Fundamental Rights of Staff

User-Guide Part I

Applicability of Fundamental Rights to legal protection and conditions of employment in International Organisations

Prepared by: LSWG Friday, 03 December 2004

1. STRUCTURE OF THIS DOCUMENT AND FURTHER INFORMATION

This paper seeks to provide an overview of fundamental rights and their applicability to international organisations. It uses as its basis the rights guaranteed by the German Constitution and the European Convention on Human Rights. This paper is not intended to be authoritative, its intention is to enable staff and staff representatives to better understand the nature of Human Rights and how these might apply to the EPO or other international organisations.

Section 2 provides a short introduction to the problem and why fundamental rights protection is important for the staff of the EPO.

Section 3 deals with the question of which rights are applicable

Section 4 Gives an overview of the rights protected by the ECHR

Section 5 Gives an overview of the rights protected by the German Grundgesetz

Section 6 includes some summary remarks but no conclusions are provided other than those presented in sections 2 and 3.

Sections 4 and 5 are provided to clarify the standard of protection that must be met. They are useful as a reference and are mainly intended to staff reps and experts. An understanding of the main points can be obtained by reading sections 1,2,3 and 6 only.

The section on the German Grundgesetz is covered in more detail in this document than the ECHR. This does not imply a greater importance, but reflects the fact that this was the main focus of a SUEPO study and also the more detailed nature of the German Law and jurisprudence. Should the reader wish more information on the case law and practice of the ECHR there are a number of excellent texts on the subject for example Ovey[1].

A further paper in this series **User-Guide II** covers some basic points that should be considered when making appeals to the ILOAT and internally to the IAC.

Further papers are intended covering SUEPO strategy to improve legal and labour protection standards and a guide on how to protect your rights.

Further information on this and related subjects can be found on the website **rights.suepo.org**.

2. BACKGROUND

[1] European Convention on Human Rights, Third Edition, Ovey and White – ISBN 0-19-876-5800

In addition to the terms contained in their specific contracts, the conditions of employment for employees of International Organisations are largely governed by the conditions of employment which each Organisation lays down for itself. In the case of the European Patent Organisation (EPO), these are collected in the Service Regulations. As a result of the privileges and immunities accorded to International Organisations national regulations are not generally applied, not even in a supplementary role to cover areas not provided for in the service regulations.

The necessity of functional immunity for international organisations is generally recognised, and this immunity protects the independence of the organisations. However, since no clear definition of functional immunity exists in international law, this has in practice resulted in such immunity having a far wider scope than was intended or would be considered consistent with fundamental rights protection within the member states.

It is usual that some limitations are provided to the immunity and these are documented in the agreements granting the immunity. For example the Protocol on Privileges and Immunities (PPI) for the EPO clearly states that the Immunity is not intended to impede justice, and that the President has an obligation to lift the immunity where this is the case (Article 19 PPI). Article 20 PPI provides an obligation upon the EPO to co-operate with national authorities to ensure proper application of national labour law/regulations, health regulations and criminal law.

These exclusions mean that national law relating to employment of staff is applicable to the EPO, but such legislation is not enforceable in practice since this requires lifting the immunity, which remains at the discretion of the Organisation. As a result, the binding protective legislation provided within member states appears to have a discretionary character within international organisations. This does not only mean that enforcement mechanisms cannot be directly applied, but that staff who have a grievance must first argue the applicability of the law in front of the ILOAT. This puts an undue burden on a complainant, and removes the protective effect of national legislation. Such problems are often referred to as “lacunae” (or holes) in the legal system.

If the situation is not resolved by either providing adequate protection internally or by lifting the immunity, the fundamental rights of staff may be violated. In part this arises due the failure of the judicial mechanisms provided to meet minimum judicial standards (IAC,ILOAT), and in part to the limitation of the law that may be applied by such mechanisms.

This is not a theoretical problem, it has resulted in serious violations of the fundamental rights of staff. Some staff have suffered injuries as a direct result of unhealthy working conditions which do not conform to national health and safety standards. In another (extreme) case a member of staff was directly assaulted by a former president during an union demonstration. Such problems are not limited to the EPO, there are cases in other international organisations where staff are seeking to lift the immunity in order to gain redress for common and sexual assault. In general staff working in international organisations do not have access to adequate legal protection instruments in order to effectively defend their rights.

SUEPO holds the view that proper protection mechanisms and appropriate law are essential to ensure the legality of international organisations. Such provisions must meet minimum protection standards required within the member states, and there is an increasing awareness of these issues among staff associations, legal practitioners and leading academics in the area of international law. A number of projects are being established to seek solutions, and there have been calls to limit the immunities granted to international organisations and to ensure effective application of Human Rights. Staff associations at NATO and Eurocontrol have filed cases with the European Court of Human Rights; SUEPO has also filed a case with the German Constitutional Court. The purpose of such litigation is to challenge the legality of inadequate Human Rights protection within international organisations, and in particular demonstrate the weakness of the legal protection provided.

SUEPO has requested discussion on these matters with the EPO Management, so far without success. During 2001-2003 the ILO Staff Union led a project seeking to reform the ILOAT. This project started out with a 39 point proposal; during negotiation with the ILO administration this was reduced to 9 points. Despite active support of the other staff associations in which SUEPO played a leading role, the proposal was reduced to half a point after consultation with the administrations of the organisations using the ILOAT. This result demonstrates the lack of support of the administrations, and the difficulty of internally driven reform.

3. WHAT FUNDAMENTAL RIGHTS ARE APPLICABLE TO STAFF OF INTERNATIONAL ORGANISATIONS

Besides the European Convention for the Protection of Human Rights (European Convention on Human Rights - ECHR BGBl. 1952 II, S. 685) other comparable rights must be considered, such as those in the International Pact of 19.12.1966 on Civil and Political Rights (BGBl. 1973 II, S. 1534), the International Pact on Economic Social and Cultural Rights (BGBl. 1973 II, S. 1570), the European Social Charter and the UN Declaration of Human Rights of 10.12.1948. Some of these international treaties and declarations are not directly binding in national law, but the obligations on member states and safeguards of human rights as laid down for example in the ECHR *should* apply to International Organisations, as should the German Constitution or Grundgesetz (GG).

Although the binding quality of human rights conventions is formally limited to the signatory states, and although they are put into effect by the states in different ways, they nevertheless have a wide applicability and comprehensive binding quality in relation to the exercise of state power within in a signatory state. The act of creating and participating in international organisations exercises sovereign powers of the state and is therefore required to conform to the Human Rights law applicable within the member state. The creation of an international organisation is only consistent with such law if sufficient guarantees are provided for protection of fundamental rights within the international organisation. This does not simply mean that the administrations of IOs must act in a manner that is consistent with fundamental rights, but that mechanisms must be provided to guarantee that this is the case.

The ECHR is binding law, however, wide discretion is allowed to member states as to how they ensure the application of the fundamental rights and freedoms guaranteed by the Convention. For example, the ECHR has been given constitutional status in Austria and therefore take precedence over ordinary law, however, in Germany the ECHR has been applied in domestic law as a mere statute without constitutional status. Despite this, no problems have resulted from the German approach; this results from the similarity of the ECHR to the German Basic Law (GG), and also that when interpreting the GG the German Constitutional Court is required take into account the obligations of the German State with respect to the ECHR and the EU. In other words, the minimum level of protection provided by the German Constitution is considered equivalent to that of the ECHR. This is an important principle, which also applies to international organisations in that they are not required to apply such law directly, but rather must ensure that equivalent standards of protection are maintained.

Despite the applicability of fundamental rights protection, interpretation of such rights and their implementation is not a simple matter. The primary function of such rights is to provide controls on state power to ensure that the rights of the individual are respected. Understanding of what Human Rights are and how they are to be applied is an evolutionary process, and can differ widely from state to state. Fundamental and Human Rights are in effect a set of guiding principles and values to which all acts requiring the exercise of authority or power must conform. Statements, like the forward to the EPO Service Regulations, which refer to “Human Rights” without defining them have limited legal effect and cannot be considered a providing adequate protection. An individual can only protect their rights if these are clearly defined.

The German model has shown that it is not necessary to apply the ECHR directly, but that the level of protection must be equivalent. Such equivalence cannot be provided (or assessed) unless the rights protected are defined and interpreted in such a manner that meets the standards of the ECHR.

In order to provide an understanding of the level of protection required by the ECHR and German Basic Law, it is necessary to examine in more detail, the rights protected by both these instruments. The following sections therefore provide an overview of the rights protected by the ECHR and the German GG.

4. FUNDAMENTAL RIGHTS PROTECTED BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome, 4 November 1950. It came into effect 3 September 1953. On that date, ten European states had ratified it. The European Convention on Human Rights was preceded by the Universal Declaration of Human Rights in 1948 which is at the level of the UN.

European human rights law remains law in constant evolution, both in content and its implementation procedures. Eleven protocols have been added to the Convention, which carry as much weight as the articles of the Convention itself. The common

understanding of what constitutes a Human Rights abuse has also developed significantly since the ECHR was first implemented in 1950, and it is no longer limited to the extreme situations seen in armed conflicts or totalitarian regimes. Refusing access to effective legal protection, or the provision of inadequate mechanisms to protect rights, is also an abuse of human rights, since such mechanisms are considered an essential element of fundamental rights protection instruments.

The rights guaranteed by the Convention can be regrouped into seven larger categories, these are:

1. **freedom of the physical person: the right to life, prevention of torture and inhuman or degrading treatment, prevention of slavery, servitude and forced or obligatory labour, right to liberty and security, liberty of movement;**

2. **respect for private life and family, home and correspondence;**

3. **right to effective appeal and a fair trial;**

4. **freedom of thought:: freedom of expression and information, freedom of thought, conscience and religion, right to education and respect of the religious and philosophic beliefs of parents;**

5. **protection of social and political activity: freedom of assembly and association, right to free political elections;**

6. **respect for possessions;**

7. **non-discrimination in the enjoyment of the rights and freedoms recognised in the convention.**

Though regrouped into seven larger categories, it is useful to look at each basic right individually. It is equally useful to look at to the scope and limitations of these rights since some rights are not absolute. The detailed definition of rights is achieved progressively through judgements of the European Court of Human Rights(EcourtHR). Each decision of the Court is explained in detail, and the interpretation of rights continues to progress by means of the jurisprudence of the Court.   A copy of the convention can be found on the SUEPO site **rights.suepo.org** or alternatively the ECHR website **hudoc.echr.coe.int** . Some key decisions relevant to international organisations are colleted on the SUEPO site, these and other decisions can also be retrieved from the ECHR website.

The convention itself is split into 2 parts; Part I deals with the rights guaranteed; Part II establishes the instruments for implementation of the rights.

The following analysis explains the 7 categories of rights listed above in more detail.

1) Freedom of the physical person

Prohibition of torture, inhuman or degrading treatment:

The rights protected by Article 3 of the Convention directly touch the personal integrity and human dignity of the individual. There is also the prohibition to be subjected to torture or to punishments or treatment which is inhuman or degrading.

Prohibition of slavery, servitude and forced labour:

Article 4 of the Convention separately treats slavery and servitude in one part, and forced or obligatory labour in another. The first two terms cover extreme forms of appropriation of an individual and characterise oppressive conditions which the individual cannot change nor escape.

Right to life: Article 2 and Protocol 6.

The right to life is one of the most obvious basic rights. Having said that, it should be noted that neither Article 2 nor Protocol 6 call for the abolition of the death penalty, nor are they aimed at unconditionally protecting life or at guaranteeing a certain quality of life. These provisions are aimed at protecting the individual against loss of life arbitrarily imposed by a State. (The European Social Charter goes much further towards to the goal of providing guarantees for quality of life, and is binding on those states who have ratified the charter, but mechanisms to guarantee its implementation are relatively week compared to the ECHR)

Right to liberty and security: Article 5 and Article 1 of Protocol 4.

Article 5.1 of the Convention guarantees everyone the right to liberty and security, but there are, a number of exceptions. Article 5 is aimed at the liberty of the physical person, notably the prohibition of arbitrary arrest or detention. The article does not protect persons against less severe forms of limitation of individual freedom, for example: the application of traffic rules, obligatory registration of foreigners or citizens, surveillance of paroled prisoners, the application of curfews or other rules which do not severely restrict the freedom of the individual to move within the community. Nevertheless, some guarantees must be observed, i.e.:

- *Right to be informed of the charges:* All individuals deprived of freedom must be informed, in the shortest delay and in a language they understand, of the reasons for their arrest and all charges brought against them. This principle holds for both criminal law and civil law.

- *Limitation of preventive detention:* Article 5.3 requires that all persons held under the conditions foreseen in Article 5.1.c are quickly brought before a judge or other magistrate, and must benefit from protection in form and in substance. Article 5.3 also guarantees that persons who have not been freed have the right to be judged within a reasonable time. The goal is to avoid indefinite detention during which the State prepares its case.

- *Habeas corpus:* Article 5.4 guarantees all persons deprived of freedom by arrest or detention, the rights to protest the justice of the action before a court.

The basis of Article 5.4 is the existence of a control of the legality of the detention.

The rights to life and dignity guaranteed within Articles 2 and 3 result in an obligation on state authorities to provided adequate protection. For example adequate protection from criminal activity must be provided; in the employment situation adequate Health and Safety at Work protection must be provided including protection against harassment.

2) Respect for private life

Right to respect of private life and family life: Article 8.

Right to marry and equality of rights between spouses: Article 12 and Protocol 7 (Article5).

Protection of private life is an area where the role of State is one of limiting interference to a minimum. This is why the Convention specifies (Article 8, Para. 2) that a State may justify interference only on grounds of a menace to the State or in public interest. When the Court has cases of this type to deal with, they scrupulously examine them.

The right to marry (Article 12) is linked to Article 8. These rights concerning the family are also treated by several points in the European Social Charter[2] (Articles 7, 16, 17, 19), but in a different manner.

For applicants to the ILOAT it is worth noting that the ILOAT has consistently refused to admit an obligation to apply such rights. In one case it explicitly stated that such rights have no legal effect. The result of this attitude of the Tribunal is such that if an international organisation fails to amend its internal regulations in line with developments in its members states and in Human Rights protection, no protection will be provided for these rights at the level of the ILOAT.

3) Right to a fair Hearing / Appeal

Right to appeal and a fair trial: (Article 6, Protocol 7, Articles 2 to 4, and the right to an effective remedy, Article 13.)

The right to a fair trial (Article 6) is a key article of the Convention. It assures two types of rights: **rights which are the foundations of freedom**, and **protection rights**. The latter do not give freedom, but rather ensure its safekeeping.

The right to a fair trial, that is to say, to justice, is the best example of protection rights. Judicial authority should be independent and impartial. Law suits must be defended in public and within a reasonable timeframe. This last point is the subject of numerous appeals to the Court. All persons must be presumed innocent until they are proved guilty. The accused must be allowed to defend himself, or by a lawyer,

[2] European Social Charter – Turin, 18 Oct 1961

and must be allowed appropriate time to prepare his defence, to call witnesses and be assisted by an interpreter if required.

In addition, anyone who considers that rights guaranteed by the Convention have been violated, must be permitted access effective judicial instrument.

Articles 6.1 and 13 are of particular importance for international organisations, since the alternatives to national courts provided within the organizations (ESA appeals Board, ILOAT, UNAT, WBAT etc) must meet the standards defined within Article 6.1. Failure to meet these standards would result in a violation of the Convention and would justify lifting the immunity of the organisation.

The case law of the European Court of Human Rights deals with a number of appeals relating to the adequacy if internal judicial standards for international organisations. The most well known are the Waite and Kennedy, and Beer and Regen decisions[3]. The Court has ruled that an equivalent protection to the ECHR must be provided within international organizations.

Since access to external courts is prevented due to the immunity granted to the organization, the Court has ruled that this grant of immunity is acceptable only provided that is serves a legitimate purpose and that the immunity granted is proportional to this purpose[4]. In further clarifying the proportionality elements the Court has stated that access must be provided to an adequate alternative means.

The means provided, must meet the requirements of the Convention itself, so although the Convention may not be directly applicable, the protection provided must meet the standards defined by the Convention and case law of the European Court. However, since no direct applicability of the ECHR to international organizations is provided, protection of these rights by an alternative internal mechanism is problematic. It is unclear how a comparison can be made without using the ECHR as the defining standard. This matter has not been directly addressed by the European Court[5].

With regard to the EPO, the Internal Appeals Committee has 2 obvious defects which prevent it from being considered as an adequate alternative means in the sense of Article 6.1 ECHR:

- The IAC is not independent since the President of the EPO appoints the majority of the members.
- The IAC does not make decisions, it advises the President.

Without need to for further examination, the nature of these defects is such that the IAC cannot be considered as a judicial instance.

---

[3] Both these decisions can be found on the SUEPO site **rights.suepo.org**
[4] Both these decisions can be found on the SUEPO site **rights.suepo.org**
[5] The adequacy of the ESA Appeals Board was superficially assess in Beer and Regen, a more detailed model of the assessment is established in the German Case law which is discussed in section 5 of this document.

The ILOAT is the only remaining quasi-judicial body that is available to the staff of the EPO for the settlement of disputes. Should the ILOAT be determined not to meet the minimum standards required, then Article 6,1 and Article 13 ECHR would be violated.

This is the issue the test litigation that has been submitted to the ECHR by the Staff associations of NATO and EUROCONTROL intends to address. The case which SUEPO has submitted to the German Constitutional Court addresses similar points.

4) Freedom of thought, conscience and expression

Freedom of thought, conscience and religion: Article 9.

The freedom to practice one's religion is also guaranteed. Protection of this right in practice may be limited for reasons of public order, but freedom of conscience and conviction is an absolute right. This right is essential for personal identity and applies to all believers, atheists, agnostics or simply undecided. This pluralism is part of the base of democratic society.

Freedom of expression and information: Article 10.

Freedom of expression is part of the foundation of democracy. It concerns not only the right to express ideas, but also the right of the public to receive them. The Court has underlined, that freedom of political debate is at the heart of the concept of democratic society. For it to function well, the State might be obliged to impose some restrictions; however, these are very limited, and the State itself might be required to intervene to protect this right.

Freedom of expression may be limited for civil servants, but care must be taken and any limitation must serve a legitimate purpose since this right cannot be guaranteed if undue limitations are placed on staff in international organisations. Due to the lack of normal mechanisms within member states such as the Press and pressure groups and democratic accountability, it would be expected that such limitations would be less restrictive upon staff in an international organisations than those applied within a national context. In the past the EPO administration has severely limited the freedom of speech of the staff representation, and some individuals. Attempts to seek protection of these rights at the level of the ILOAT have generally failed.

Right to education: Protocol 1 (Article 2).

In the Convention, the right to education is a basic right, in the sense that no one can be refused this right. On the other hand, it is not specified what mechanisms the State is required to employ. However, everyone must have equal access, without discrimination, to education and instruction.

With respect to international civil servants, due account needs to be taken of the limited access due to expatriation. Limited access to education may result from cultural or language differences, or for example registration problems in the host

state. This may in turn lead to an increased obligation upon the international organisation to provide support.

5) Social and political activities

Freedom of assembly and association: Article 11.

Freedom of assembly refers to short-term gatherings, while freedom of association refers to lasting groupings with legal characteristics. These freedoms are sometimes subject to authorisation by the State, which must ensure the good functioning of society. However, such limitations must be proportional, and are intended to protect society from disorder, or riots, not simply to prevent inconvenience to the state. The State may also be called upon to protect the freedom of assembly and association, if these have been hampered by a third party. Freedom of association also means the freedom to *not* associate, and to *not* belong to an organisation or union.

Freedom of association requires rights of collective bargaining and representation, and the rights and facilities that associations and unions should enjoy. The Court has been criticised for its failure to fully address these matters and its reliance on national bodies to protect such rights. The European Social Charter[6] addresses some of these issues but it does not have the binding nature of the ECHR. It should also be noted that the conventions of the ILO address the issue of workers rights.

Obligation of States to organise *free elections*: Protocol 1 (Article 3).

This article includes the right of all persons to vote (universal suffrage) and to participate in elections, as stated in the jurisprudence of the Commission and the Court. It does not specify how the voting must take place, but a number of conditions must be fulfilled. Elections must take place by secret ballot, at reasonable and regular intervals, and must ensure the free expression of the people.

6) Right to respect for possessions

Respect for possessions: Protocol 1 (Article 1).

This is the only economic right in the Convention. It protects the right of ownership. Given the long debates between States during its elaboration, this right concentrates on the protection of possessions already owned and not on access to ownership. In addition, this article is the only one which leaves such a large latitude to States to regulate its usage. International control of this provision is weaker than for other rights.

Where this may be relevant to staff of international organisations is with respect to the contract of employment and any subsequent changes made. For example, the manner in which the contract of employment is established within the EPO leads to the establishment of property rights. The Service regulations in force at the time of

[6] European Social Charter, Turin, 18 Oct 1961: Articles 5 , 6

entry in to service form part of that contract, and any property rights contained within the service regulations must be respected. Unilateral changes to the terms and conditions of employment may violate the ECHR.

7) Non-discrimination

Non-discrimination: application of the rights of the Convention: (Article 14).

This Article protects the principle of equality. It does not exist on its own, since it refers to equal application of the other articles. The questions of discrimination (arbitrary distinctions) which it treats are thus with regard to the way the other rights are respected.

The criteria applied by the Court require that any differences of treatment fulfil a legitimate aim, and the difference is proportional to that aim. The difference must also be within the states margin of appreciation. Put in other terms, individuals may only be treated differently for an objective reason which is relevant to the situation.

5. HUMAN RIGHTS PROTECTED BY BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY

The Basic Law of the German Federal Republic of 23 May 1949 was developed against the background and experience of the Second World War. The basic rights therein are more than a mere programme of non-binding statements. They are **binding legal principles** which apply as “**directly applicable law**” (Art. 1 (3) GG). According to Art. 1 (3) GG the basic rights bind not only the legislature, but also the executive and the judiciary. All organs of the state are required to conform to them, and their freedom of action is thus limited.

As objective constitutional law, the fundamental rights have priority over other laws, particularly over mere statutes: every legal provision must conform to these basic rights. The principle of constructing law in conformity with the constitution also applies, according to which certain legal terms and “blanket” clauses must be interpreted so as to comply with these rights.

The fundamental rights do not only include guarantees for certain institutions, such as for example marriage and the family (Art. 6 (1) GG), or property and rights of inheritance (Art. 14 GG); they also protect institutional fields such as freedom of the press (Art. 5 GG). According to the judgments of the Constitutional Court [Bundesverfassungsgericht (BVerfG)] this covers the whole field of Press and News Agencies, not just the activities of the individual citizen who wishes to run a newspaper business.

Thanks to the subjective legal character of the fundamental rights, the individual has the power to enforce these rights, if need be through the courts.

The rights provided by the Basic Law may be divided into four *classes*:

Rights to liberty: These are listed in Arts. 2, 4 - 6, 8 - 14 GG and which take the form of guarantees for the freedom of will and of action in certain fields.

Rights defining the nature of liberty: this category includes Arts. 16, 17 and 19 (4) GG. In contrast to the rights to liberty, the rights of the nature of liberty do not guarantee freedom from state interference in any area, but rather grant specific rights to the individual which limit the power of the state and the scope of interference permitted.

Rights to equality: These include Arts. 3, 33 and 38 GG, and provide guarantees that a citizen may only be treated differently from his fellow citizen for some objective reason.

The fourth group, is made up of the **rights which have the same rank as basic rights**. These are listed in Arts. 93(1) GG. Although these do not form part of the basic rights section, they may nevertheless serve as subjective constitutional rights for the individual which can be enforced in the courts. Rights of the same standing as basic rights flow from Arts. 20(4), 33, 38 (insofar as this extends beyond equal treatment), 101, 103 and 104 GG.

Regarding the *function* of these basic rights, three areas may be distinguished: those which are **protective**, those **rights requiring action of the state**, and **rights of participation and consultation**.

- Basic rights are first and foremost **protective**, and guarantee to the individual the possibility for the free development of his life and protect him from any state interference or restraint which would disproportionately limit his citizen's rights to self-determination.

- It has also come to be recognised that these basic rights also constitute rights of the individual to **require action to be taken**. This defines rights to protection by the state, which is under an obligation to ensure that no third party infringes such basic rights. This is particularly the case where the state has permitted or enabled the third party to act in a manner that infringes basic rights.

  This principle applies to the situation of the employees of International Organisations, who by reason of the privileges and immunities granted to the Organisation are denied practically all protection under the criminal law and also under regulations regarding health and safety at work, or other protective legislation applying to the employment relationship.

  The duty of providing effective guarantees and pre-emptive safeguards for basic rights derives from the rights themselves and constitutes an obligation the state to enforce action to protect fundamental rights. Organs of the state must therefore ensure that in the course of a particular procedure, or in a

particular organisation, regard is paid to fundamental rights so that no breach actually arises.

This duty, which is reflected in the **"Solange I" and "II" and "Maastricht" decisions** of the Constitutional Court, is also the foundation for **the duty of the German State to provide equivalent and effective guarantee of basic rights in those International Organisations of which it has become a member.**

- Fundamental rights also give rise to **rights of participation and consultation.** This applies for example to participation in the state decision-making process which flows from Art. 38 GG. Rights of participation may also be derived indirectly from Art. 21 GG, which ensures the freedom to found political parties, which themselves influence state decision-making. Last but not least, and bearing in mind the "Arbeitnehmerkammer" decision BVerfGE 38, 281, 303, this could also constitute an additional argument for the duty to recognise a trade union such as SUEPO, providing they speak for a representative proportion of employees.

With regard to the entitlement to basic rights, one can distinguish between possession of such rights, the capacity to enjoy them, and the capacity to enforce them. Whilst possession or the capacity to enjoy rights relates to parties which are capable of *having* such a right, the capacity to enforce is limited to those who can *enforce* their rights independently.

Any natural person of German nationality may be a **possessor of basic rights** (Art. 116 GG). Such "citizens'" or "Germans'" rights are contained e.g. in Arts. 8, 9, 11 and 12 GG.

In addition, natural persons of foreign nationality may also be possessors of basic rights, where the fundamental law, by its wording, gives a right to 'everyone' [Jedermann.] The rights of 'everyone,' which are also described as human rights, are contained e.g. in Art. 2 (1); Art. 2 (2) first sentence; or Art. 5 (1) first sentence GG.

Legal persons under the civil and commercial law based within Germany may also, according to Art. 19 (4) GG, be possessors of basic rights in so far as the individual right can be applied to them (cf BVerfGE 4, 7, 12; 20, 257, 266).

Although it is generally considered that foreign-based legal persons under private law cannot benefit from the application of basic rights, they may still enforce Art. 101 (1) and Art. 103 (1) GG, because these provisions are not fundamental rights, they merely contain objective procedural safeguards (BVERFGE 18, 441, 447; 21, 362, 373).

So far as the legal capacity of minors and mental patients etc. to enforce a basic right is concerned, the general view is that one cannot be guided by ordinary legal capacity. Instead, one should be guided by the capacity of the person to understand their rights and also the protective purpose and nature of the basic right.

Fundamental rights bind the power of the state. This includes legal persons, institutions and foundations under public law, and also privately organised bodies such as agencies used by public authorities to carry out their sovereign tasks. This also extends to International Organisations used by the state in order to carry out inter-governmental tasks, for example in the fields of patents (EPO) or air safety (Eurocontrol). In contrast, private persons are not directly subject to fundamental rights, but may be bound by legislation which is provided by the state to protect fundamental rights.

1.1. THE INDIVIDUAL BASIC RIGHTS GUARANTEED BY THE GERMAN CONSTITUTION

Art. 1 (1) GG - Protection of human dignity

In Art. 1 (1) GG the highest principle of objective law is simply declared; it is protected as a basic right anyway by Art.2 (1) GG.

The concept of human dignity cannot be generally defined by this article. The limits of the protection provided can be defined only by reference to the given situation and with regard to the facts of the specific case (BVerfGE 30, 1 25). If an individual is simply subjected to state action and is abused in order to achieve the policy of the state, this always constitutes a breach. Examples are forced deportation, the destruction of 'valueless' lives**,** experiments on humans, or criminal investigations involving psychological pressure or the use of chemical or psycho-technological methods.

Art. 1 (1) GG provides protection against public exposure, humiliation and harassment (e.g. the needless publication of detention pending trial, harassment of conscript soldiers, etc.) and also against criminal sanctions which are inappropriate, cruel or humiliating and do not stand in a proper relationship to the criminal act. (e.g.. „lebenslanger Freiheitsstrafe" [life imprisonment] cf. BVerfGE 45, 187, 238).

Recent jurisprudence in Germany[7] has also demonstrated that the right to adequate protection of dignity for employees (anti-harassment) derives directly from Article 1.

Art. 2 GG

Apart from the concrete basic rights set out therein, Art. 2 GG also has significance as a "blanket" clause or safety-net, by which circumstances and relationships not expressly set out in the list of basic rights can nevertheless be safeguarded.

A. Art. (2) 1 GG - General freedom to act, general right to develop one's personality

The protection of human dignity takes on special practical significance within the Basic Law by means of Art. 2 (1) GG, through the recognition of the **general right to free development of one's personality.** Specific areas of application of this general right are the right over one's own image (unlicensed publication of photographs etc.), the right over one's spoken words (unlicensed recording), the right of control over the

[7] Erfurt case.

way in which one is presented (protection from misquotation), the right over the use of one's name, and the right to one's honour (BVerfGE 54, 148, 153 ff.). In addition the general law on freedom of personality guarantees the so-called right of control over one's own records (BVerfGE 66, 1 ff - "Volkszählung"), which protects the person from the unrestricted collection of data, its recording and exploitation.

B. Art. 2 (2) first sentence, first part, GG - the right to life

The right to life guarantees the physical integrity of all persons. Whether it is a question of the unborn, the incurably ill or the final stage of life, because of this protective right the state may not intervene.

Art. 2 (2) GG does not contain any right dispose of one's own life, nor does it forbid suicide. Exceptionally, a duty on the state to act may be derived from the right to life. The state must act protectively against private attacks on life by third parties and is under the obligation to ensure that the minimum necessities of life are provided (protection from starvation).

In certain narrowly defined exceptional circumstances regulated by formal law, state attacks on life are permissible, subject to the principle of proportionality. Apart from the use of firearms by the police etc. these include the so-called shoot-to-kill or the intentional shooting down of an aeroplane in case of definite danger of a terrorist attack. In addition police and members of the armed forces or fire services may be legally obliged to put their lives at risk.

C. Art. 2 (2) first sentence, second part, GG - Right to physical integrity

The right to physical integrity both protects the functioning and substance of the body from all external and internal foreign influences and also from psychological influences with psychological consequences. This basic right may be limited pursuant to a law, if formally and materially enacted in accordance with the constitution and such a limitation is justified (e.g. sedation of mentally ill).

The Obligation to provide adequate Health and Safety at work protection derives directly from Art. 2.1.

D. Art. 2 (2) second sentence GG - Freedom of the person

Freedom of the person is protected and thus the freedom to visit any given place and to remain there.

Limitations imposed by statute law are permissible. Special rules apply in the case of custodial orders under Art. 104 (2) GG (exclusive jurisdiction of judges). A judicial decision must be obtained without delay. If this is not obtained within one day, the arrested person must be released.

Art. 3 GG - Equality before the law

A. General principle of equality

The **general principle of equality before the law** set out in Art. 3 (1) can be embodied in two principles. Firstly there is the requirement that essentially similar cases should be similarly treated and essentially different cases differently. Secondly there is the prohibition against treating essentially similar cases differently and essentially different cases the same. This follows from the reasoning that it is unfair either to treat equal persons differently, or unequal persons the same.

Art. 3 (1) guarantees a subjective right in public law and gives everyone a claim to equal treatment by public authorities (limitation by the authorities of their own freedom of action; the right to proper exercise of discretion). Art. 3 (1) however does not guarantee any claim to equal treatment in a case of misadministration.

1. Unequal treatment

In a case of unequal treatment, Art. 3 (1) is breached unless there is some objective justification. Such justification can only take the form of
- properly differing aims
- pursued with properly differing criteria where
- the differing criteria are appropriate and proportionate to the achievement of the aim.

Where benefits are to be conferred the state generally enjoys greater freedom of action than where individuals are to be burdened.

2. Equal treatment

In a case of unequal treatment, Art. 3 (1) is breached where the differing nature of the two similarly treated cases is so significant that equal treatment would appear to be unconscionable in the interests of justice.

B. Special principles of equality

Art. 3 (2) includes as a special principle of equality the equal rights of men and women. Unequal treatment is thus only justifiable insofar as the differing treatment is founded upon biological or functional (allocation of labour) differences.

Further prohibitions against discrimination and requirements of equal treatment are contained in Arts. 3 (3), 6 (5), 21, 33 (1) to (3) and 38 GG. These are not further discussed here.

Art. 4 GG - Freedom of faith, conscience and creed

Art. 4 GG contains a composite basic right to freedom of faith and creed, which also includes the freedom to undisturbed exercise of one's religion.

Any conviction held by a person is protected as a faith in the sense of Art. 4 (1) GG if it relates to the position of mankind and his relations to higher powers and lower

orders of creation. Both religious and non-religious world-views are protected. Not only the internal development of such a conviction but also the freedom to give expression thereto (largely identical with freedom of creed) is protected. The freedom to practise religion under Art. 4 (2) GG is a sub-division of the freedom to give expression to faith.

Limitations flow only from conflicting basic rights and other norms of constitutional rank (principle of construction in conformity with the Constitution).

The basic right of freedom of conscience, likewise guaranteed by Art. 4 (1) GG, is protected by the freedom of conscientious decision. Every serious decision relating to the categories of "good“ and "evil“ which the individual regards as unconditionally binding upon himself is covered by the term "conscientious decision.“ Here too, it is not merely the process of internal development of the conscience and the conscientious decision that is protected, but also, it is generally considered, the freedom to give expression to one's conscience.

Limitations on this basic right again flow only from the principle of construction in conformity with the Constitution.

Together with the basic right to refuse to serve in the armed forces, which is expressly protected by Art. 4 (3) GG, the conscientious decision against military service or against service with firearms is protected. However, it is generally held that only the refusal of the individual citizen as a matter of principle is protected, and not his decision in the circumstances of an individual case.

In the case of this basic right, it is generally considered that there are no latent limitations which could flow from the principle of the unity of the Constitution.

Art. 5 (1) and (2) GG - Freedom of expression

A. Scope of protection

The basic rights contained in Art. 5 (1) GG guarantee freedom of information and of the press, of broadcasting and of the cinema, in addition to freedom of opinion.

1. Freedom of opinion

The freedom of opinion protects "opinions" as the results of rationally evaluative thought processes (BVerfGE 33, 1, 14; 42, 143, 149). Besides mere evaluations, the giving of factual information is it is generally considered also protected (BVerfGE 65, 1, 7). Data gathered for the purpose of drawing up statistics are however excluded from this protection (BVerfGE 65, 1, 40) as are also statements of facts which are either demonstrably false or known to be false, and false quotations (BVerfGE 61, 1, 8; 54, 208, 219).

3. Freedom of information

This basic right only protects the right of information from “generally accessible sources,” that is sources accessible to classes of persons who cannot be individually defined (BVerfGE 27, 71, 83). Freedom of information essentially constitutes a defensive right. A right to require action, placing the state under a duty to pass on particular information can thus only be deduced there from in a limited number of exceptional cases in which the flow of information would dry up in the absence of state action (BverwG, DÖV 1979, 102). In particular a comprehensive right to information from files held by the authorities can thus normally *not* be founded upon Art. 5 (1) GG but rather upon simple statutory regulations such as e.g. §. 29 VwVfg (Verwaltungsverfahrensgesetz [=Administrative Procedure Act]).

The procedure of obtaining information should be rendered neither impossible nor significantly more burdensome through delay (BVerfGE 27, 71).

3. Freedom of the press

The freedom of the press protects all activities which of their nature are connected with the work of the press and also the organisation of the institution of the press itself. (BVerfG 20, 162, 175; 52, 283, 296). To obtain information, therefore, the press can rely directly upon the basic right of freedom of the press so that it to this extent does not need to have recourse to the basic right of freedom of information.

The term “press” (and its products) covers all materials intended for distribution, which includes both the section of a newspaper devoted to advertisements (BVerfGE 21, 271, 278; 64, 108, 118), and also simple photocopies or flyers (BVerwGE 39, 159, 164) or “baseless” information for example in the form of an invented interview (BVerfGE 34, 269, 283 – “Soraya”).

4. Freedom of broadcasting and the cinema

Freedom of reporting through these media is also protected, whether the emphasis is on factual reporting or propagating opinion (BVerfGE 12, 205 ff. – “Fernsehurteil“; 57, 295, 319). Besides the services organised under private law, broadcasting institutes under public law are also in particular possessors of the basic rights under guarantee.

B. Limitations

Art. 5 (2) GG contains limitations which apply to all the basic rights flowing from Art. 5 (1) GG. These limitations permit derogations from the freedom of communication.

Such limitations may first of all flow from “general laws.“ These are laws which are not intended to affect the freedom of communication and which are also not directed against any opinion as such (BVerfGE 7, 198, 209; 21, 271, 280; 28, 282, 292; 47, 198; 57, 250, 268).

Further because of specific dangers to the press, steps against it may only be taken when in accordance with state press laws. These have been passed by all the federal states. These special laws strengthen the position of the press and protect it against state interference in particular. They have priority over the general police and

public order provisions so that the press is also described as being not subject to police control.

In addition the so-called latent limitations to basic rights apply. When applying the basic rights flowing from Art. 5 (1) GG, one must have regard to the scope of the protection provided by other basic rights and this may lead to limitations on the former. In particular, resulting from the general right of free development of one's personality must be borne in mind as this right may have priority over the freedom of communication.

Besides this the prohibition of censorship constitutes a fetter on any limitations and is thus termed a limit on limitations. Pre-censorship is absolutely forbidden (BVerfGE 33, 52).

C. Supplementary

Questions arise in particular in connection with Art. 5 GG relating to effects on third parties and to the validity of the basic right in particular hierarchical relationships, and these are also relevant in the case of certain other basic rights such as e.g. Art. 9 (3) GG (Freedom of association).

1. Effects on third parties

In contrast to Art. 9 (3) GG, which has a direct effect involving third parties who are subjects of private law, it is generally considered that Art. 5 GG has (only) a so-called "indirect effect on third parties" (BVerfGE 7, 198, 200 f.). As basic rights do not only constitute subjective protective rights at public law, but also include objective normative principles which apply to all areas of the law, they have an indirect effect upon the private legal relations of citizens between themselves. In case of judicial interpretations of imprecise legal terms and general clauses, basic rights must be taken into consideration just as they are in the case of judicial interpretation and development of the law (BVerfGE 7, 198, 205; 30, 173, 199; 42, 147; 58, 377, 396)[8].

2. Validity in particular hierarchical relationships

In particular hierarchical relationships, such as e.g. in the case of members of the armed forces or civil service, pupils in state schools or prisoners, basic rights are *not* suspended. They continue to apply, but are subject to greater limitations. Basic rights subject to limitation by statute may thus even in such cases only be effected by or by means of a statute; the principle of proportionality is still to be applied in the same way as are the additional and possibly narrower limitations implicit in the Constitution. These could flow from e.g. Art. 7 (1) – School; Art. 33 (4) and 5 – Civil Servants; Art. 104 – Prison; Art. 17 a GG – Military (BVerfGE 15, 228; 28, 36 ff; 28, 289; 33, 1, 9 ff; 44, 197, 203).

As far as the EPO is concerned, it is to be emphasised that the mere fact that the staff are divided into categories termed "permanent employees" [Beamte] and other

[8] The reader is referred to the leading case of "Springer Verlag v Blinkführ" (BVerfGE 25, 256), which considered the acceptability of a call for a boycott. (cf. also BVerfGE 61, 230).

staff [Angestellte] does not mean one should assume that in particular EPO permanent employees are actually within a special hierarchical structure comparable with that of Art. 33 (4) and 5 GG and thus that their rights are thus subject to stricter limitations (duty of loyalty etc.).

Art. 5 (3) GG - Freedom of art and scholarship

In addition to freedom of art, the basic rights derived from Art. 5 (3) GG also guarantee freedom of scholarship, research and teaching.

1. Freedom of art

Although a final definition of the term "art" would not appear to be possible, a part of the artistic activities protected include the following:

- the traditional subject matter of art;
- free creative production;
- entertainments capable of multiple interpretations

The scope of the work itself and its effects are equally protected. The freedom of art is subject only to limitations latent in the Constitution (BVerfGE 30, 173, 188; 36, 321, 331; 67, 213, 226).

2. Freedom of scholarship

Every serious and methodical attempt at discovering the truth is protected as "scholarship," mental activity aimed acquiring new knowledge is protected as "research" and the scientifically-based transmission of knowledge acquired by research is protected as "teaching" (BVerfGE 31, 314, 322; 35, 12; 35, 79, 113; 43, 268; 47, 388; 55, 37; 61, 210, 237; 67, 202, 207 f.). Purely political activities cannot be a part of scholarship, even if they are allegedly scientifically motivated (BVerfGE 5, 85, 146 – "KPD"). This basic right is guaranteed without express limitation and is thus subject only to limitations latent in the constitution.

Art. 6 GG - Marriage and the family; children born outside marriage

The basic rights flowing from Art. 6 GG include the protection of marriage and the family (Art. 6 (1), the care and upbringing of the children (Art. 6 (2) and (3) – BVerfGE 56, 363, 385), the protection of the working mother (Art. 6 (4) - BVerfGE 60, 68, 74) and equal rights for illegitimate children (Art. 6 (5) GG).

"Marriage" is viewed as a union intended to last till death (BVerfGE 56, 363, 386; 31, 58; 82), regardless of the national law under which it was concluded (BVerfGE 62, 232, 330), and „Family" is the domestic community of parents and children. The basic right flowing from Art. 6 (1) GG includes a right of protection against state interference, as well as a guarantee of the institution, and it accords to the whole law of marriage and the family the status of a normative fundamental principle (BVerfGE 6, 55, 75; 44, 249, 273 ff.). The basic rights flowing from Art. 6 (1) GG do not protect

only German citizens but everyone, and thus are relevant in case of subsequent immigration of family members (BVerwGE NJW 1984, 2775, 2776; BVerfGE 57, 170, 176; 51, 386, 396).

For applicants to the ILOAT it is worth noting that the ILOAT has consistently refused to admit an obligation to apply such rights. In one case it explicitly stated that such rights have no legal effect. The result of this attitude of the Tribunal is such that if an international organisation fails to amend its internal regulations in line with developments in its members states and in Human Rights protection, no protection will be provided for these rights at the level of the ILOAT.

Art. 7 GG – School education

Besides guarantees for religious education (Art. 7 (3)), for the existence of private schools (Art. 7 (4)), and the institutional guarantee of state supervision, Art. 7 GG includes in subsections (2) to (4) real basic rights.

In the relationship between state supervision (Art. 7 (1)) and the rights of parents (Art. 6 (2)), the parents may choose between the available types of school, but they have no right to a form of school in accordance with their wishes. There is also no right contained in the constitution to co-decision making as to the manner in which teaching is carried on, but there is a claim to be informed as to the procedures followed in schools (BVerfGE 34, 165, 184; 53, 185, 193; 47, 46, 78 ff.).

Under Art. 7 (2) the persons having custody care and control of a child have the right to decide whether the child takes part in religious education. From the twelfth birthday on the child also has a right to co-decision; from the fourteenth birthday the child alone has the right to decide (BVerwG NJW 1983, 1815).

Art. 7 (4) guarantees the right to set up private schools and also gives rise to a claim for subsidies. Art. 7 (4) does not, however, contain any points of reference to decide the scope or manner of such subsidies (BVerwG DVBl. 1985, 110; BVerwG NVwZ 1985, 111).

Art. 8 GG - Freedom of assembly

The basic right of freedom of assembly protects gatherings of several – and at least three - persons who are pursuing a common purpose (BVerfGE 56, 63, 69). Besides planned assemblies, so-called spontaneous assemblies are protected. According to the majority view, the common purpose must consist of the common formation or expression of opinion (BVerfGE 56, 63, 69; 57, 29, 35 f.). The discussion of private affairs can suffice for this purpose.

According to the wording of Art. 8 GG, only Germans possess this basic right. A certain constitutional protection is also available to foreigners under Art. 2 (1), as over and above the general freedom to act, the freedom of assembly for foreigners is also protected. Furthermore, only peaceful assemblies are protected, at which neither a violent nor riotous outcome is intended or ensues (BVerfG NJW 1985, 2395,

2400). Although the meaning of the term “violence” in connection with the freedom of assembly is disputed, psychologically-transmitted threats, and not only the use of physical force, are regarded by most as unjustified violence under Art. 8 (BGHSt. 23, 46; BGH NJW 1982, 189; OLG Köln NJW 1983, 2206; KG NJW 1985, 209). Deep-seated doubts have been cast on this however (OLG Stuttgart, NJW 1984, 1909, with further details). The violence of individual demonstrators does not deprive the other peaceful participants of the protection of Art. 8 GG. But carrying weapons or wearing masks can be taken as an indication of violent intent.

“Weapons” includes guns, knives, etc. and also any object which is objectively apt and subjectively intended to injure persons or cause significant damage to property.

The reference to statute laws in Art. 8 (2) GG only applies to open-air assemblies and has been developed in the Assemblies Act (VersG). Assemblies in closed rooms are thus subject only to the latent limitations in the Basic Law.

Art. 9 GG - Freedom of association and coalition

A. Freedom of association

Art. 9 (1) contains the basic right to freedom of association, to which only German citizens are entitled, but which however also applies to legal persons under the private law which are based in Germany. The freedom of association for foreigners and legal persons based outside Germany is however protected by simple a Federal Act (cf. § 1 (1) VereinsG [= Associations Act]).

Associations and societies involving at least two persons and which remain together for a long time and pursue a definite common aim are protected. The participants must also have joined together on a contractual or similar basis (BVerfGE 10, 89, 102; 38, 281, 298; but this is not undisputed) and must have subjected themselves to an organised decision-making process. As the voluntary nature of such bodies is not a criterion, associations to which one is forced to belong, such as certain professional bodies, are protected by Art. 9 (1) GG.

The latent limitations flowing from the basic rights of third parties and other norms of constitutional rank including that of the constitutional order in the sense of Art. 2 (1) GG (BVerfGE 39, 334, 367) may affect the freedom of association.

B. Freedom to Organise and form coalitions (employees, trades unions, employers’ associations, etc.)

Art. 9 (3) contains the basic right to organise and form coalitions, that is the freedom of employers and employees to form professional associations (trades’ unions and employers’ associations). This basic right, unlike the freedom of association, is possessed by everyone and is thus sometimes also described as a “human right.”

Associations for the preservation and advancement of conditions of labour and business in the sense of Art. 9 (1), and which are freely formed and independent, and which are organised so as to exclude the opposing side from membership, and so as

to extend over more than one business are protected (BVerfGE 50, 290, 368; 58, 233, 247). Works associations, i.e. associations of the employees at one particular business, are thus not coalitions in the sense of Art. 9 (3) GG. This however does not apply where the business covers an entire branch of economic life.

Although it can be argued that the criterion of an organisation extending over more than one business need not be fulfilled in the case of the European Patent Organisation and SUEPO since they comprise a "branch of economic life", this is an open question that has not been addressed by the German Constitutional Court. It is therefore not clear as to whether the legal safeguards of Art. 9 (3) GG extend to the SUEPO or to the Central Bureau and/or any or all the local sections in The Hague, Vienna, Munich and Berlin as such.

Both the positive freedom of coalition (which protects *inter alia* the foundation and subsequent activities of coalitions) and also the negative freedom of coalition (which provides protection against clauses in a pay agreement which put persons under pressure to join a trades union) are safeguarded by Art. 9(3) GG. Moreover Art. 9 (3) GG also secures the right of members of a coalition to take part in the constitutionally protected activities of their trade union (BVerfGE 19, 303). The freedom of coalition also gives constitutional protection to a central area of the activities of coalitions, namely the system of staff representation including publicity by trade unions before elections to staff councils- which is permitted (within limits) at the place of work and during working hours. (BVerfGE 19, 303; 42, 133; 28, 295; 50, 290).

Collective bargaining capacity, the power to make pay agreements and call strikes are not essential features of the term "coalition" in constitutional law (BVerfGE 58, 233; 18, 18). For political parties Art. 21 applies and for religious societies Art. 140 GG together with Art. 137 (2) and Art. 7 WRV [Weimar Reich Constitution] as special provisions vis-à-vis Art. 9 GG.

Art. 10 GG - Privacy of correspondence, posts and telecommunications

The basic rights flowing from Art. 10 (1) protect

- the privacy of letters, that is correspondence between individuals;
- the privacy of mail, that is communications sent by post;
- the privacy of the telecommunications services, that is private and business telecommunications.

These basic rights are, according to Art. 10 (2) first sentence, subject to the limitations for statute law, so that the basic rights of Art. 10 (1) can be derogated from pursuant to statutes which have been enacted in a formally and materially legal manner. In particular, §§ 94 StPO [=Criminal Procedure Rules] and the Act to Limit the Privacy of Letters and Postal and Telephone Services, (the so-called "G 10") contain important limitations which have been upheld by the Constitutional Court (BVerfGE 30, 1 f.; 57, 170, 183 f.; 67, 157 ff.). However these limitations have been overwhelmingly criticised and in effect rejected in the literature (Manuz-Dürig-Herzog-Scholz, Art. 10 at fig. 36 f.; v. Münch-Pappermann, Art. 10 at fig. 33 ff., AK Schuppert, Art. 10 at fig. 26 ff. with further details).

Art. 11 GG - Freedom of movement

Art. 11 (1) GG guarantees to all German citizens the basic right of freedom of movement over the federal territory and thus the right to go to any place in the federal territory and to remain there (BVerfGE 43, 203, 211). Whilst the general view is that the right of re-entry is also protected, Art. 11 (1) does not guarantee the right to leave. Only movement "within" the federal territory is protected.

According to Art. 11 (2) GG this basic right may be subjected to limitations by means of statute law and generally by reason of the latent basic rights of third parties.

Art. 12 GG - Occupational freedom; prohibition of forced labour

Art. 12 guarantees as a composite basic right of all German citizens freedom of occupation (BVerfGE 7, 377, 400 ff; 95, 193, 214), that is the right of freedom of choice of occupation, place of work and place of education, and also freedom to exercise a profession. Every long-term activity, serving to provide for the acquisition or maintenance of the basis for life, even if an untypical one, is thus protected and not only statutorily-defined forms of profession (BVerfGE 14, 19, 22; 54, 301, 314). Occupations in the public service (e.g. civil servants, members of the armed forces and judges) and occupations linked to the state (notaries, publicly appointed and sworn experts) are protected, although Art. 33 contains far-reaching special provisions for these professions.

The composite basic right of freedom of occupation contains a protective right. It also contains a "normative principle" (BVerfGE 16, 214, 219) or "objective purpose" **(**BVerfGE 92, 26, 46; 97, 169, 176). A subjective legal right to work or to a particular profession is not contained in Art. 12.

The basic right to freedom of occupation is subject to various limitations and regulatory powers (cf. Art. 12 (1) second sentence GG). The complicated system of limitations and the assessment of the indirect limitations (BVerfGE 13, 181, 186; 16, 147, 162; 22, 380, 383; 52, 42) are not discussed here.

Art. 12 protects earning capacity whereas Art. 14 GG protects earnings themselves (as property.)

Art. 12 a GG - Compulsory military or alternative service

The provision contained in Art. 12 a introduced in 1968 only contains statements on the military and alternative as well as the emergency services following basic decisions in constitutional law, but no independent basic rights (cf. e.g.: BVerfGE 48, 127, 160).

Art. 13 GG - Inviolability of the home

The basic right contained in Art. 13 is connected with the free development of the personality and secures the privacy of the home as a fundamental living space (BVerfGE 42, 212, 219; 51, 97, 110); the spatial zone for the development of the personality (BVerfGE 32, 54, 72). As well as private premises closed to public access and ancillary spaces such as cellars, attics, closed courtyards, etc., Art. 13 GG also protects business premises (BVerfGE 97, 228, 265).

In addition to either searching or entering protected spaces, the surveillance of activity within protected spaces without physically entering them also constitutes a violation when carried out by way of technical means such infra-red cameras, directional microphones, listening devices or even satellites. If telecommunications equipment is tapped, only Art. 10 applies.

Every direct occupier of protected rooms, and therefore not only freehold owners or tenants possesses this right; all other persons entitled to use the premises such as guests and members of families are thus covered.

The basic right contained in Art. 13 (1) is subjected by sub-section 2 ff. to limitations, as it is by the further set of limiting circumstances contained in Art. 17 a (2). Searches are, according to the qualified exclusions for statutes in Art. 13 (2), only permissible pursuant to a court order. There are exceptions for cases of urgency. Art. 13 (3) contains further sets of limiting circumstances which e.g. in cases of common danger or danger to life can themselves form the basis for derogation (a direct constitutional limitation), or else flow from statute. In case of business and commercial premises a reduced protection applies so that e.g. legally regulated checks can be carried out and commercial premises entered for this purpose.

Art. 14 GG - Guarantee of property and inheritance

The guarantee of property contained in Art. 14 is a fundamental basic right and contains a normative principle of special importance (BVerfGE 14, 263, 277; 102, 1, 15). According to the jurisprudence of the Constitutional Court, Art. 14 contains two different areas which fall under guarantee. Whilst (1) and (2) contemplate derogations from property rights which are not related to confiscation, (3) provides for confiscation. Parties to be protected are basically those with any concrete rights over valuable assets recognised by the legislature (BVerfGE 24, 367, 396; 53, 257, 290; 58, 300, 336). In addition to rights under private law, the right to the organised practice of a trade is included and also, under certain conditions, interests of the state under public law.

Art. 14 does not protect wealth as such and thus proffers no protection against devaluation of money or the imposition of financial burdens by public law. Following the general recognition that Art. 14 contains two different areas subject to protection, differing justifications for derogations apply, which need not be discussed here.

Art. 15 GG - Socialisation

Given the history of its development, Art. 15 is to ensure that in spite of the far-reaching protection of property rights contained in Art. 14 GG, socialist policies can nevertheless be put into effect. Art. 15 thus does not contain a basic right, but rather introduces a further justification for derogations from property rights to be added to the possibilities of limitation contained in Art. 14 GG (cf. also BVerfGE 12, 354, 363 f.).

Art. 16 gg - Protection from loss of citizenship and extradition

A. Protection from loss of citizenship

Art. 16 (1) protects nationality. A distinction is to be made between withdrawal of citizenship, i.e. the proscribed act of unilateral deprivation of German nationality on the one hand (first sentence), and the *loss* thereof on the other (second sentence), which may happen by virtue of statute where there is no danger of statelessness. A withdrawal of naturalisation does not infringe the scope of protection provided by Art. 16 (1.)

B. Protection from Deportation
Art. 16 (2) forbids the deportation of a German, i.e. the removal by force of a person from the jurisdiction of the Federal Republic and their surrender to a foreign jurisdiction at the request of a foreign state. Thus not only extradition to facilitate foreign criminal proceedings is forbidden but also where it is for the purpose of any judicial or administrative procedure.

Art. 16 a GG - Right of asylum

Anyone who is exposed to danger to life and limb or to limitations on his personal freedom as a result of persecution by reason of his race, religion, nationality, membership of a social group, or because of his political convictions, or who has a well-founded fear of such persecution, enjoys the protection of a right to asylum under Art. 16 a (BVerfGE 76, 143, 157 ff.; 80, 315, 335; BVerfGE 49, 202, 204 f.; 68, 171, 173; 79, 143, 145).

Whilst this definition is not exhaustive, significant limitations to the basic right and also to the simple statutory right to asylum emerge from the amendment to the constitution of 1993. The doubts raised against this (BVerfGE dissenting, 94, 157 ff, 223 ff) were rejected by the Constitutional Court (BVerfGE 94, 49 ff, 115 ff, 166ff). This means that in practice there is no real scope for the application of this basic legal safeguard in Germany.

Art. 17 GG - Right of petition

The right of petition contained in Art. 17 (1) ensures that the state has to take cognisance of both individual and general concerns even without formal administrative and legal procedures. The basic right is primarily a right to action by

the state but it also has protective aspects. From Art. 17 GG there also flows the right of the representatives of the people against the executive to demand and obtain information insofar as this is required in order to deal with the petition.

The legal effect of a petition is that it leads to a duty to act, i.e. the duty to receive, take cognisance of, review and decide upon the petition. There is however no duty to give reasons for the decision.

Art. 18 GG - Forfeiture of basic rights

This article is concerned with self-defence. (BVerfGE 28, 36, 48; 80, 244, 253). It pursues a similar goal to Art. 30 of the Universal Declaration of Human Rights, and Art. 17 ECHR and does not contain any basic right. Because of the danger to the liberal democratic order emanating from the aggressor, the former withdraws from the latter certain concrete and listed basic rights.

The practical consequences are few, as might be expected. A forfeiture of basic rights has yet to be declared and the only three claims for such have been refused (BVerfGE 11, 123 ff.; 38, 23 ff.)

Art. 19 (4) GG - Availability of recourse to the courts

Art. 19 (4) first sentence contains a subjective right as well as a “fundamental principle for the whole legal system” (BVerfGE 58, 1, 40) and guarantees a right to legal remedies against measures taken by “public authorities.” The basic right is a right to require action to be taken (BVerfGE 101, 106, 123) and only contains a minor protective element. It obliges the state to make available through the courts a substantial and effective check on its own actions. The central content of Art. 19 (4) cannot even be removed by virtue of a constitutional amendment, although the heading is not in the list of unalterable constitutional principles contained in Art. 79 (3) GG (BVerfGE 30, 1, 25 ff.).

Although acts of other states or inter-governmental institutions are not caught by Art. 19 (4) (BVerfGE 59, 63, 88; 58, 1, 30), basic legal safeguards must generally be provided against the acts of supranational organisations to which the exercise of Germany’s sovereign rights has been transferred, and these are to be regarded as essentially the same as the basic legal safeguards deemed mandatory by the Basic Law and are those safeguards which generally guarantee the quintessence of those basic rights (BVerfGE 102, 147, 164; 73, 339, 387; 89, 155, 174 f.).

This provision is of crucial significance in the context of constitutional procedural law. The EPO must provide access to a court in which all its actions can be challenged, and this court must provide an equivalent level of protection to the Basis German Law. However, a series of decisions relating to the level of protection provided within the EU have placed the burden upon an applicant to first demonstrate that the legal means provided within the EPO is inadequate. Only once this has been established will the German Court consider an application receivable (BVerfGE 101, 147, 164).

The comments relating to Article 6.1 ECHR above also apply to Article 19 GG.

SUEPO has been evaluating the level of protection provided by the ILOAT and has concluded that it fall significantly below the standards required. The test litigation that SUEPO has presented to the BVerfGE aims to demonstrate this, and provide motivation for substantial reform. The applications made by EUROCONTROL and NATO to the ECourtHR seek to demonstrate the same point. In the case of EUROCONTROL the court in question is also the ILOAT, and therefore the results of the SUEPO and EUROCONTROL initiatives may be mutually supportive.

Provisions of the Basic Law having the same rank as basic rights

Art. 93 (1) no. 4a, which lays the foundation for the jurisdiction over constitutional complaints and sets out the preconditions for admissibility, places certain provisions of the Basic Law on the same level as basic rights in the sense of Art. 1 to 19. These provisions, which rank as basic rights, include the right to resist attacks on the constitutional order of Art. 20 (4); the conditions on public service of Art. 33 ((1) to (3): special provisions on equality; (4) and (5): objective principles of constitutional law and the institutional guarantee of the profession of the civil servant; the fundamentals of electoral law of Art. 38 and the so-called procedural basic rights of Art. 101 (guarantee of statutory judges, prohibition of exceptional or special courts), 103 ((1): claim to a judicial hearing, (2): prohibition of retrospectively, (3): prohibition of repeated punishment and 104 GG.

Even though the special provisions of Art. 33 may be relevant when drawing a comparison between "permanent employees" in the EPO and "Beamten" in Germany and the procedural basic rights mentioned above be of importance when assessing the legal safeguards system within the EPO and the ILOAT in the interests of clarity it is not proposed to describe them in detail here.

6. CONCLUDING REMARKS

From the summaries in section 4 and 5 above it can be seen that the rights protected by both the ECHR and the German Basic Law are comprehensive. The EPO is required to meet similar standards of protection, and although the means by with the EPO achieves this remains open, the failure to recognise and apply clear fundamental rights standards such as those provided in the UDHR or the ECHR, raises serious questions.

The current view presented by the administration is that it does in fact meet these minimum standards and that the level of legal protection provided by the ILOAT is adequate. SUEPO holds a different view and considers that serious problems exist. There are deficiencies in four key areas:

1. **Due process rights (Article 19 GG (DE) and Art. 6.1 / 13 ECHR).** Due process and an effective judicial means to resolve grievances are essential elements of the rule of law. SUEPO holds the view that the ILOAT does not meet the criteria necessary to justify denying staff access to national courts.

2. **Health and Safety at Work protection and protection from harassment**. Although much of the legislation within member states derives from an EU Directive, the principles supported by this legislation derives directly from human rights. International organisations have a duty of care that must meet this minimum standard. Some of these issues may be addressed by the EPO health policy, which is currently being implemented, however, there are many areas are not covered by this policy.

3. **Adequate Labour Protection / lack of normative control for service regulations**. The lack of normative control of policy and service regulations implemented with the EPO is a serious problem. Some level of control is provided by the ILOAT, but this is not sufficient to meet the standards set by the ECHR or German GG. The failure of the ILO to recognise the principles of the ECHR as binding law and the wide discretion (without normative control) grated to the Administrative Council with regard to drafting and reviewing the service regulations are serious problems.

4. **Protection from criminal behaviour.** In a national context the State has a duty to protect individuals from behaviour which would violate their fundamental rights, not only from direct actions of the state, but also actions of third parties. This includes protection from criminal behaviour. Although the immunity granted to the EPO is not intended to prevent such national legislation having effect, the reluctance of the EPO to lift this immunity means that a member of staff cannot rely on such protection.

SUEPO is working to:

1. determine in detail what are the fundamental rights applicable to the EPO.
2. determine what level of fundamental rights protection is currently provided within EPO
3. pursue means and measures to ensure implementation of the applicable rights.

We hope that this guide has helped explain the nature of fundamental rights protection, and the need for such protection in the EPO. Seeking to establish your rights in not just a matter for SUEPO, it requires correct action on the part of individual staff members. SUEPO will assist in any way it can and If you feel you have been treated in a way that violate the rights summarised in this document, we advise you to contact one of the nominated SUEPO experts. If you choose to make an appeal we strongly advise you to contact one of our experts and to read the **User Guide II,** which provides concrete advice on how to ensure your rights are fully taken into account during the appeal process, and how you can help SUEPO to ensure that better protection is provided in the future.