

# HUMAN RIGHTS 1- INTRODUCTION: HUMAN BEING AND HER RIGHTS ENTERING THE STAGE



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# INTRODUCTION OF INTRODUCTION

- Introduction of me and you and the course (of course;)
- Materials?
- Pavel.molek@law.muni.cz
- I am providing questions, you are providing answers  
(but feel free to ask too)
- Structure of the course



# STRUCTURE OF THE COURSE

- § 1. Introduction (human rights relationship and historical evolution until 1945) (14/9)

Magna Charta Libertatum (1215); Declaration of the Rights of Man and of the Citizen (1789), U.S. Bill of Rights (1791); Judgment of ECJ in Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et al.*

- § 2. Traditional levels of protection (national, regional, universal level of human rights protection – reasons, instruments, procedures) (15/9)

Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; European Convention on Human Rights

- § 3. New level of protection (human rights protection in the EU – reasons, instruments, evolution) (16/9)

Charter of Fundamental Rights of the European Union; Judgment of ECJ in Case C-168/91, *Konstantinidis* (including opinion of AG Jacobs); Judgment of ECJ in Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et al.*

- § 4. Right to life (17/9)

Judgment of German Constitutional Court of 15 February 2006, 1 BvR 357/05 (English excerpt); ECHR Grand Chamber judgment of 24 March 2011, *Giuliani and Gaggio v. Italy*, application No. 23458/02 (excerpt); views of Human Rights Committee in case *Chitat Ng v. Canada* (communication No. 469/1991 of 5 November 1993) in Steiner, H., Alston, P.: *International Human Rights in Context*, 2nd ed., Oxford, Oxford University Press 2000, pgs. 761 – 766.

- § 5. Prohibition of torture (18/9)

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; ECHR judgment of 28 February 2008, *Saadi v. Italy*, application No. 37201/06.



# STRUCTURE OF THE COURSE

- § 6. Freedom of expression (21/9)

ECHR judgment of 8 July 2008, *Vajnai v. Hungary*, application No. 33629/06;  
ECHR judgment of 25 November 1996, *Wingrove v. United Kingdom*,  
application No. 17419/90

- § 7. Right to asylum (22/9)

- § 8. Prohibition of discrimination (23/9)

ECHR Grand Chamber judgment of 13 November 2007, *D. H. and others v. the Czech Republic*, application No. 57325/00; Judgment of ECJ in Case C-144/04 *Mangold v. Helm*.

- § 9-10. Right to fair trial (24-25/9)

ECHR judgment of 8 June 1976 *Engel and others v. The Netherlands*, applications No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, ECHR judgment of 26 June 2007 *Tocono and Profesorii Prometeisti v. Moldova*, application No. 32263/03, Judgement of ECJ C-53/03 *Syfait*, ECHR judgment of 22 March 2001 *Streletz, Kessler, Krenz and K.-H.W. v. Germany*, applications No. 34044/96; 35532/97 a 44801/98; and 37201/97



# STRUCTURE OF THE COURSE

- § 11. Moot court (28/9)
- § 12. Exam and final discussion: universalism versus particularism (are we rather “humans” or “Portuguese”?) (29/9)

Steiner, H., Alston, P.: International Human Rights in Context, 2nd ed., Oxford, Oxford University Press 2000, pgs. 343 – 350, 383 – 389, 439 – 444; ECHR judgment of 18 March 2011, application no. 30814/06, Lautsi v. Italy



# INTRODUCTION

- What are human rights (or fundamental rights or basic rights or constitutional rights – I focus rather on the content than on a hair-splitting exercise in defining legal notions)?



# HUMAN RIGHTS (ALEXY)

- Guarantees of liberty
- Principles of social formation
- Elements of social ordering
- Constitutional principles
- Limits on legislative discretion
- Goals
- Tasks
- Binding guidelines
- Constitutional freedoms
- Constitutional goals
- Determination of state goals
- Framework of participation
- Legislative tasks
- Directives
- Principles and determinations in their institutional-functional aspect



# PRE-HISTORY I.

*„The girl whose drinks refresh the soul  
then said these words to...:*

*"Remember always, mighty king,  
that gods decreed the fates of all  
many years ago. They alone are let  
to be eternal, while we frail humans die  
as you yourself must someday do.*

*What is best for us to do  
is now to sing and dance.*

*Relish warm food and cool drinks.*

*Cherish children to whom your love gives life.*

*Bathe easily in sweet, refreshing waters.*

*Play joyfully with your chosen wife.*

*It is the will of the gods for you to smile  
on simple pleasure in the leisure time of your short days."*





## PRE-HISTORY II

„16 Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee.

17 And unto Adam he said, Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life;

18 Thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field;

19 In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return.“



## PRE-HISTORY – THE CLUE

- Epic of Gilgamesh, Tablet X – Siduri speaking
- Genesis, Chapter III, King James Bible



# HR RELATIONSHIP

- What are the quotations talking about?
- Limits of „the possible“ vs. limits of „the guaranteed“



# WHO IS RIGHTS HOLDER?

- Individual – every individual?
- Art. 2/1 ICCPR: „1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*“
- *within its territory and subject to its jurisdiction.* Is there a difference?
- ECHR: LOIZIDOU v. Turkey, 23/3/1995, ap. no. 15318/89
- ECHR: BANKOVIC v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, 12/12/2001, ap. no. 52207/99



# WHO IS RIGHTS HOLDER?

- Foetus?
- right to property, right to life:
  - Art. 6/5 ICCPR: *„5. Sentence of death ... shall not be carried out on pregnant women.“*
  - Indent 9 Convention on the Rights of the Child 1989: *“Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,,*
  - third subsection of Article 40, Section 3, of the Irish Constitution: *"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."*



# WHO IS RIGHTS HOLDER?

- Dead person?
- Good reputation as part of right to privacy
- Right to fair trial – Cadaver synod and posthumous ecclesiastical trial of Catholic Pope Formosus 897



## WHO IS RIGHTS HOLDER?

- Legal persons?
- ICCPR Art. 2/3: „3. *Each State Party to the present Covenant undertakes: (a) To ensure that **any person** whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*“
- But it is new (a contrario Declaration of the Rights of Man and of the Citizen)
- In which rights?



# WHO IS RIGHTS HOLDER?

- Other „subjects“ without legal subjectivity? (nature?)
- In different legal systems different types of subjects (preparatory committee of a political party, trade unions in *statu nascendi*)
- The „peoples“:
  - ICCPR Art. 1/1: „1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*“
  - Or African charter: Article 20
    - „1. *All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.*
    - 2. *Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.*
    - 3. *All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.*“





# WHO IS DUTY BEARER?

- The state
- Public authorities?
  - European Convention Art. 10/1: „1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference **by public authority** and regardless of frontiers.*“ – is there a difference?
  - Bars, Chambers, Local authorities, Private realizers of public duties, Churches, Multinational corporations, State monopolies...? – double nature



## WHO IS DUTY BEARER?

- Vertical relationships as a starting point
- Individual as a duty bearer?
- Horizontal relationships?
- Direct horizontal relationships – what would be the consequences?
- Indirect horizontal relationships – Drittwirkung („interradiation“ – third party effect)



## WHO IS DUTY BEARER?

- ECJ: C-159/90 - The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others
- What are the facts, subjects and their rights at stake?
- ECHR: OPEN DOOR AND DUBLIN WELL WOMAN v. IRELAND, 29/10/1992, ap. no. 14234/88; 14235/88



## TO SUMM UP

- Analyze ECHR Art. 1: *„The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.“*



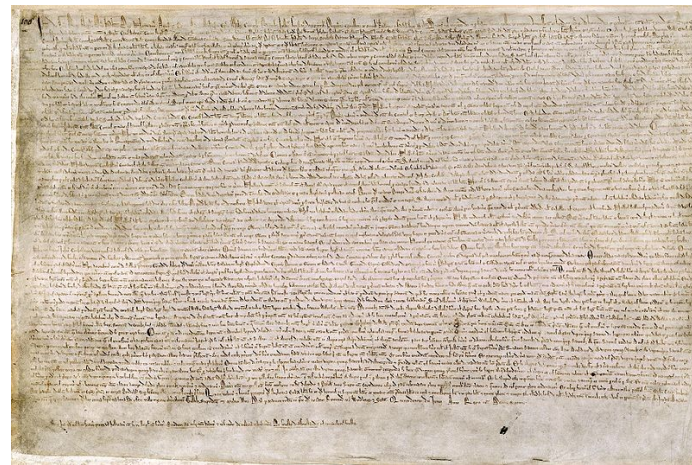
# HISTORY – WHERE TO START?

- Philosophy?
- Christianity?



# HISTORY – MAGNA CARTA

- 1215: weak King John Lackland after Battle of Bouvines in July 1214 during upheavels – weak state is a typical situation
- What HRs have you identified there?



# HISTORY – MAGNA CARTA

- „1. *In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English Church,...*
- *13. And the city of London shall have all its ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.*
- *39. No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.“*



# LATER ON.....

- Other documents but not as important as Magna Charta (still valid after „amendments“)
- Absolutism as a bad time for positive law and good time for thinking
- English exception 1689 (English Bill of Rights):
  - An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689:  
*„Englishmen, as embodied by Parliament, possessed certain immutable civil and political rights. These included:*
  - *freedom from royal interference with the law (the Sovereign was forbidden to establish his own courts or to act as a judge himself)*
  - *freedom from taxation by royal prerogative, without agreement by Parliament*
  - *freedom to petition the Monarch*
  - *freedom from a peace-time standing army, without agreement by Parliament*
  - *freedom [for Protestants] to have arms for defence, as allowed by law*
  - *freedom to elect members of Parliament without interference from the Sovereign*
  - *the freedom of speech in Parliament, in that proceedings in Parliament were not to be questioned in the courts or in any body outside Parliament itself (the basis of modern parliamentary privilege)*
  - *freedom from cruel and unusual punishments, and excessive bail*
  - *freedom from fines and forfeitures without trial“*





# ENLIGHTENMENT

- France: Rousseau, Montesquieu, Voltaire: „*I disapprove of what you say, but I will defend to the death your right to say it.*“
- Britain: John Locke: *Two Treatises of Government*
- Kant: *Groundwork of the Metaphysic(s) of Morals* (*Grundlegung zur Metaphysik der Sitten*): „...*humanity and generally every rational nature is an end in itself (which is the supreme limiting condition of every man's freedom of action)*...“
- *Federalist Papers*



# REVOLUTIONS



# FRENCH REVOLUTION

- Declaration of the Rights of Man and of the Citizen approved by the National Assembly of France, August 26, 1789
  - *„1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.*
  - *4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.*
  - *5. Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.“*



# FRENCH REVOLUTION



# AMERICAN REVOLUTION

- Virginia Declaration of Rights (12. 6. 1776) - what is this revolution about...
  - *„I That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*
  - *II That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.*
  - *XII That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.*
  - *XV That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.*
  - *XVI That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.*
  - *Adopted unanimously June 12, 1776 Virginia Convention of Delegates drafted by Mr. George Mason“*



# AMERICAN REVOLUTION

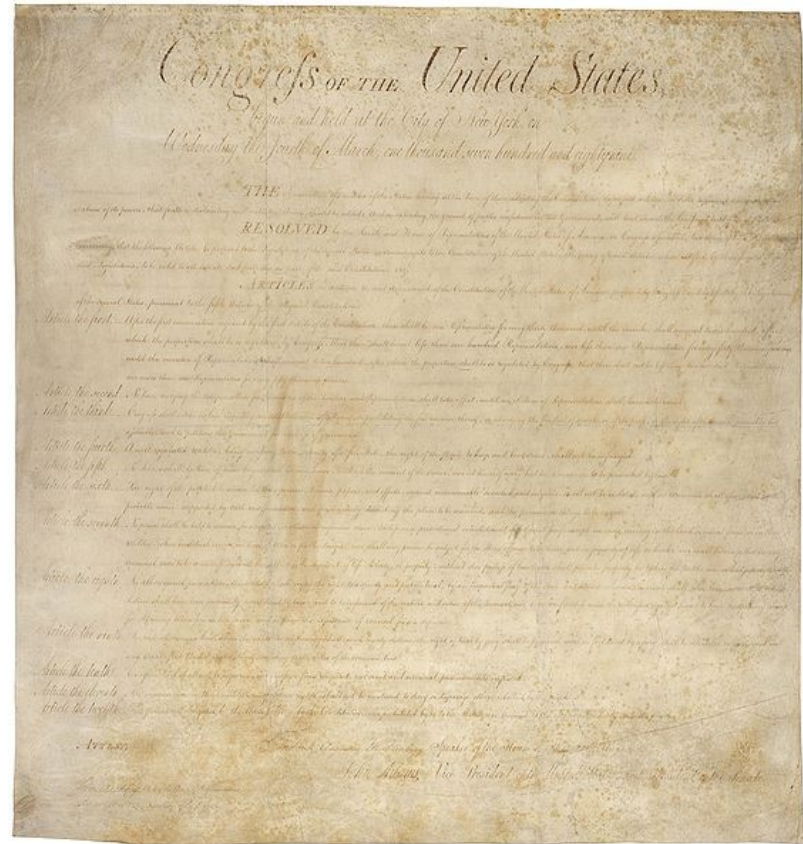
- Bill of Rights 1791

- „**Amendment I**

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

- **Amendment II**

*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.“*



## OTHER CONSTITUTIONS....

- Spain 1812
- Portugal 1822
- Belgium 1831
- Austria 1848
- .....Why do we need International Law then?

