

HUMAN RIGHTS AND FUNDAMENTAL RIGHTS  
AND THEIR IMPACT ON THE CIVIL LAW SYSTEM

## Human Rights and Fundamental Rights

### § 1 Introduction

#### I. Historical backgrounds

- development of the philosophical concept of human rights in Europe and North America
  - School of Salamanca (16<sup>th</sup> century), philosophy of the enlightenment
- first implementation of the concept of human rights at the level of the state
  - Magna Charta (1215), Habeas Corpus Act (1679), Virginia Bill of Rights (1776), Déclaration des droits de l'homme et du citoyen (1789), First Amendment of the US Constitution (1791)
- first international human rights treaties in the 19<sup>th</sup> century (against slavery)
- development of global and geo-regional human rights protection systems after the Second World War
  - Genocide Convention (1948), Geneva Refugee Convention (1951)
  - UDHR (1948), ICCPR, ICESCR and ICERD (1966), CEDAW (1979), CAT (1984), CRC (1989), CRPD (2006)
  - ECHR (1950), ACHR (1969), Banjul Charta (1981), Arab Charter of Human Rights (2004)
- since the 1990s complementation by international criminal justice (1998 establishment of the ICC)

#### II. The concepts of human rights and fundamental rights

- see special material "Terminology and abbreviations"
- human rights: (1.) the "natural rights" of every human being (philosophical concept); (2.) the rights guaranteed in intern. human rights treaties (mirroring the "natural rights")
- fundamental rights: the rights created in the national legal order for the implementation of the concept of human rights

#### III. Human rights law and human rights politics

- see note in bibliography, p. 4
- human rights treaties as "*living instruments*"?
- tendencies to confuse law with politics in human rights law
  - teleological interpretation or political campaigning?
  - putting political documents (→ "soft law") on a level with sources of law?
  - note that the *rules of legal methodology apply* in human rights law as in any other field of law...
- tendencies in Vietnam to misunderstand human rights as a predominantly political concept
  - a problem caused by a lack of knowledge about human and fundamental rights legal doctrine

#### IV. Essential characteristics of human rights

- 1) The inalienability of human rights
  - human rights cannot be transferred, given up or revoked
- 2) Universality of human rights or dependence on development and civilisation?
  - human rights as an element of Western imperialism? The criticism by historical and cultural relativists
  - cultural differences in the understanding of human rights and their limits
  - the incompatibility of the concept of human rights with political extremism and religious fundamentalism
  - OWN POSITION: for a differentiated approach - the *core human rights* are absolute, without regard to cultural, political or economic backgrounds
    - e.g. right to life, prohibition of torture, slavery and ethnic cleansing, core elements of self-determination
  - the ongoing paradigm shift in Southeast Asia caused by development
    - in particular: "new thinking" and "old thinking" on human rights in the Vietnamese Constitution of 2013
- 3) Indivisibility and interdependence of human rights?
  - do civil and political rights and economic, social and cultural rights necessarily belong together?
    - note that many national constitutions do not guarantee economic, social or cultural rights
  - interdependence of rights as a description of facts or a political or legal concept?

## § 2 The parallelism of human rights protections systems

- I. The sovereignty of the state and the primary responsibility of the state for the effective protection of human rights
- II. The plurality of human rights protection systems
  - see Diagram 1
- III. The reasons for the plurality of human rights protection systems
  - 1) The recurring insufficiency of the national protection of human rights and the necessity of guarantees from outside the State
    - international human rights treaties as instruments of "mutual insurance", operating like a *safety net*
  - 2) The necessity of particular fundamental rights regimes for supranational powers
  - 3) Geo-regional fundamental rights regimes as expressions of identity of civilisations
    - see, for example, the differences between the ECHR and the Banjul Charta
    - the controversial ASEAN Human Rights Declaration of 2012: expression of Southeast Asian culture and civilisation or attempt of dilution of human rights?
- IV. General aspects of the parallelism of human rights protection systems
  - 1) Intensified protection through cumulative requirements
    - national and international rights do not compete or collide but complement each other
  - 2) Parallel operation without correlation or interference
    - while human right treaties only set minimum standards, the national standards should be higher
  - 3) Mutual influence of interpretation
  - 4) Risk of conflicts in case of fundamental rights concepts obliging authorities to intervene
    - e.g. prohibition clauses, rights with direct horizontal effect, duties of protection

## § 3 Types of human and fundamental rights

- I. Civil and political, economic, social and cultural rights
  - 1) Civil and political rights (→ ICCPR, ECHR)
    - the original and main part of human rights ("first generation rights")
    - mostly defensive rights, which the states have to *respect*
  - 2) Economic, social and cultural rights
    - developed later as a complement to the civil and political rights ("second generation rights")
    - often positive rights obliging the states vaguely to take "*progressive action*" towards their (better) realisation in practice; therefore difficult to apply as legal norms
- II. Freedom rights, equality rights, personality rights, social rights, citizens' rights and justice
  - note that each group of rights has a specific dogmatic structure
- III. Individual and collective rights
  - in some treaties the individual rights are complemented by rights of certain groups of people (minorities, peoples, indigenous groups etc.)
  - examples: right to self-determination of peoples (art. 1, ICCPR, 1 ICESCR, 20 Banjul Charter), right to development (art. 22 Banjul Charter), equality of peoples (art. 19 Banjul Charter), right to free disposal of wealth and natural resources (art. 21 Banjul Charter)
- IV. Rights of the citizen and rights of man [= of all human beings]
  - see special material "Terminology and abbreviations"
  - a source of confusion: the terminological differentiation between "human rights" and "fundamental rights" within the Vietnamese Constitution of 2013
- V. Other categories

## § 4 Functions of human and fundamental rights

- I. Human and fundamental rights as defensive rights (status negativus)
  - the classical and main function of human and fundamental rights; easy to enforce by the courts (cf. § 5)
- II. Human and fundamental rights as positive rights (status positivus)
  - in particular social rights (see in particular the ICESCR and the European Social Charter, art. 34 et seq. of the Vietnamese Constitution of 2013)
  - need to be implemented by legislation or government action
  - guaranteed under the reserve of the financial and economical capability of the state (→ wide discretion)
- III. Human and fundamental rights as participatory rights (status activus)
  - in particular the right to vote and to stand as a candidate as elections
- IV. Human and fundamental rights as objective values
  - have to be taken into consideration by the legislator and the courts and even in foreign policy
- V. Human and fundamental rights and state duties of protection
  - the duty of the state not only to refrain from own encroachments of the rights but also to intervene against private persons encroaching on them
  - example: the duty of the state not only to allow assemblies but also to protect them against counter-demonstrators who are going to attack them

## § 5 Human and fundamental rights as directly binding law

- I. Background: the imperative of effectiveness of law
  - The imperative of effectiveness of law, a basic element of the rule of law, also applies to human rights (as guaranteed in intern. treaties) and fundamental rights. They are not programmatic objectives (which a state may approximate to) but *directly binding legal norms that must be implemented and enforced effectively in practice* at all times in all areas of life by all public authorities without any exceptions.
- II. The primacy of fundamental (and, possibly, human) rights
  - Fundamental rights (as guaranteed in the constitution) enjoy primacy over all other law in the state. The primacy of the constitution, one of the fundamentals of the modern constitutional state (see for Vietnam art. 8(1), 119 and 4(3) Constit. 2013) applies to all parts of the constitution.
  - Human rights guaranteed in international treaties usually have the same status as the ratifying law. However, in some states the constitution, following the so-called monist approach, grants primacy to all international law (including h.r. treaties) over national law.<sup>1</sup>
- III. The direct binding effect of human and fundamental rights
  - Human rights under international treaties are directly binding all public authorities as a part of national statutory law.
  - Fundamental rights are directly binding as a part of constitutional law. Some constitutions provide for that explicitly (e.g. art. 1(3) of the German Basic Law) but this is not necessary. In a modern constitutional state *all* constitutional provisions not explicitly arranging otherwise are directly binding.
    - In Vietnamese constit. law doctrine, the direct binding effect was traditionally denied, but this position was questionable under the Constitution of 1992 and is obsolete under the Constitution of 2013.
  - As a consequence, the *citizen is entitled to exercise his freedom* and the authorities must allow him to do so *without waiting for a law* that concretises the limits of the freedom. If necessary, the authorities must concretise the limits themselves. This demanding task requires a thorough education of the responsible officials in human and fundamental rights law.
    - For example, the Vietnamese citizens have the right to demonstrate (art. 25 Constit. 2013) without waiting for the National Assembly to pass a law on demonstrations. The local authorities must allow the demonstrations but take the necessary precautions for the protection of public security on the basis of the general public security legislation and in line with art. 25 Constit. 2013. This requires a differentiated and well-balanced reasoning (see § 6).

## § 6 The dogmatic structure of (defensive) human and fundamental rights

- I. Introduction
  - a general structure common to all defensive rights, deriving from their nature
  - the structure of the examination of a possible violation of the rights follows their dogmatic structure
    - therefore, the following part of this paper can be used as a check list!

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<sup>1</sup> See the materials "The Radiation of Human Rights into the Civil Law System", p. 1.

## II. The sphere/scope of protection

- = is the right in question concerned?
- if not, the right cannot be violated and the public authority does not need to justify its measure!
- 1) The personal sphere of protection
  - is the affected person protected by the right in question?
  - note that most constitutions (including the Vietnamese of 2013) reserve some rights to national citizens
- 2) The material sphere of protection
  - is the restricted activity concerned protected by the right in question?
  - here: delimitation between different fundamental rights

## III. The interference/encroachment

- = is the right in question affected?
- 1) Acting of a public authority (→ not of a private person)
  - acting of any public authority in the state (including local authorities)
  - in case of duty of protection, the acting can also consist in a failure to intervene against the attacks of private persons
- 2) Direct negative effect of the acting on the rights of the citizen
  - note that the terminology is heterogeneous ("interference"/"limitation"/"restriction"/"encroachment" etc.)

## IV. The illegality of the interference/encroachment (no justification by the right's limits)

- every right has its limits; usually they are determined in the same text in a special or general *limitation clause* - see for Vietnam art. 14(2) Constit. 2013
- only an interference/encroachment that is not justified by the right's limits constitutes a *violation* of the right
- 1) Interference/encroachment prescribed by law
  - the necessity of a *legal basis*
  - in many countries the constitution requires a statutory legal basis (*principle of statutory reservation*)
  - the legal provisions must be accessible and definite
- 2) Fulfillment of the preconditions set in the limitation clause
  - in particular: pursuit of the right public interest (public safety, order, health or morality, fundamental rights of others etc.)
- 3) Compliance with the "limits of limits"
  - a) *Proportionality* of the interference/encroachment
    - the *principle of proportionality* is the most important element of the rule of law and of human and fundamental rights doctrine
    - aa) Legitimate aim
      - the pursuit of the right public interest
    - bb) Suitability
      - the measure must be conducive to its purpose
      - caution: measures might be harsh but nevertheless suitable!
    - cc) Necessity
      - the measure must be the least intrusive act of intervention that is equally conducive
      - often the crucial point in the examination of a given case; consider possible alternatives to the measure!
      - note that a measure, which is not suitable cannot be necessary!
    - dd) 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 some f.r./f.r. regimes not an independent requirement but an aspect of "necessity"
  - b) Compliance with other "limits of limits"
    - in particular no infringement of the essence of the concerned right

More information on this course at [www.thomas-schmitz-hanoi.vn](http://www.thomas-schmitz-hanoi.vn). For any questions, suggestions and criticism please contact me in my office (room A.603) or via e-mail at [tschmit1@gwdg.de](mailto:tschmit1@gwdg.de).