes the
moral integrity of a person

§ 1004 (1) BGB – removal and injunction

- absolute rights protected by § 823 (1) BGB give
rise to a claim to removal and an injunction

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Claim against the state

to prosecute the unidentified person for malicious distress

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Fair Balance

- Balancing exercise between the moral integrity of a minor and the legitimate interests of protection of privacy and data protection
- Effectiveness of protection by comparing the M's claim against the owner (private law) with his claim against the state (public law)