Prof. Dr. Thomas Schmitz Semester 2, 2022/2023

GEO-REGIONAL HUMAN RIGHTS LAW AND MECHANISMS

Contribution to the course Human Rights Law

concerning § 1 I Human and fundamental rights

On the terms "human rights", "fundamental rights" and "constitutional rights"

The term *human rights* stands pre-eminently for a philosophical concept that originates in the philosophy of the Enlightenment. Human rights are the "natural rights" of every human beeing deriving from *natural law*. These rights are considered pre-legal. They existed before the state. The state can neither create nor abolish nor regulate them but must respect and safeguard them. The national constitution cannot grant human rights but only guarantee their respect and safeguard. For this reason, most advanced constitutions do not use the term "human rights" except in the preamble and in order to express the general commitment to the idea.

The common way to legally implement the philosophical concept of human rights is to create corresponding particular legal positions within the national legal order. These positions are called *fundamental rights* (or, sometimes, "basic rights"). They are not identical to the human rights. They are created, shaped and granted by the state, can be repealed and are different in every state. But they are the rights that can be handled by the lawyers. If they are granted in the constitution, they are also called *constitutional rights*. However, in most states not all constitutional rights implement the idea of human rights or not all human rights have been transposed to constitutional rights. It may also happen that the fundamental rights guaranteed in a substandard constitution allow too far-reaching restrictions that are incompatible with the idea of human rights.

When human rights are guaranteed in *international treaties*, they are still called "human rights". However, in this case, the words represent a legal term. Like the fundamental rights, these "human rights" are not the natural, pre-legal rights of the human being but artificial rights. They have been created and organised by the treaties and show many similarities to the fundamental rights guaranteed in the constitutions. There may even be a special legal procedure to defend these rights. However, they usually pretend to be just a *mirror of the natural rights* and therefore are called like them. In this case, they just define indispensable minimum standards. For this reason, usually the standards of the fundamental rights in the national constitutions are higher.

Some constitutions (e.g. the Constitution of the Republic of Indonesia of 1945) call the fundamental rights guaranteed in the constitution "human rights". This may provoke misunderstandings, since in reality the concerned constitutional rights are not human but fundamental rights. A constitution cannot grant human rights but only fundamental rights. The many political-philosophical theories and concepts concerning the human rights as "natural", pre-legal rights do not apply and cannot be transferred to the fundamental rights that have been shaped by the law.

The same applies in the case of another confusing usage of terminology: Most constitutions reserve some fundamental rights to persons having national citizenship and grant others to all human beings. The first category may be called *rights of citizens*. The second category may be called *rights of man* or *rights of the human being*. The term "human rights" is inappropriate because dogmatically these rights are not human rights but fundamental rights too. By ignoring the common linguistic usage, the Constitution of the Socialist Republic of Vietnam of 2013 has caused some misunderstandings that have affected the debate on human and fundamental rights in Vietnam. When working with specific constitutions and general human or fundamental righs doctrine this risk of errors should be beared in mind.

More information on this course contribution at www.thomas-schmitz-yogyakarta.id. For any questions, suggestions and criticism please contact me via WhatsApp or e-mail (tschmit1@gwdg.de) or in my office (Building A, room A.IV.11).