

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

The Radiation of Human Rights into the Civil Law System

§ 1 The problem

- I. The imperative of effectiveness of human rights in all fields of law
 - human rights treaties are not political proclamations but binding law
 - human rights are not programmatic objectives (which a state may pursue or approximate to) but binding legal norms that must be implemented and enforced in practice effectively at all times in all areas of life without exceptions
- II. No autonomy of civil law vis-a-vis human rights
 - in a modern state based on the rule of law and the concept of human rights, no field of law can be autonomous vis-a-vis human or fundamental rights
 - there cannot be any exception for civil law, even if it has already been developed longtime before the concepts of directly binding human and fundamental rights gained acceptance
 - as a consequence, all *civil law legislation must comply with human rights* (as with fundamental rights)
- III. The impossibility to settle all human rights questions by legislation
 - the legislator cannot foresee all human rights problems, which often are caused by new economical, social or technical developments
 - the legislators must find - and have found - general solutions - which allow the civil judge to implement and enforce human rights in the process of application of civil law
 - consequently, human rights can only be implemented and enforced effectively in practice, if all civil judges (and other lawyers active in the field of civil law) receive a sound education in this field

§ 2 The background: the relationship between national and international law

- I. The contrasting concepts of monism and dualism
 - monism: intern. law and domestic law are elements of one integrated legal system (with primacy of internat. law)
 - dualism: intern. law and domestic law are two separate and independent legal systems (no primacy)
- II. Vietnam as a monist country
 - cf. art. 6 of the Law No. 41/2005/QH11 on the conclusion, accession to and implementing of international treaties¹
 - consequence: in case of conflict, the *human rights* as guaranteed in the human rights treaty, will *prevail*
- III. Germany as a dualist country
 - The German Basic Law follows a differentiated approach: In case of conflict with statutory law, the general rules of international law shall prevail (cf. art. 25 Basic Law). However, internat. treaties, incl. human rights treaties, do not have a special position in the hierarchy of norms. Since they are approved and transposed by statute, they have the *same rank as (federal) statutory law*.
 - Consequence: In case of conflict, the human rights as guaranteed in the human rights treaty, will *not* prevail. The judge must try to avoid the conflict in the ways described in § 3 (see infra) or by applying the treaty provisions as *lex specialis*. If this is not possible, the human rights will be violated.

§ 3 The solution: Aligning civil law with human rights by means of legal methodology

- I. The interpretation of civil law "in the light of" human rights
 - interpreting norms and provisions in a way that they comply with the human rights

¹ "In cases where a legal document and a treaty to which the Socialist Republic of Vietnam is a party, contains different provisions on the same matter, the provisions of the treaty shall prevail." This also applies to human rights treaties.

- in particular: human rights friendly interpretation of *indeterminate legal concepts* such as "public order", "public morals/policy", "morality", "equity", "good faith" and "reasonable"
- restrictive interpretation of terms that will lead to a restriction of human rights, extensive interpretation of terms that will lead to the protection of human rights
- usually, the human rights will be a topic of teleological interpretation

II. The further development of civil law with regard to human rights

- e.g. developing new types of *defences* based on human rights

III. Other ways

- e.g. considering analogy assuming that the legislator would want to prevent any possible violation of human rights

IV. Limits

- 1) Limits set by the generally recognised rules of legal methodology
 - no interpretation or application of law *contra legem* - not even in favour of human rights!
 - in particular no exceeding of the limits of interpretation!
 - in particular no analogy or further development of law against the clearly expressed will of the legislator!
- 2) Limits set by conflicting fundamental rights under the national constitution
 - in case of balancing between conflicting rights of different citizens, the alignment of the national civil law with intern. human rights treaties must not result in a violation of fundamental rights under the national constitution (see German Federal Constitutional Court, BVerfGE 128, 326, on possible conflicts between the German Basic Law and the European Convention)

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