

# Lecture 1: The universality of human rights

## I. The Western origin of the human rights idea

### 1) A concept rooting in the Western philosophy

- first approaches, based on the philosophy of natural law, in Spain with the SCHOOL OF SALAMANCA (16<sup>th</sup> century)
- full development of the idea of natural, pre-legal rights of the human being in the *philosophy of enlightenment*
- important milestone: the French Déclaration des droits de l'homme et du citoyen (1789)
- very influential: the philosophy of IMMANUEL KANT (1780s - 1790s)

### 2) A concept first legally implemented in Western countries

- 1215: Magna Carta Libertatum (predecessor to modern fundamental rights catalogues)
- 1776: Virginia Bill of Rights (first positivisation of fundamental rights)
- 1791: first French Constitution (includes the French Déclaration of 1789)
- 1791: 1<sup>st</sup> to 10th amendments adding fundamental rights of the American Constitution

## II. The global spread of the human rights idea

### 1) The recognition of human rights as binding universal values by the member states of the United Nations

- 1945: commitment to h.r. anchored in the Charter of the United Nations (art. 1(3), 55)
- 1948: Universal Declaration of Human Rights

### 2) The spread of the human rights idea after the Second World War

- first mainly in Europe but later more and more also in other parts of the world
- 1950: European Convention on Human Rights (ECHR)
- 1961: foundation of amnesty international
- since 1965: numerous global human rights treaties on special subjects prepared by UN
- 1966: International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR)
- 1969: American Convention on Human Rights (ACHR)
- 1981: African Charter on Human and Peoples' Rights (ACHPR)

### 3) The further spread of the human rights idea after the decline of communism

- new constitutions in the East European former socialist states, guaranteeing effectively fundamental rights
- accession of the East European states to the European Convention and numerous other European and global human rights treaties
- 1993: World Conference on Human Rights in Vienna (attended by 170 states)

### 4) The growing and deepening support for the human rights idea in the era of globalization

- growing interest in human rights in many developing and newly industrialised countries
- rise of ratifications of global human rights treaties

- growing international legal cooperation often focusing on rule of law and human rights
- 2005: World Summit resolution on the "responsibility to protect" (→ see lecture 3)
- 2012: ASEAN Human Rights Declaration

### III. The universal claim of the human rights idea

- 1) **A change-orientated political-philosophical concept, aiming to *overcome, not preserve* the traditional customs and values**
  - a consistently rational concept that consistently challenges any not rationally justified restrictions of freedom, unequal treatments or other kinds of injustices, regardless of whether they are historically established, deeply rooted in the local culture or derive from the local religion or ideology
- 2) **A concept unavoidably colliding with rigid conservative thinking - in all cultures and civilisations**
  - a concept that denies to accept any status quo as it is (or has always been) but insists on compliance with its requirements, even if this amounts to substantial change
  - a concept that, thus, a priori excludes any rigid conservatism which does not allow to adapt to modern standards
  - a concept that has been a *challenge to every society, also in the West*, since the traditional order met nowhere the modern, rational standards of human rights
  - even in the West it took a long time until the human rights were consistently implemented and incompatible traditional rules removed
    - example 1: although there is no possible justification to prohibit homosexual intercourse, since it does not harm anyone, such prohibitions existed in most Western countries until the 1970s
    - example 2: even in Europe, women and men did not enjoy equal rights before the second half of the 20<sup>th</sup> century
- 3) **A concept with universal claim of validity for all human communities (and beyond), regardless of civilisation, culture, religion and ideology**
  - a universal political-philosophical concept referring to *human dignity, freedom and equality as abstract universal values*
  - a concept that is by design not limited to any specific civilisation or cultural, religious or ideological environment (just like other abstract philosophical concepts)
  - a concept based on the *autonomy* of the human being (with its own individual intelligence, consciousness and will), which could, if applicable, even be applied one day to other autonomous living beings, which may live in the universe or on Earth

### IV. Historical challenges to the human rights idea

- 1) **The denial of human rights by *totalitarian ideologies***
  - human rights as defensible legal positions are incompatible with the total claim to power of regimes based on communism, fascism or religious fundamentalism
  - their denial by these ideologies led to the biggest atrocities in the history of mankind
    - e.g. the Holocaust committed by national-socialist Germany
    - e.g. the Gulag labour camps for dissidents and others in the Soviet Union
    - e.g. the Cultural Revolution in China
    - e.g. the Killing Fields of the Khmer Rouge in Cambodia
    - e.g. the reintroduction of slavery by ISIS

- 2) **The rejection of human rights for the time being by the *historical relativism***
  - e.g. KARL MARX, CHINA on the World Conference 1993; rather rare today
  - arguing that in countries which are still developing, as before in many Western states, the concept of human rights can only apply after the necessary degree of development has been reached and the necessary civilisatory, economic and social conditions created
  - often used as a pretext to downplay constant serious h.r. violations; once these countries developed, the situation did not improve
  
- 3) **The rejection, dilution or sabotage of human rights by the *cultural relativism***
  - heterogeneous, often culturally conservative approaches, strongly hyping the value of the own local culture (or even rejecting any rights not recognized there and, thus, supra-cultural universal values at all), objecting the impact of h.r. on the free exercise of the state's sovereignty (sometimes conceived as an attempt of Western imperialism), criticising a too strong focus on the rights of the individuum and a neglect of the interest of communities (e.g. family, local community), and/or fearing a (conceived) destructive effect on the (traditional) social order
  - a radical form of cultural relativism: placing one's own religion above human rights
    - e.g. insisting on strict application of the Sharia, even where this would inevitably lead to human rights violations
  - often not a total rejection of human rights but a rejection of certain rights or of certain rights in certain contexts, which can amount to sabotage in practice
    - example: no total rejection of the freedom of expression but exclusion of essential parts from it, such as the right to criticise the government, the mainstream culture or religion
  
- 4) **In particular: the "*Asian values*" doctrine**
  - e.g. LEE KUAN YEW (longerm autocrat of Singapore)
  - an ideological approach referring to an East-/Southeast Asian identity based on common characteristics of society, culture and history and traditional Asian values, especially less individualism, as antithesis and counterweight to the "Western" ideas of universal h.r. and democracy
  - traditional elites in many East- and Southeast Asian countries rejected the human rights idea until the end of the 90s; this caused the late ratification of global human rights treaties by these countries
  - the Bangkok Declaration on Human Rights of 1993 (at an Asian summit) still relativised human rights with regard to sovereignty, non-interference and needs of development

## V. The growing global consensus: human rights are universal but their design and balancing can vary in detail

- 1) **The Universal Declaration of Human Rights of 1948 as a global expression of universal values of mankind**
  - only a political declaration (soft law) but a common political commitment of all 193 member states of the United Nations, which represent almost the whole population of the world
  
- 2) **The protection of an absolute minimum standard of essential human rights by mandatory customary public international law** (→ see also lecture 3)
  - there is a broad global consensus that the *ius cogens* (absolutely binding) part of the customary public international law includes some basic norms on human rights
    - a global consensus dating already from the 19<sup>th</sup> century (→ prohibition of slavery) and growing since the end of the Second World War (→ prohibition of genocide, establishing of international criminal justice etc.)

- these norms constitute an *inherent conceptual limit to the sovereignty* of the state, which is reflected in the political concept of *responsibility to protect* (→ see lecture 3)
- however, these norms only *prohibit large-scale gross violations of elementary h.r.*
  - such as genocide, slavery, forced labour, ethnical cleansing, other crimes against humanity, war crimes etc.; see for examples the Rome Statute of the International Criminal Court of 1998
  - no global consensus on all or all important human rights as *ius cogens*

### 3) The overwhelming world-wide commitment to global legal minimum standards in global human rights treaties

- a vast majority of the states has signed and ratified most or all global human rights treaties
  - ICCPR: 113; ICESCR: 111; CEDAW: 113; CRC: 116; ICERD: 112; CRPD: 112; CAT: 111 states
- these treaties only guarantee international *minimum standards considered imperative for any human civilisation*, without regard to its political, economical, cultural or ideological characteristics; the national standards should be and usually are higher
- the sovereign state is free to withdraw from these international treaties but as a member of the UN cannot withdraw from its political commitment under the UDHR

### 4) The wide-spread commitment to higher or additional geo-regional legal minimum standards in geo-regional human rights treaties

- geo-regional h.r. treaties (ECHR, ACHR, ACHPR etc.) define geo-regional minimum standards considered *imperative within the given (European, American, African) civilisation*; these standards are specific or higher than the global minimum standards
  - a controversial exception: the Arab Charter on Human Rights which attempts to neutralise or dilute essential universal h.r. standards

### 5) Nevertheless the freedom of the sovereign state to define its own human rights regime

- as long as the international minimum standards are still met...
- not all rights guaranteed in Western constitutions are universal
  - example: the (capitalist) freedom to conduct a business (art. 16 EU ChFR)
- human rights do not necessarily need to be transformed into constitutional rights
  - example: the former British tradition to respect human rights without recognising them as legal rights
- the scope of protection of the individual rights can be different in the various states
  - example: in Germany lies are a priori not protected by the freedom of opinion
- different limitation clauses can give the same rights a higher or lower weight in different states, taking into account national particularities
  - e.g. different limits for the freedoms of expression, of religion and of occupation or the right to privacy
  - e.g. limitation clauses demanding considerateness for local values (family, local community etc.)
  - however, the limits must not be stricter than allowed under global and geo-regional human rights law

## VI. Current controversial issues (→ see also lecture 6)

### 1) General examples for current controversial issues

- Can a totalitarian history justify to prohibit the expression of pro-totalitarian opinions?
  - the prohibition of national-socialist or stalinist propaganda in European post-totalitarian states
- Can the cultural or religious background justify to curtail women's rights on this planet?
- Can religion be allowed to stay above human rights on this planet?
  - the problem of the abuse of blasphemy laws
- Can the state be allowed to interfere with the universal human value of free sexual self-determination of adults?
  - the problem of attempts to criminalise homosexuality or extra-marriage sex (see below)

## 2) Special: The new Indonesian Criminal Code and the universal human right of sexual freedom

- the controversial art. 411 of Law No. 1 of 2023 on the Indonesian Criminal Code, which has been heavily criticised by human rights groups (e.g. [HRW](#), [ai](#)) and experts

## VII. Further reading

- *Donnelly, Jack; Whelan, Daniel J.*: International Human Rights, 6<sup>th</sup> edition 2020, p. 49 ff.
- *Kälin, Walter; Künzli, Jörg*: The Law of International Human Rights Protection, 2<sup>nd</sup> edition 2019, p. 18 ff.
- *Moeckli, Daniel; Shah, Sangeeta; Sivakumaran, Sandesh; Harris, David (editors)*, International Human Rights Law, 3<sup>rd</sup> edition 2018, p. 41 ff.
- *Lakatos, István*: Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights, Pécs Journal of International and European Law 2018/I, p. 66 ff., [http://ceere.eu/pjiel/wp-content/uploads/2018/08\\_pjielPJIEL1801.pdf](http://ceere.eu/pjiel/wp-content/uploads/2018/08/pjielPJIEL1801.pdf)
- *Dahre, Ulf Johansson*: Searching for a middle ground: anthropologists and the debate on the universalism and the cultural relativism of human rights, International Journal of Human Rights 21 (2017), p. 611 ff., <https://doi.org/10.1080/13642987.2017.1290930>
- *Howard-Hassmann, Rhoda E.*: In Defense of Universal Human Rights, 2019
- *Pratiwi, Cekli Setya*: Bridging the Gap between Cultural Relativism and Universality of Human Rights: Indonesia Attitudes, Journal of Indonesian Legal Studies 5 (2020), p. 449 ff., <https://journal.unnes.ac.id/sju/index.php/jils/article/view/39271>
- *Suetyo, Heru*: Human Rights Regime Between Universality and Cultural Relativism: The Asian and Indonesian Experience, Indonesian Journal of International Law 16 (2019), p. 191 ff., <https://doi.org/10.17304/ijil.vol16.2.749>
- *International Commission of Jurists*: Indonesia: New Penal Code is a major human rights setback and must be repealed or substantially amended, 09.12.2022, <https://www.icj.org/indonesia-new-penal-code-is-a-major-human-rights-setback-and-must-be-repealed-or-substantially-amended> (press release also available [in Bahasa Indonesia](#))
- *Llewellyn, Aisyah*: Indonesia's controversial new criminal code: 7 things to know. Critics say 'authoritarian' legislation taints Jokowi's legacy, Nikkei Asia 10.12.2022, <https://asia.nikkei.com/Politics/Indonesia-s-controversial-new-criminal-code-7-things-to-know>
- *Nugraha, Ignatius Yordan*: 'Inherently Repugnant'? Indonesia and the Criminalisation of Sex Outside Marriage, Verfassungsblog 07.12.2022, <https://verfassungsblog.de/inherently-repugnant>