

§ 1 Introduction

I. Historical foundations of international human rights law

- guaranteeing and enforcing human rights originally an exclusive mission of the state
 - important steps: English Magna Carta Libertatum (1215, on rights of nobles), English Bill of Rights (1689), Virginia Bill of Rights (1776), French Déclaration des droits de l'homme et du citoyen (1789)
- first rudimentary steps towards international human rights protection in the 19th century
 - prohibition of slave trafficking in intern. treaties
 - humanitarian interventions to protect persecuted Christians in the Osman Empire
- first universal human rights treaties after the First World War
 - 1926: Convention to Suppress the Slave Trade and Slavery
 - 1930: Forced Labour Convention
- the development of a global human rights protection system after the Second World War
 - 1945: commitment to human rights anchored in the Charter of the United Nations
 - 1948: Universal Declaration of Human Rights
 - 1948: Convention on the Prevention and Punishment of the Crime of Genocide
 - 1951: Geneva Refugee Convention
 - 1966: two *general global human rights treaties*: ICCPR and ICESCR
 - since 1966: numerous global h.r. treaties on special subjects prepared by UN
 - since 1990s: strong increase in ratifications of human rights treaties
- the development of geo-regional human rights regimes
 - 1950: European Convention on Human Rights
 - 1969: American Convention on Human Rights
 - 1981: African Charter on Human and Peoples' Rights
 - 2004: Arab Charter on Human Rights
 - 2012: ASEAN Human Rights Declaration

II. Universality or cultural determination of human rights?

1) The naturally universal approach of the idea of human rights

- human rights protect any human being and bind any public power regardless of their characteristics and backgrounds
- human rights are by nature challenging: historically, they did *not aim to preserve culture and society but to change them*

2) Cultural relativist attempts to deny or dilute human rights: a serious approach or just an excuse for oppression and intolerance?

- an intensive debate at the time of the turn of the millenium
- nowadays, a total rejection of the idea of human rights is rare
 - example: Asian politicians in the past referring to (not substantiated) "Asian values"
- but cultural or ideological backgrounds are invoked to reduce or undermine human rights
 - example: the controversial Arab Charter on Human Rights of 2004 that rather serves to prevent than to protect freedom and equality of men and women (see infra, § 4 IV)

3) The growing global consensus: human rights are universal but their design and balancing can vary in detail

- as long as the international minimum standards are still met... (see infra, IV.3)
- 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
- different limitation clauses can give the same rights a higher or lower weight in different states, taking into account national particularities

4) Current 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 religious-cultural background justify to curtail women's rights on this planet?
- 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
- Can religion be allowed to stay above human rights on this planet?
 - the problem of the abuse of blasphemy laws

III. Human rights and fundamental rights

1) On the terms "human rights" and "fundamental rights"

- see *special material* on the terms "human rights", "fundamental rights" and "constitutional rights"

2) Human and fundamental rights regimes and other mechanisms

- human rights regimes (in international treaties and protocols) and fundamental rights regimes (in constitutions and laws) are *comprehensive integrated systems* including
 - the substantial human rights law
 - the law on the institutions to monitor and/or enforce compliance
 - the law on the mechanisms (procedures, legal remedies) to monitor/enforce compliance
- they are often *complemented by political mechanisms* (supported by human rights commissioners/commissions without legal powers, human rights funds, training programs etc.) that mainly serve to raise human rights awareness but may also bring or support cases before the courts

IV. The parallelism of human and fundamental rights regimes

1) The primary responsibility of the state for the effective protection of human rights

- a conclusive consequence of the sovereignty of the state and the corresponding ultimate responsibility of the state

2) The development of a plurality of human and fundamental rights regimes

- the parallel development of a global and several geo-regional human rights regimes which do *not replace but complement* the national human rights protection

3) The reasons for the plurality of human and fundamental rights regimes

- the recurring insufficiency of the national h.r. protection and the necessity of guarantees from outside the State
- international human rights treaties are instruments of "mutual insurance"; they operate like a *second safety net* which (only) guarantees *international minimum standards*
 - geo-regional h.r. treaties define *geo-regional minimum standards* considered imperative within the given (European, American, African, Arab...) civilisation
 - global h.r. treaties define *global minimum standards* considered imperative for any human civilisation, without regard to its political, economical, cultural or ideological characteristics
 - the *national standards* can and must be *higher*
- the necessity of particular fundamental rights regimes for supranational powers

4) In particular: Geo-regional human rights regimes as expressions of identity of civilisation

- the answer to the debate about the universality of the human rights and its limits
 - protecting human rights but taking into account geo-regional cultural and philosophical differences
- similar rights can have a *different emphasis in different civilisations*; this usually manifests in *different limitation clauses*
 - example: h.r. restrictions on behalf of religious values in Indonesia (art. 28J(2) Constit. 1945) while France protects the right to commit blasphemy.
- special rights may be unique to individual civilisations
 - example: peoples' rights in Africa

5) General aspects of the parallelism of human and fundamental rights regimes

- intensified protection through cumulative requirements
 - national and intern. rights do not compete or collide but complement each other
- parallel operation without correlation or interference
 - while h.r. treaties only set minimum standards, the national standards are (should be!) higher
- mutual influence of interpretation
- risk of conflicts in case of concepts obliging authorities to intervene
 - e.g. prohibition clauses, rights with direct horizontal effect, duties of protection