

European human and fundamental rights regimes

I. Introduction

- 1) Human and fundamental rights?
 - under common international terminology (which differs from Indonesian terminology)
 - "*human rights*" are the pre-legal ("natural") rights of the human being (according to philosophical doctrine) and also the rights guaranteed in international human rights treaties (who pretend just to reflect them), while
 - "*fundamental rights*" are the legal positions created by the implementation of this doctrine into the (constitutional) law
- 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 and the law of the institutions and mechanisms (procedures, legal remedies) to monitor and/or enforce compliance
 - they are often *complemented by political mechanisms* (involving human rights commissioners/commissions without legal powers, training programs etc.) that mainly serve to raise human rights awareness but may also bring or support cases before the courts
- 3) The parallelism of human and fundamental rights regimes
 - in the world order of sovereign states the state is primarily responsible for the effective protection of human rights
 - yet there is a *plurality of human and fundamental rights regimes* at national, sub-national, geo-regional and global level
 - in Europe, a public authority must have up to five different human and fundamental rights regimes in mind
 - the reasons for this plurality:
 - the recurring insufficiency of the state's protection of human rights and the necessity of guarantees from outside
 - international human rights treaties as instruments of "mutual insurance", operating like a *second safety net*
 - the necessity of particular fundamental rights regimes for supranational powers, such as the EU
 - *geo-regional human rights regimes as expressions of identity of civilisations*
 - general aspects of the parallelism of human and fundamental rights regimes:
 - intensified protection through cumulative requirements
 - parallel operation without correlation or interference but mutual influence of interpretation
 - risk of conflicts only in case of concepts obliging authorities to intervene (prohibition clauses, rights with direct horizontal effect, duties of protection)

II. The European Convention on Human Rights and other European human rights treaties

- a pan-European human rights law for up to 47 states, prepared by the Council of Europe
- 1) The function of the European human rights law as a "second safety net"
 - an international regime providing protection in case of failure of the national h.r. protection
 - *only European minimum standards* considered imperative within the European civilisation
 - 2) The rights guaranteed in the European Convention (ECHR) and its protocols
 - see separate list of rights and prohibitions
 - limited to classical human rights (civil and political rights, in particular freedom rights)
 - initially limited to the most important rights but successively complemented by numerous protocols
 - some rights still missing but this is partially compensated in the jurisprudence
 - no freedom of occupation, no general right to equality
 - freedoms of the press, of arts and of science derived from art. 10 ECHR as parts of the freedom of expression
 - various rights concerning data protection and personal identity derived from art. 8 ECHR as parts of the right to respect for private life
 - a strong point: *central elements of the rule of law anchored as human rights*
 - a concept that has inspired geo-regional human rights regimes in other parts of the world
 - e.g. right to liberty and security (art. 5), right to a fair trial (art. 6), *nulla poena sine lege* (art. 7), *ne bis in idem* (art. 4 Prot. 7), right to an effective remedy (art. 13)
 - abundant jurisprudence on these rights has shaped and consolidated rule of law in Europe

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² Please click on the underlined passages in the PDF file to follow the links to further information and sources.

- 3) The specific limitation clauses in the European Convention and its protocols
 - note: not the formulation of the rights but of their limits is decisive for their protection!
 - specific limitation clauses are necessary for a sophisticated, differentiated h.r. protection
 - many rights may only be subjected to restrictions that are
 - prescribed by law and
 - necessary in a democratic society (with pluralism, tolerance, openness etc.)
 - in the interests of national security or public safety, for the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others
 - problem: human rights restrictions for the *protection of morals*?
 - incompatible with the modern understanding of law and human rights
 - in a state committed to freedom and rule of law, enforcement of morality is *not a mission of the state* but of society
- 4) The European Convention on Human Rights as a "living instrument"
 - European Court of Human Rights has developed ECHR to a powerful h.r. regime *far beyond its wording* by
 - generous understanding of the rights' spheres of protection, closing gaps and partially compensating for missing rights
 - restrictive interpretation of the outdated, far-reaching limitation clauses, in particular of terms such as "necessary in a democratic society", "public order" or "morals"
 - consistent, *sophisticated human rights doctrine* that influences national fundamental rights doctrines in Europe
 - *clear dogmatic structure* of the rights (sphere/scope of protection, restriction/interference, justification by the right's limits)
 - consistent application of the *principle of proportionality*
 - doctrine of *positive obligations* requiring to provide protection against unlawful private interference
 - thus, ECHR has approximated to the standards of constitutional f.r. regimes - is it still a "second safety net"?
- 5) The protection of the human rights by the European Court of Human Rights in Strasbourg (ECtHR)
 - a) An international human rights court
 - a full-time court (since 1998) that has delivered *more than 10.000 judgements*
 - 47 judges, sitting in various formations (art. 26 ff. ECHR), mainly deciding in Chambers of 7 judges
 - can find that Convention has been violated but cannot annul the attacked decision
 - execution of judgements supervised by the Council of Europe's Committee of Ministers (art. 46)
 - jurisdiction on *interstate complaints* (art. 33), *individual complaints* (art. 34) and to give *opinions* (art. 47) and *advisory opinions* (on request of high courts and tribunals, Prot. 16)
 - b) Individual complaints to the Court (art. 34 ff. ECHR)
 - by individuals, groups of persons or NGO
 - applicant must claim to be victim of a violation of a Convention right (art. 34)
 - must be personally and directly concerned and have suffered significant disadvantage (art. 35(3) lit. b)
 - application must not be manifestly ill-founded or abusive (art. 35(3) lit. a)
 - case must not have been submitted to another international mechanism (art. 35(2) lit. b))
 - only after all domestic remedies have been exhausted, within 6 months (art. 35(1))
 - Court can take interim measures (art. 39 Rules of Court)
 - Court can - and often does - afford just satisfaction (compensation) to the injured party (art. 41 ECHR)
- 6) Other human rights treaties and their control mechanisms (selection)
 - European Social Charter (original version of 1961 and revised version of 1996)
 - economic and social rights
 - states only obliged to take measures to promote their realisation
 - weak control mechanisms with Council of Europe's Committee of Ministers as monitoring body (involvement of a European Committee of Social Rights only under revised version)
 - European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) of 1997
 - enhanced preventive control mechanisms, including ad hoc visits of places of detention
 - see also the Convention on Human Rights and Biomedicine (CHRB) of 1997
 - prohibition of reproductive cloning of human beings
 - prohibition of making the human body and its parts as such a source of financial gain
 - ECtHR may be asked for opinions on interpretation

III. The Charter of Fundamental Rights of the European Union

- a specific f.r. regime for the EU, necessary because EU exercises on a large scale supranational public power
- part of EU primary law (cf. art. 6(1) EU Treaty) but binding the member states only when they implement or execute EU law or interfere with the economic fundamental freedoms
- one of the *most modern fundamental rights catalogues in the world* with many *innovative approaches*
 - contemporary and precise wording
 - clear structure based on innovative classification of the rights
 - rights taking into account the newest developments in the field
 - *anti-neoliberal approach* (social rights, horizontal effect, business restrictions etc.)
 - innovative: fundamental restrictions of biomedicine (art. 3(2)), freedom to conduct a business (art. 16), cultural, religious and linguistic diversity (art. 22), rights of the child and of the elderly (art. 24, 25)
- weak point: a substandard system of fundamental rights limits with an undifferentiated general limitation clause for most rights and a transfer of the archaic limits from the ECHR to corresponding Charter rights (art. 52)

IV. The European human rights law compared to other human rights regimes

- 1) The decisive aspect: the *effectiveness* of the system for the protection *in the individual case*
 - a) The essential lesson learnt from experience in Europe and elsewhere: no effective human rights protection without the legal remedy of individual complaint to a court
 - the need of a remedy for the individual, not just for groups or NGOs
 - the need of a remedy to a court, not to a political institution
 - not politicians or political experts but judges must decide
 - not in a political discourse but in formalised legal proceedings
 - execution of the decision must be ensured
 - b) The individual complaint under the ECHR compared to those under universal, American and African human rights law
 - aa) Access to a court
 - not only to an expert treaty-body (as under universal h.r. law)
 - bb) Direct access to the Court without filter
 - no filtering by a human rights commission (as in America and Africa)
 - complaint to the Court a *real, practical option for everyone*
 - consequently a much higher number of adjudicated cases
 - made possible by the higher number of judges: 47 (ECtHR) compared to 7 (IACtHR) and 11 (ACtHPR)
 - cc) Binding force of the Court's decision
 - judgements of ECtHR, IACtHR and ACtHPR legally binding (unlike decisions of expert treaty-bodies)
 - effective execution of ECtHR judgements ensured by supervision by the Council of Europe's Committee of Ministers (no such mechanism elsewhere)
- 2) The dynamic of the development of human rights doctrine
 - in Europe, the high number of ECtHR decisions has led to a comprehensive, sophisticated and differentiated h.r. doctrine far beyond the European Convention's wording that adapts quickly to new challenges
 - the European human rights doctrine as *common European heritage* - a civilisation heritage existing also in America and building up in Africa but missing in Asia
- 3) The guarantee and protection of the different kinds of rights
 - a) Classical human rights (in particular civil and political rights, justice)
 - in the focus of the European and American Convention but less developed in the African Charter; under attack in the Arab Charter on Human Rights
 - in Europe strong focus of the ECtHR's jurisprudence on rights concretising elements of the rule of law
 - in Europe guarantee of the equality between spouses as human right (art. 5 Prot. 7 ECHR)
 - in Europe absolute prohibition of Death Penalty (Prot. 6, 13 ECHR)
 - b) Non-classical economic and cultural rights, social rights
 - in Europe rather weak protection, mainly in the European Social Charter
 - c) Collective and other "third generation rights"
 - in Europe protection limited to some selected aspects in special treaties prepared by the Council of Europe
 - much stronger protection under the African Charter on Human and Peoples' Rights, due to the different focus of the African human rights concept

Further Reading

Bond, Martyn: An Introduction to the European Convention, 2018, <https://book.coe.int/en/human-rights-and-democracy/7694-an-introduction-to-the-european-convention-on-human-rights.html>

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Harris, David; O'Boyle, Michael; Bates, Ed; Buckley, Carla: Law of the European Convention on Human Rights, 4th edition 2018 [for in-depth studies]

Peers, Steve; Hervey, Tamara; Kenner, Jeff; Ward, Angela (editors): The EU Charter of Fundamental Rights. A Commentary, 2014 [2nd edition announced for 2021]

Rainey, Bernadette; McCormick, Pamela; Ovey, Clare: The European Convention on Human Rights, 8th edition 2020 [for in-depth studies]

Renucci, Jean-François: Introduction to the European Convention on Human Rights, 2015, [www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01\(2005\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01(2005).pdf)

Schabas, William A.: The European Convention on Human Rights. A Commentary, 2017 [article-by-article presentation]

See for quick orientation also the [information documents at the ECtHR's website](http://www.echr.coe.int), www.echr.coe.int