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Rainer Arnold *Editor*

The Universalism of Human Rights

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The Universalism of Human Rights

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Editor

The Universalism of Human Rights

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Foreword

This book presents a discussion on the universalism of human rights from national perspectives across the world. Universalism is often contrasted with cultural autonomy. The question of to what extent the idea of human rights is accepted and practiced as a universal concept arises. This includes a further question of the nature of the human rights' normativity.

The book is based on the national reports of 23 countries submitted to the XVIIIth International Congress of the International Academy of Comparative Law, held from July 25th to August 1st, 2010 in Washington, DC.

The great interest in the questions of universalism of human rights was confirmed by a vivid debate on this topic during the Congress' session. In this respect, special gratitude is expressed to the Session's Chairman Prof. Patrick Glenn of the McGill University Faculty of Law, Montreal (Canada).

I am very grateful to the Springer International Publishing House for their continuing support in helping to realize this book.

I owe particular thanks to Dr. Anna Lytvynyuk for her valuable assistance in this project.

Regensburg Rainer Arnold

Préface

La protection des droits de l'homme est aujourd'hui une tâche primordiale des États et de la communauté internationale. En Europe, la garantie des droits fondamentaux existant au niveau national est complétée par la Convention européenne des droits de l'Homme, instrument régional de haute influence juridique et politique, qui est un instrument de l'ordre public européen pour la protection des êtres humains. Depuis plus de soixante ans qu'elle existe, la Convention a fortement contribué à l'évolution d'un standard commun de droits au sein des quarante-sept États-membres du Conseil de l'Europe, standard qui a été un exemple pour le développement des droits de l'homme dans d'autres régions du monde.

Les droits humains, en tant que garants de la dignité, de la liberté et de l'autonomie de l'homme, sont par nature universels. Bien que l'on doive reconnaître aux États, dans un degré assez limité, une certaine marge d'appréciation, l'efficacité de ces droits doit être nécessairement assurée.

L'obligation de respecter les droits humains, garantis au plan national par des Constitutions et au plan international par des Conventions multilatérales ou par le droit coutumier, fait partie du *jus cogens*, au moins en ce qui concerne les plus fondamentaux de ces droits. Quant aux arrêts d'une juridiction comme la Cour européenne des droits de l'homme, ils ont force obligatoire, comme le dit l'article 46 de la Convention.

Le pouvoir supranational de l'Union européenne, pour sa part, ne s'exempte pas de la protection des droits humains mais travaille au respect des droits fondamentaux. Cette activité a été exercée initialement de manière jurisprudentielle, la Cour de justice ayant placé les droits fondamentaux parmi les principes généraux du droit communautaire (droit de l'Union) dont elle a la charge. Elle est exprimée aujourd' hui par une Charte, texte fortement influencé par les traditions constitutionnelles nationales ainsi que par la Convention européenne des droits de l'Homme. Afin de perfectionner son système de protection, l'UE va, dans un futur proche, adhérer à cette Convention. Ceci est prévu par le Traité de Lisbonne et confirmé par le Protocole 14 à la Convention.

Ce livre réunit les rapports nationaux de 23 pays, présentés au Congrès mondial de l'Académie internationale de droit comparé qui a eu lieu à Washington en 2010

sur le thème: “Les droits humains sont-ils universels et obligatoires?” Il est en effet important de connaître les perspectives des pays de divers continents et de cultures différentes, mais cela tout en visant une finalité unique: l’Homme.

Il m’est agréable de préfacer un tel ouvrage, fait de rapports aussi impressionnants. Je remercie et félicite le Professeur Rainer Arnold, rapporteur général du Congrès, et éditeur de cet ouvrage qui aura, je l’espère, tout le succès qu’il mérite.

Président de la Cour européenne des droits de l’homme Jean-Paul Costa
Strasbourg

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Introduction

Rainer Arnold

Human Rights and Peace

The protection of dignity, autonomy and freedom of the individual is a vital aspect of national, regional and international communities. Not only are human rights indispensible as instruments for the protection of human beings, they are also primordial elements of safeguarding peace in the World.

There is peace neither within the borders of a state, nor beyond them, when human rights are disrespected. The two main obligations of the World community are keeping peace and respecting human rights. Both are closely interconnected: international peace is threatened when human rights are violated; internal peace can only be upheld if democracy, rule of law and, in particular, human rights are observed.

Contemporary Developments

It corresponds to the contemporary developments of both national and international law that the protection and the promotion of human beings, in their basic rights, have become increasingly significant. Constitutional law of today is regularly anthropocentric, placing men on top of the constitutional guarantees. In the national sphere human rights are connected to the rule of law as a basis of a democratic state. The modern state, in its finalities, has to promote personal, social and economic welfare of the individual, and has three interconnected foundations: democracy, rule of law and human rights. Democracy means political self-determination of the individual. Rule of law makes law the very basis for public power activities, however, not in a formal, but in a value-oriented sense including a third element: human rights.

A failure of one of these elements affects the other two. Democracy cannot exist without rule of law and rule of law would lack real substance should it not concentrate on a human being. Thus, constitutional law of today accepts emancipation of men, the result of a long enduring historical process. The disregard of human beings

during the first half of the twentieth century, accompanied by two World Wars, opened the way to recognizing the need to efficiently and internationally ensure the protection of human rights. The developments of national constitutionalism and individual-oriented internationalism from the second half of the twentieth century on has been characterized by the promotion of fundamental rights on the national level and by a strong reinforcement of human rights on the international level. World-wide covenants and efficient regional charters have been drafted for this purpose, making human rights part of *jus cogens* and a matter of concern of the whole world community. However, it is evident that manifold violations of human rights which have occurred in the past and occur today could not, and may not, be fully averted. National constitutional courts have been created with the necessary instruments to effectively protect the individual and raise awareness of the crucial importance of the protective function of a state. Not only universal but also regional protection systems have appeared, introducing a plurinational level of control of national systems.

Plurinational Level of Protection

The idea of fundamental rights protection appears on various interconnected levels. In order to appreciate the efficiency of a human being's protection it is necessary to analyze the interdependencies of these levels and identify divergences, as well as convergences, between them. In this respect, it is not merely coincidental that one of the subjects of the International Congress of Comparative Law in Washington in 2010 was the question of whether human rights are universal and binding. The more protected human rights are by the instruments of different legal orders, the greater is their normative and political complexity.

Universality means the recognition of human rights in a world-wide scale. Two dimensions of universalism can be distinguished: *horizontal* and *vertical*. A horizontal dimension presupposes that the idea of the efficient human rights protection is accepted and realized by most, if not all, states of the international community. Vertical dimension can be said to exist only if all the levels of public power (national, regional, supra- and international) offer such efficient mechanisms of protection.

Universalism has also a *functional* dimension which means that the values, or at least the core of these values, expressed by human rights, are recognized in a same way by the totality of countries, regions and cultures.

Universalism can be *absolute* or *relative*. It is absolute if assumed that the international community agrees on the core values of human rights. It is relative if such uniformity is incomplete through the exceptions reserved by certain cultures. In this respect: should the international community accept such divergent cultural approaches? If so, how differently do the states (or groups of states) resolve this issue?

Instruments and Mechanisms

The instruments and mechanisms of human rights protection are different. These are judicial and political safeguards which can diverge from one state to the other. The modern tendency is to entrust constitutional courts with the protection of fundamental rights. Regional systems, however, have a broader understanding of what human rights are and how they must be observed by national state powers. Here specific questions arise: how far is the impact of regional and multinational instruments of protection on the national practices, and how are national and regional orders influenced by universal covenants?

Questionnaire

These and a number of other topic-related questions were collected into a form of a Questionnaire and were distributed amongst the national reporters representing various countries and all the continents of the World. This book is a selection of 23 national perspectives on the main issues raised for the discussion in Section: "Are Human Rights Universal and Binding? The Limits of Universalism" originally presented at the: XVIIIth International Congress of Comparative Law held in Washington, USA, in 2010.

There were two major types of questions of the Questionnaire: the first one related to the theory of universalism of human rights (e.g. a national reporter's approach and/or predominant view in a country). The second block of questions was directed at identifying the current situation on both the substantial reach of human rights on national, regional and universal levels and the evaluation of the factual situation against the concepts of 'culturalism vs. universalism', the binding effect of universal human rights and the convergence of the three levels of human rights protection.

Results

The idea of the necessity of human rights is global and further confirmed by the universal covenants to which most countries formally adhere. The contents are more and more converging in regions (such as Europe) where a common democratic legal culture can be found. Similar convergences exist in Latin America.

There is a great extent of convergence with regards to the content. If universalism also means regional convergence and a form of rights identity—it is more present in regions (as Europe) where there are Charters, and courts applying this multinational Charters in addition to coherent legal and political cultures.

There are also transfers of these concepts from one region to another. The ECHR concepts, for example, are transferred from Europe to South American courts. Convergence is not so far-reaching in a universal perspective when compared to this regional context.

Whereas on a universal level, international covenants form the basis for universal convergence in human rights, they reflect the influence of culturalism more than the regional documents. One can only speak of relative universalism. An element of subsidiarity in a human rights context, reflecting particular cultures, may be introduced. A margin of appreciation of how fundamental rights are understood, and how a conciliation (weighing up with other values) can be achieved, must be respected. However, the core elements of human rights must be universally recognized and understood uniformly. The interpretation of the universal covenants must, therefore, be based upon it.

The binding force of human rights is the second dimension of the Questionnaire. The classical type of binding force is normativity, which does not exclude certain autonomy. One may also speak of relativism here, especially in the interpretation of courts. However, the existence of a strong ideological force of human rights may be asserted, which is based on the idea and the fact of emancipation of a human being. In addition, many other instruments of human rights protection, even non-normative, appear and have a great impact on political behaviour. They give incentives and impulses which are similar to normative concepts.

There is a rich body of jurisprudence interpreting the normative concepts, and adapting them, corresponding to the task of the judge, to the social changes. This is needed because wordings in the constitutions are often general and must be duly interpreted: the transformation of culture and social progress into normativity is realized through such interpretation.

There is, however, also a large body of non-normative concepts which are much more flexible than the normative ones, weaker and stronger at the same time. If normative concepts cannot be realized because of non-conformity to the common political will, soft law is then more easily accepted. It forms the consciousness of people and has a direct impact on legal culture. The function of binding force concepts is, in a growing way, substituted by non-normative documents.

Evaluation

As an overall assessment it may be stated that universalism of human rights is well founded in the consciousness of the people all over the world, despite the many violations which continue to take place. This orientation corresponds to the indispensability of recognizing the human being's dignity and autonomy, on which human rights are based. A growing scale of international documents contributes to safeguarding universal values in relation to a human being. However, it cannot be denied that cultural diversity has a certain influence on the understanding and interpretation of the contents and restrictions of human rights. A certain margin of

appreciation should be accepted. Culturalism in this sense must not lead to the human rights' relativism. The core elements of these rights must be universally upheld.

Furthermore, it corresponds to the importance of human rights that their guarantees should be normatively binding. Notwithstanding this assumption, it is observed that even a non-normative political behavior and the growing number of soft law are able to favor the respect for human rights and contribute to the formation of a World consciousness taking adequate account of the protection of the individual.

Chapter 1
Reflections on the Universality of Human Rights

Rainer Arnold

1.1 Are Human Rights Universal?

1.1.1 How to Define Universality?

It is difficult to define universality. It is a complex concept which incorporates geographical, cultural, historical and political dimensions (Solomon Islands, Chap. 6). As yet, there is no generally accepted notion of universality of human rights.

Firstly, universality of human rights can be understood as a *propensity towards global acceptance* of human rights. This is a *territorial* or *outer dimension*.

One may identify, in this territorial dimension, a *vertical* and a *horizontal* acceptance of human rights.

Vertical acceptance of human rights takes place on three levels: national (local), regional and international. This cross-level perspective is important for universality in order to give a comprehensive insight into the interactions of these levels.

Horizontal dimension implies a tendency towards the acceptance of human rights in all the geographical parts of the world.

Universality also has an *inner dimension* which is related to the qualities of universality as such. Universality also touches on the questions: who is entitled to human rights, who has to respect human rights, what scope do human rights have,[1] do they function efficiently?

[1] See Poland, Chap. 20.

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A distinction can be made between a *substantive* and a *functional* aspect in this context:

The substantive aspect of this dimension includes:

(a) human rights are inherent to all human beings – *active aspect;*
(b) human rights must be protected against all encroachments (by public and private powers) – *passive aspect;*
(c) the basic values such as dignity, freedom and autonomy of an individual must be explicitly or implicitly protected – *objective aspect*.

The functional aspect of the aforementioned inner dimension of human rights embraces the following requirements:

1. Necessary limitations must respect the *principle of optimalization* of human rights.
2. Intervention by public power must be founded on law, be backed up by a legitimate reason, be necessary for the needs of the democratic society (Canada, Chap. 3; Hungary, Chap. 22; Greece, Chap. 17) and be the sole adequate means of achieving such a legitimate reason *(principle of proportionality).*
3. The core (the very nature, the essence) of human rights must not be affected.
4. Efficient judicial protection is indispensable.

It can therefore be stated that universality of human rights has (1) horizontal and vertical geographical dimensions as well as (2) the inner, quality-related dimension with the substantive, matter-related and the functional, efficiency-related aspect.[2]

1.1.2 The Human Rights Idea, the Political Transformation of This Idea Into Normative Structures, and the Gap Between Normative Claim and Reality

Universalism of human rights is an *ideological concept* which presently constitutes a pillar of public awareness in the world, despite the many reported and unreported human rights violations. Such public awareness results in manifold political initiatives to ameliorate the legal protection of human rights on all three levels (national, regional and international). Judicial activism in promoting effective protection of human rights also plays an important role in this cause.

Whilst the idea of universalism of human rights is widely shared, its political and normative reality bears serious shortcomings, in particular, with regard to the mechanisms of control and sanctions on the international level (Great Britain, Chap. 11).

[2] See also Brazil, Chap. 5 ("universalism of confluence").

1.1.3 Normative Claim and Normative Reality

Universalism of human rights can be considered from various perspectives.

Firstly, universalism of human rights can be understood as an *idea* or *concept*.

Secondly, it can be understood as a *normative reality* (normative requirement and normative fact (Slovakia, Chap. 19)).

Universal human rights protection is an *ideological concept* deeply rooted in American history with impact on the formulation of the international key instruments,[3] the UN Charter and the Declaration of 1948. The universality formula has been affirmed in the Vienna Declaration of the UN World Conference on human rights expressing the opinion of 171 states[4]– a quasi-universal opinion – that human rights derive from "dignity and worth inherent in the human person"[5] and are "universal, indivisible, interdependent and interrelated" and must be treated by the international community "globally in a fair and equal manner, on the same footing, and with the same emphasis".

This ideological concept has been transformed into *normative structures*, on the international level, in particular, in the form of the UN Covenants and specific human rights instruments, on the regional level with guarantee systems in America, Africa, and – deemed as the most efficient and influential of them – with the European Convention of Human Rights (ECHR) (Great Britain, Chap. 11; Slovakia, Chap. 19; Ukraine, Chap. 24; Netherlands, Chap. 14; Scotland, Chap. 12; Taiwan, Chap. 9). In the beginnings of state constitutionalism national rights developed autonomously, but have later received considerably reinforcing incentives from the human rights internationalization process. The autonomy of the national level still exists, but is characterized, as one of the consequences of globalization, by a growing "internationalization" or, in EU Europe, with even more external impact by the tendency towards "supranationalization" in the field of fundamental and human rights. The EU Charter, in force with the Lisbon Treaty since December 1 2009, also applies to state action to a great extent, in the frequent cases where national administration executes EU law. This is also influential on the remaining national field of action and promotes conceptual convergence. Regional human rights stemming from the ECHR, which enjoys high authority for its elaborated jurisprudence and long human rights experience, are respected as convincing sources of inspiration both for national and supranational judges.

The influence of international law can be realized in various ways: through interpretation of internal laws in light of international human rights, on the basis of a principle of a "friendly attitude towards international law" or even through the *presumption* of the willingness of national organs to conform to international law, or, by means of filling up national discretionary power clauses with international law contents, etc.

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[3] See USA, Chap. 2.

[4] See Germany, Chap. 15.

[5] See Hungary, Chap. 22; Japan, Chap. 7.

In *monist systems* international law, including human rights, constitutes an integral part of the state order and prevails regularly over ordinary national laws (Greece, Chap. 17; Belgium, Chap. 13) – kind of highly effective impact of the international standards on the state level. Such impact is even stronger in the case of EU law, which enjoys primacy over national ordinary and – in the opinion of the ECJ[6] – even constitutional law.

Thus, the human rights idea has become a legal reality in many parts of the world but does not fully satisfy the ideological claims, particularly on the international level. State sovereignty, the coordination structure of mutual relations, the lack of a sufficient legal position of the individual in the state-related international community, deficient complaint, control and sanction mechanisms have created a rather weak human rights protection system. Neither the rudimentary elements of individualization in this context, set up by Optional Protocols to the human rights treaties, nor the modest beginnings of an evolving objective, *jus cogens* value order with *erga omnes* effect especially in the field of international human rights, can be regarded as adequate.

Thus, normative reality does not correspond in many respects to normative claim. In regard to the aforementioned three levels, it can be said that the more legally and socially integrated a system is (state, region), the higher the chances are of legal claims being approximated to reality. The least integrated system, the international community, shows the most striking deficiencies of all the three levels in the human rights protection mechanisms.

1.1.4 Universality v. Relativism[7]

Are there limits to the idea of universal human rights? This question seems to be crucial in the current context. This global problem is particularly significant in regions where "clashes of culture" are imminent. However, in countries with marked cultural diversity and distinct political decentralization, such as Canada, culture-related divergences in interpreting human rights texts are also visible (Canada, Chap. 3). It must also be briefly mentioned that interpretation of normative texts in any country is interdependent with local and regional culture (Ukraine, Chap. 24; Great Britain, Chap. 11; Taiwan, Chap. 9; Russia, Chap. 10; Belgium, Chap. 13); what is decisive is the readiness of the interpreter to objectivize her/his culture-shaped mindset and to duly respect the international obligations. Thus, the need for universality is satisfied, and cultural particularity is observed to the extent that the universal documents explicitly or implicitly allow it.

We can roughly distinguish three approaches to the above mentioned question of conflict of relativism v. universalism:

[6] ECJ, Case 11/70, Rep.1970, 1125.

[7] Netherlands, Chap. 14.

(a) *absolute relativism* – a rather seldom-used approach, which, for whatever conflicting cultural reasons, would totally deny the universal, or at least quasi-universal, normative effect which results from the human rights treaties. This approach cannot be upheld.

(b) *relative, limited, moderate universalism* which upholds the treaty-based human rights as such, or at least the core of them,[8] but allows consideration of particular cultural aspects when interpreting the – often vaguely formulated – human rights, when filling up a "margin of appreciation" (Slovakia, Chap. 18); or, more importantly, when weighing human rights and public interests (Belgium, Chap.13, Japan, Chap. 7; Croatia, Chap. 23). Collectivism could prevail over individualism in the judicial assessment process.[9]

With this approach a conciliation of the universality claim with cultural diversity could be reached. The core of a human right, however, must remain intangible. It remains doubtful whether, for example, "patriarchal attitudes" can be regarded compatible with the universal human rights claim for gender equality (Japan, Chap. 7).

(c) "*Universality through culture*" approach which confirms an inner link and not a contrast between both dimensions saying that cultural adaptation increases or even creates sociological acceptance of the normative prescription and therefore gives real efficiency to human rights.[10] This (rarely formulated) approach is not far from the first mentioned one and is subject to the same objections.

1.1.5 Human Rights and National Constitutional Law

Fundamental and human rights were initially a purely internal matter, progeny of a long political-cultural evolution centered in the Anglo-American sphere[11] and in revolutionary France. The emancipation of an individual has become a predominant characteristic of the national legal orders and is an achievement of modern constitutionalism – a process in Europe with a far-reaching impact also on non-European countries and which started in its particularly significant phase after the Second World War. In three sub-phases[12] (the immediate post-war period with the influential anthropocentric model of the German *Grundgesetz*, the 1970s with the post-authoritarian constitutions in Spain, Portugal and Greece, and the last and most advancing period of the turn from the 1980s to the 1990s with the transformation of communist

[8] See Netherlands, Chap. 14; Great Britain, Chap. 11; Portugal, Chap. 18; Ukraine, Chap. 24; Slovakia, Chap. 19; Solomon Islands, Chap. 6.

[9] See Taiwan, Chap. 9.

[10] See also Netherlands, Chap. 14; Taiwan, Chap. 9; Russia, Chap. 10.

[11] See USA, Chap. 2.

[12] See Arnold (2006, 41–45).

states to new democracies) *individualization* has become the main feature of the new constitutionalism. It focuses on an efficient protection of the individual's rights, based on human dignity[13] (a rather undetermined concept undergoing various definition attempts[14]), with a comprehensive scope of protection covering explicitly or implicitly (that is by judge-made guaranties) all threats to freedom and aiming at its functional efficiency which consists, in particular, of an adequate judicial control, the application of the principle of proportionality and the observance of the essence of a right even by the legislator. These are the general elements which characterize protection efficiency, and which have already been referred to above in the context of the "functional universality" of international human rights.

The New Constitutionalism combines individual protection with a modern approach to rule of law: human rights are part of it (Taiwan, Chap. 9; Germany, Chap. 15); it is therefore value-oriented, with human dignity as a supreme value, basic for state and society. Legality is no longer the leading principle; it is complemented by constitutionality addressed to the legislator. Assuring the primacy of the Constitution, and with that of the individual rights, is a task which today is often attributed to the constitutional courts.

Human rights, as part of fundamental rights, held by all[15] and not only by the citizens (as is the case for political rights), have been developed in national jurisdictions in principle autonomously, based on own traditions and legal cultures. It should be noted that the states undergoing transformation commonly adopt models and inspiration in the field of human rights from either the experienced democratic constitutions or from international, in particular regional, human rights systems, in order to effectuate the transition from authoritarian regimes, or even from dictatorships, to pluralistic democracies.[16] The ECHR played an extraordinary role in this context, particularly in Central and Eastern Europe countries. This role can be seen in the process of reforming national constitutions or their redrafting. Later references to the ECHR were also frequently made by national constitutional courts, in particular, to the Strasbourg jurisprudence, in order to legitimize and confirm their own constitutional solutions using arguments from a highly respected European institution.[17] As constitutional courts regularly apply only constitutional law, except for procedures where international law is relevant (such as the review of the compatibility of national legislation, as it is foreseen in some countries), the references to the international level acts as such confirmation.

In some systems legislation is reviewed under international covenants and not under national constitutional law, such as in the Netherlands (Article 120 of the Dutch Constitution).[18] This results in regional human rights, as embodied by the

[13] See Slovakia, Chap. 19; Portugal, Chap. 18.

[14] See Great Britain, Chap. 11.

[15] See Italy, Chap. 16.

[16] See Poland, Chap. 20.

[17] See also Portugal, Chap. 18; Slovakia, Chap. 19.

[18] Netherlands, Chap. 14.

ECHR and interpreted by the Strasbourg Court, having a direct impact on the internal legal order while the impact of the own constitution is reduced.[19] Such phenomenon also exists in other countries where the international treaties, in particular those on human rights, prevail over ordinary national law as it is, for example, in France under Article 55 of the Constitution.

Many of the Central and Eastern Europe countries have assumed the monist model where a national law is superseded by international treaty law.[20] It is significant that in some of these countries such primacy model was originally introduced to human rights treaties, and was later expanded to the international treaties. International influence is even greater where an international treaty (e.g. the ECHR) has become a part of the internal constitutional order as, for example, in Austria. A similar situation can be found in Switzerland where the ECHR has a rank of constitutional law: it is evident that Swiss legal thinking is adapting to a great extent to the Strasbourg solutions. In other countries, such as Spain, the international instruments, in particular the Convention, serve as a means of interpretation of internal rights as embodied in the Constitution. Thus, the Constitution itself opens the door for international concepts with the intention of overcoming national legal isolation.

The power of the international order is so mighty that it is able to reform, from outside, deeply rooted traditional systems as, for example, in the United Kingdom. Parliamentary Sovereignty, the supreme constitutional dogma in this country, has become seriously qualified both by the EU law (with the famous *Factortame* case[21]) and by the Strasbourg law which was introduced into the internal legal order about 10 years ago by the Human Rights Act. Functionally, the Human Rights Act mechanisms are destined to override Westminster legislation in case it is incompatible with the Strasbourg Convention. If a higher court states such incongruence, the Minister has to adapt the existing legislation to the Convention with prior or, in urgent cases, subsequent consent of the Parliament. Thus, Westminster legislation is no longer able to avoid being challenged by the courts. Although the courts cannot annul the incompatible laws, they can interrupt their application and launch the process of a reform. Besides the impact of the regional human rights instruments on British law, it should be stated that European continental concepts are adopted by the system which for a long time guaranteed fundamental human rights by common law. In the words of Lord Denning, M.R: European law is "like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back" (*H.P. Bulmer Ltd v. J. Bollinger SA* [1974] Ch 401, 418).

Even in Germany, where the traditional dualist view restrains the full internal deployment of international law, a principle of 'open statehood' has developed (Federal Constitutional Court (FCC), vol. 111, 317/318). Thus, internal legislation

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[19] Ibid.

[20] Poland, Chap. 20 ('general incorporation').

[21] *R v Secretary of State for Transport (ex parte Factortame)* [1990] 2/AC 85, [1991] 1/AC 603.

is interpreted in a way favourable to international and (as the Federal Constitutional Court recently said in the Lisbon Treaty decision) also the European Union law. Primacy of Union law has long since been accepted in the field of fundamental rights (with a certain evolution from *Solange I*[22] to *Solange II*[23]). The recent decisions of the Constitutional Court are not manifestly contrary to this position, but try to ensure the remaining fundamentals of the national sovereignty. Thus, 'constitutional identity', as a core set of principles which cannot be destructed by Union Law, has been declared sacrosanct under the protection of the Constitutional Court itself.[24] The external obligations are fully respected, but on the internal scale there is no primacy of international treaties over national law with regard to the traditional, yet anachronistic dualism. This is also valid for the ECHR. The famous *Caroline von Monaco*[25] and *Görgülü*[26] cases illustrate the possibility of major divergences between the Karlsruhe and Strasbourg jurisprudence on human rights. It was deemed more appropriate to adapt the solution to the national Constitution than to the Convention because the normative context was found to be better elaborated under the former.

In conclusion, it can be said that human rights expressed by national constitutions have developed autonomously, but are found to be increasingly under the influence of international law experience.[27] In a regional integration system, vertical and horizontal impacts and influences can be distinguished which are able to harmonize the human rights protection to a certain extent and by doing so, favour universalism. The vertical impact results in the primacy of the European Union law on national ordinary and even constitutional law. This phenomenon seems to be unique in the European area. The impact, originating from the ECHR, is traditional in its forms; it is an international treaty with a binding force but not primacy in the sense of the EU law. However, functionally, the impact of the Strasbourg Convention goes significantly beyond this and can be said to have a constitution-like character. National constitutional concepts, in reverse, had their significant influence on the shaping and interpretation of the EU and the ECHR human rights (Arnold 2008, 41).

Horizontally, the ECHR exercised much influence on the EU legal thinking and will soon become a formal source of it. EU human rights are recognized by the Strasbourg Court as a high level protection system. The Strasbourg Court declared its trust in the EU human rights system and presumes the compatibility of the EU acts therewith (the *Bosphorus* case).[28] Therefore, it no longer reviews such acts

[22] FFC vol. 37, 271.

[23] FFC vol. 73, 339.

[24] FFC judgment of June 30, 2009 see: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (English translation).

[25] FCC vol. 101, 361.

[26] FCC vol. 111, 307; see Germany, Chap. 15.

[27] See also Hungary, Chap. 22.

[28] No. 45036/98 (complaint), Neue Juristische Wochenschrift (NJW) 2006, 197.

under the ECHR except for the cases of manifest violations. This means that Strasbourg confirms the equivalence of the EU human rights – a further step towards universalism through harmonization and mutual recognition.

1.2 Are Fundamental Rights Binding?

1.2.1 International and Regional Level

This question may be answered shorter than the question of universality as the two issues overlap in part.[29]

What is binding? From the view point of the lawyer, only normative texts are binding in so far as reference can be made to the traditional sources of law. It should be taken into consideration that also non-normative acts which can be called 'soft law' are able to create law: they can be an element of a developing common conviction which leads, if practice follows it, to customary law or constitutes general principles of law.

On the international and regional level, human rights guarantees are laid down by treaties which belong to the sources of law indicated by Article 38 of the Statute of the International Court of Justice. The binding character results from the principle of *pacta sunt servanda*.

It is true that the fully binding force can be relativated by the reservations (or declarations) made by some of the parties to the treaty.[30] The state practice shows numerous examples of such declarations reducing the binding force of the treaties. Under the Vienna Convention on the Law of Treaties, such reservations can be made, but must not affect the "objective and purpose of the treaty" (Article 19 of the Vienna Convention on the Law of Treaties, 1969). Reservations are particularly problematic in the field of human rights. If we look at Article 57 (1) of the ECHR, reservations can only be made prior or with ratification, and not afterwards, and only if they refer in an abstract way to the national laws. Thus, the scope of reservations and equivalent declarations is limited.

On the international law front, reservations as to the international treaties on human rights can be made by the countries which want to uphold their own national solutions. Such reservations attempt to make the treaty protection compatible with internal, in particular, constitutional requirements and to gain acceptance instead of a possible refusal by that state.

Human rights have an inherent tendency to objectivize the values embodied by them[31] and to make them resistant against unfavourable modification by the treaty

[29] See also Ukraine, Chap. 24.

[30] See USA, Chap. 2.

[31] See also Hungary, Chap. 22.

parties. The idea of *jus cogens* increasingly embraces human rights.[32] It can be seen that there develops an objective public order (on the international level and even with more consistency on the regional level) which is no longer dependent on the will of the contracting parties. It is also the reason for occasional reference to such international law as 'constitutional'. The intention is to qualify these norms as basic and inalienable, with particularly binding force as recognised by a state.

1.2.2 State Level

Human rights are regularly embodied in a state's constitution which is the supreme law of the land. They share the binding force of the constitution which prevails over legislation and all other public acts. This binding force results from the hierarchy of norms and is regularly defended by the courts. For the purpose of human rights adjudication, administrative courts, and in so far as the legislator is concerned, constitutional courts, have also an elaborated procedural system for guaranteeing human rights' binding force. Even in the rare exceptions, as in Great Britain where a formal constitution does not exist, the ECHR, as a regional treaty, assures the binding force of human rights in the interior of the state as well.

In the well integrated state system, reservations, which are possible to a certain extent on the international level, cannot be made. Constitutional human rights have an all-embracing binding effect. National constitutions are *per se* objective public orders, which do not allow individual exceptions. The principle of equality which is reflected in the abstract character of legislation and constitution, could not accept an exceptional exemption from binding rules.

The binding force of human rights is not hindered by the fact that in the many cases of conflicts between various human rights as well as human rights and public interests, a weighing out of the conflicting values has to be effectuated. This means a concretization of conflicting principles, which human rights are. The aim of the human rights protection system is reached by an 'optimal' solution which realizes best the human rights' protection in concrete cases. Of course, in this context it should be mentioned that human dignity (despite whatever problems arise in defining it[33]) cannot be weighed out against other constitutional values. It is the very basis of the values system and affecting it would impair the human rights idea as such. So, dignity has a primary binding force.

The binding force of national human rights is not threatened by an integration system where national and multinational, especially supranational, human rights co-exist. If you look at the question of whether German or EU human rights should

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[32] See Ukraine, Chap. 24; Portugal, Chap. 18.

[33] Great Britain, Chap. 11("equal moral worth"); Portugal, Chap. 18; Ukraine, Chap. 24; Slovakia, Chap. 19.

be applicable in EU-related cases to be administered by German authorities, the Federal Constitutional Court has renounced, in its *Solange II* decision of 1986, to apply national human rights and left this task to the supranational level. This is a substitution of a national protection by supranational which does not, abstractly, diminish the binding force resulting from human rights. In integrational systems the instruments at a national level can be replaced by those of the supranational level, given that the basic task of the individual's protection is adequately fulfilled.

A similar consideration can be made as to the conflict of EU human rights with the rights of the Strasburg Convention. As already mentioned, the *Bosphorus* case allowed the non-application of conventional rights if it can be presumed that the EU actions conform to it own supranational human rights. However, this does not relativate the binding force of the Convention.

1.2.3 The Effects of Human Rights Soft Law

Whilst the Universal Declaration of 1948 was not normatively binding, its ideology was extremely influential and turned out to be a specific landmark in the further development of human rights, even in legally binding forms[34]. We can state that the directive effects of normative prescriptions can be reached, to a certain extent, by 'soft law' (non-binding resolutions) which have the power to shape people's conscience. In the field of human rights the most effective steps were done politically and not normatively, that is to say by the non binding 1776, 1789 and the 1948 Declarations. This holds as evidence that many non normative declarations, especially in the field of human rights, should not be underestimated as to their effects; they can even exceed the effects of a binding norm.

In a more advanced stage the threshold from not binding to binding, from formal declaration to normativity, can be crossed.

1.2.4 Human Rights and the Rule of Law

Modern constitutionalism confirms the binding character of human rights by integrating it in a new concept of the rule of law which is value-oriented so that the constitutional guarantee of the rule of law extends also to the guarantee of human rights. A double normative basis can be said to exist: the rights as embodied in constitutional law and the rule of law as a normative concept. The binding character also reflects the judicial attitude of interpreting existing normative texts in a way which is favourable to an individual's protection using the principle of *effet utile*[35] in giving

[34] See USA, Chap. 2.

[35] See also Russia. Chap. 10.

full effect to the written norm. In addition, the judge has taken on the function of expressly completing the human rights protection by interpretation or law development. In this way the normative effect is extended to newly formulated rights. Besides these procedural techniques in interpretation, there can be stated a growing willingness of national constitution makers to introduce specific action forms for defending human rights, such as an individual complaint ('Verfassungsbeschwerde' in Germany[36], 'recurso de amparo' in Spain, the 'Individualanfechtung' in Austria and the many forms of individual complaints in the new democracies in Central and Eastern Europe). The judicial system has been individualized on the national level and in part on the regional levels whereas on the international level only small steps in this direction can be seen.[37] This is due to the fact that an individual is not conventionally a subject of international law.

Human rights can be qualified as binding internationally, regionally and nationally in so far as they constitute a source of law. Also 'soft law' has its important political effects and can serve as the base for future normativity. Limitations to the binding effect can be stated particularly on the international level. On this level the gap between a normative claim and reality is significant. Strengthening the human rights on the regional and, in particular, on the national level has its positive incentives also for the international community.

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No. 45036/98 (complaint), Neue Juristische Wochenschrift (NJW) 2006, 197.

[36] Germany, Chap. 15.

[37] See also Slovakia, Chap. 19; Great Britain, Chap. 11.

Chapter 2
Universal Human Rights in the Law of the United States

Mortimer Sellers

2.1 Introduction

The founding legal principles and separate political existence of the United States of America began with the claim that "all men" are born with certain "unalienable rights," including rights to "life, liberty, and the pursuit of happiness" (Declaration of Independence of the United States of America, July 4, 1776). The United States' Declaration of Independence from Great Britain rested on this assertion that human rights are universal and binding on all human beings, nations, and states and that it is only to secure these rights that governments legitimately exist, so "that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it" (Ibid.). The political architects of the United States believed that by violating fundamental human rights the British king had made himself a "tyrant…unfit to be the ruler of a free people," and therefore subject to replacement by a "new government" more suited to the "safety and happiness" of its citizens (Ibid.). Universal human rights are, will be, and always have been deeply embedded in the law of the United States, and binding in all American tribunals of justice.

There was not at the beginning, is not now, and never can be for Americans any question whether human rights are universal and binding, because universal human rights supply the theoretical foundations that support the U.S. Federal and separate State governments and necessarily provide, in the American view, the ultimate basis of all legitimate government anywhere.[1] John Adams, the leading constitutional lawyer of the American Revolution, took it for granted, as early as 1765, that "many

[1]On American conceptions of rights in the era of independence, *see* Shain (2007), Breen (2001), Reid (1986), Adams (1980), White (1978), White (1978), Dana (1900).

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of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed" (Adams 1865, 463). When the North American States established their own independent governments, most followed Adams' advice by supporting their new written constitutions with detailed declarations of rights, listing some of the "inherent rights," of which no government or state can presume to "deprive" or "divest" its subjects (*VA Declaration of Rights*).

These declarations of the newly independent American States were no innovation. They followed the example of such famous documents as the Pennsylvania Charter of Privileges of 1701 or the Massachusetts Body of Liberties of 1641,[2] and would be replicated on a larger scale by the French *Déclaration des droits de l'Homme et du citoyen* of 1789, the United States Bill of Rights of 1791, and finally the Universal Declaration of Human Rights of December 10, 1948.[3] The Universal Declaration, like the American declarations, threatened "rebellion against tyranny and oppression" unless human rights were "protected by the rule of law" (UDHR 1948, Preamble), and insisted that "all human beings are born free and equal in dignity and rights" (Ibid., Art.1). So intimate is the relationship between universal human rights and the rights protected by the U.S. Constitution, that in the eyes of the U.S. government and courts most international covenants and treaties recognizing universal human rights are simply restatements of existing U.S. law and established constitutional guarantees.[4] To the extent that international documents and scholarly or other interpretations of universal human rights depart from traditional American understandings of these ancient guarantees, American officials have usually preferred their own longstanding precedents to more recent (and less well-established) interpretations of human rights law.[5]

This last point is particularly important in understanding the role that universal human rights play in the legal systems of the United States of America. While there is no question that human rights are universal and binding throughout the United States, there have been strong and persistent disagreements about who has the authority to prescribe or to identify these rights in detail, to enforce their requirements against violations in practice, and to adjudicate legal disputes that arise from their enforcement. There are international, Federal (United States), and State constitutions and declarations purporting to identify and to protect universal human rights, and international, Federal (United States) and State authorities with simultaneous

[2]On these and other antecedents of the American declarations of rights, *see* Schwartz (1992).

[3]For a collection of such texts, *see* Mari (1949 *Cf.*), Morsink (1999).

[4]*See, e.g.,* Message of President Jimmy Carter to the United States Senate, February 23, 1978 (concerning the International Convention on the Elimination of All Forms of Racial Discrimination, signed on behalf of the United States on September 28, 1966; The International Covenant on Economic, Social and Cultural Rights, signed on behalf of the United States on October 5, 1977; The International Covenant on Civil and Political Rights, signed on behalf of the United States on October 5, 1977; and the American Convention on Human Rights, signed on behalf of the United States on June 1, 1977).

[5]*See, e.g., id.* and *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights,* 138 Congressional Record S4781-01 (daily ed. April 2, 1992).

and often overlapping responsibility to implement and protect the fundamental rights of the people. This discussion will consider State, Federal, and international documents and authorities in the order in which they first asserted their jurisdiction through courts, beginning with the separate State institutions.

2.2 Human Rights in the States

The United States of America forms a Union of otherwise independent States, which have delegated certain powers to a Federal government, but reserve the rest.[6] Each of the United States has its own constitution, and each of the State constitutions has its own bill or declaration of rights.[7] The constitutions of five of the most influential States can be taken here as useful and typical examples of these various State provisions. Thus, the Massachusetts (the Massachusetts Constitution, Art. I), Pennsylvania (the Pennsylvania Constitution 1780, Art. I), Virginia (the Virginia Constitution, Art. I), Texas (the Texas Constitution, Art. I), and California (the California Constitution, Art. I) constitutions all contain their own lists of fundamental rights, which are to be protected by courts and public officials (who must take an oath to do so).[8] The State constitutions describe these rights as "natural, essential, and unalienable" (Massachu-setts (the Massachusetts Constitution 1780, Art. CVI)), the "inherent rights of mankind" (Pennsylvania (the Pennsylvania Constitution, Art. 1 §1)), "inherent rights, of which… they cannot, by any compact, deprive or divest their posterity" (Virginia (the Virginia Constitution, Art. I §1)), because "All people are by nature free and independent and have inalienable rights" (California (the California Constitution, Art. I §1)), which must be maintained by their "free and independent State[s], subject only to the Constitution of the United States, and the maintenance of our free institutions" (Texas (the Texas Constitution, Art. I §1)).

The bills and declarations of rights of the existing American States served as the model for the U.S. Bill of Rights, which was added to the Constitution by amendment, as a condition of that document's ratification.[9] Many feared that under the

[6]This point is clarified in the Tenth Amendment (to the US Constitution) (1971).

[7]These may be found easily on-line through the various State websites.

[8]For example, in California all members of the legislature, and all public officials and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, must "before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation." The oath reads: "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter" (Constitution of the State of California, Art. 20). California public officials must further swear or affirm that they belong to no party or organization that advocates the overthrow of the government by force or violence.

[9]Preamble of the "Bill of Rights" as proposed by the United States Congress to the States (March 4, 1789).

new constitution, the U.S. government might "deprive them of the liberty for which they valiantly fought and honorably bled"[10] and wanted the same protections at the federal level of "those safeguards which they have long been accustomed to have interposed between them and the magistrate who exercises the sovereign power" (Madison 1789, 450). James Madison, who proposed the U.S. Bill of Rights to Congress, cited possible threats to liberty not only from the federal executive and legislature, but also from the people of the United States themselves, "operating by the majority against the minority" (Ibid., 455).

The hope expressed for the Federal, as for the State bills of rights, was that the "independent tribunals of justice" would consider themselves to be "the guardians of those rights" (Ibid., 457) and an "impenetrable bulwark" against every improper "encroachment upon rights"(Ibid.) enumerated in the "declaration of the rights" of the people (Ibid.). The most persuasive argument offered against the Federal Bill of Rights was that such lists of rights, however carefully drafted, might seem to "disparage" those rights not explicitly set down (Ibid., 456), James Madison averted this danger by proposing what became the Ninth Amendment to the U.S. Constitution, which provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[11] The citizens of the United States were united from the beginning in seeking to "fortify the rights of the people against the encroachments of the Government" (Madison 1789, 459).

The relationship between the duty of the separate state governments to protect the natural and inherent rights of the people, and the duty of the Federal government to do the same was highly contested at first. The famous Kentucky (Resolutions of the Kentucky Legislature, November 10, 1798) and Virginia Resolutions of 1798 (Resolution of the Virginia Senate, December 24, 1798) denied both that the protection of fundamental rights in the States was the province of the Federal government (Resolutions of the Kentucky Legislature, November 10, 1798, no.3) and that the U.S. government should be the final arbiter of its own jurisdiction in these or any other circumstances (Ibid., Resolution no. 1). Kentucky claimed the right to "nullify" any Federal Acts that overstepped the proper limits of Federal control (Ibid., Resolution no. 8), insisting that "it is jealousy, and not confidence which prescribes limited constitutions" (Ibid.). Both State and the Federal authorities claimed to protect fundamental rights and justice, without being certain at first which jurisdiction had ultimate control.

Chief Justice John Marshall concluded in the famous case of *Barron v. City of Baltimore* (1833) that the "liberty of the citizen" was a subject on which the States remained the judges "exclusively" (*Barron v. Baltimore*) under the U.S. Constitution. Marshall suggested that the purpose of listing fundamental rights in the Federal Constitution was solely to constrain the U.S. government, while the State courts, constitutions and legislature had primary responsibility for keeping their own governments in check (Ibid., 250–251). This did not mean that the fundamental and

[10] James Madison discussed this viewpoint in his speech to the Congress proposing a Bill of Rights. The Annals of Congress, House of Representatives, First Congress, 1st Session (June 8, 1789), 449.

[11] On the Ninth Amendment *see* Farber (2007), Prince (2005), Barnett (1991).

inherent rights of all persons did not apply against the State governments, but rather that the U.S. courts were not responsible for their enforcement against the States' own public officials.[12] The "fundamental" guarantees, "which belong, of right, to the citizens of all free governments," have been enjoyed by the citizens of the American States "from the time of their becoming free, independent, and sovereign," (*Corfield v. Coryell*) and generally protected by the State courts.[13] The famous Federal cases of *Calder v. Bull* (1798) and *Corfield v. Coryell* (1823) confirmed that State governments have a duty to respect "that security for personal liberty, or private property, for the protection whereof government was established" (Ibid.) and to uphold those rights which are "in their nature, fundamental" (*Corfield v. Coryell*).

The United States discovered in the eighteenth and nineteenth centuries what has become apparent to the world since the Second World War, which is that local ("national" or "sovereign") enforcement of the "great rights of mankind" fails in the face of petty prejudice and the parochial self-interest of local ethnic, religious, and political factions.[14] For example, the Court of Appeals of Kentucky held in the case of *Amy, a woman of color, v. Smith* (1822) that "free negroes and mulattoes" are a "degraded race of people" (*Amy, a woman of color v. Smith*) and therefore not entitled to any of those "ordinary rights of personal security and property" enjoyed by others in the Commonwealth (Ibid., 333). The same was true in Tennessee, which considered any "man of color" to belong to an "inferior caste in society" and "scarcely" worthy of enjoying "a single right in common with the mass of citizens of the State".[15] All this, in spite of constitutional clauses in their State bills or declarations of rights, which guaranteed that "no free man shall be… deprived of his life, liberty of property, but by… the law of the land."[16]

The disregard by the southern States in the American Union of the universal or "inherent" rights of humanity, as applied not only to their slaves, but also to free African Americans, led to increasingly sharp conflicts with other States and their representatives in the U.S. legislature, and in the courts.[17] U.S. Chief Justice Roger B. Taney tried to settle the question, and to strengthen the slaveholders' position, by

[12] The Constitution itself referred to the "privileges and immunities of citizens in the several states," the US Constitution (1787), Art. IV § 2.

[13] *See Calder v. Bull* for those acts "which the Federal, or State, Legislature cannot do, without exceeding their authority."

[14] James Madison saw this already when he proposed the Bill of Rights to the First Congress and observed that he thought "there is more danger of those powers being abused by the State Governments than by the Government of the United States." James Madison, in The Annals of Congress, House of Representatives, First Congress, First Session (June 8, 1789), 458. For "the great rights of mankind," *see* 449.

[15] *The State v. Claiborne*, 340–341. "An emancipated slave is called a freeman in common parlance… but in reference to the conditions of a white citizen, his condition is still that of degraded man, aspiring to no equality of rights with white men, and possessing a very few only of the privileges pertaining to a 'freeman'."

[16] Constitution of the State of Tennessee of 1835, Art. I, Declaration of Rights, section VIII. *Cf.* Magna Carta, chapter 39.

[17] For the vast literature on the antebellum conflict over fundamental human rights, *see* Barnett (2004).

extending the reasoning of the *Amy* and *Claiborne* cases to the United States as a whole in the infamous decision of *Dred Scott v. Sandford* (1857) in which Taney argued that the "self-evident" truths of the Declaration of Independence, although they "would seem to embrace the whole human family," were never intended to extend to the "African Race" (*Dred Scott v. Sandford*, 410).

The promotion of such reasoning, and principled resistance against it, let in time to a great Civil War (1861–1865), and ultimately to the passage of three new amendments to the U.S. Constitution, prohibiting slavery (Amendment XIII),[18] extending the vote to African Americans (Amendment XV),[19] and prohibiting the States from depriving "any person of life, liberty, or property, without due process of law" or denying "any person within its jurisdiction the equal protection of the laws" (Amendment XIV).[20] These provisions had the effect of overturning *Dred Scott v. Sandford*, which had protected legal discrimination against African Americans, but also reversed *Barron v. Baltimore*, because the Fourteenth Amendment gave the U.S. Congress the power to enforce the provisions of the amendment "by appropriate legislation" (US Constitution, Amendment XIV, § 5).

The Fourteenth Amendment to the U.S. Constitution did not limit or in any way compromise the separate duty of the governments and courts in each of the States to protect and respect the universal, inherent and inalienable rights of humanity, as recognized by the Declaration of Independence and in the various State constitutions and bills of rights.[21] States continue to apply their own bills and declarations of rights directly, through their own courts.[22] But the imposition of the Fourteenth Amendment gave the Federal government and courts full power to intervene when states invade or fail to protect the "life, liberty, or property" of any person subject to their jurisdiction. State governments and courts can and often do protect rights (including universal rights) more broadly and generously than has yet been required by U.S. courts, but they cannot now diminish the rights of their citizens by narrow or parochial constructions of universal human rights (Linde 1980, 1984).

2.3 Federal Protections of Human Rights

The U.S. government did not at first fully exercise the powers conferred by the Fourteenth Amendment,[23] and even when the United States did act, such action was not at first supported by the courts, which were slow to accept the vastly

[18] The Thirteenth Amendment was ratified on December 6, 1865.

[19] The Fifteenth Amendment was ratified on February 3, 1870.

[20] The Fourteenth Amendment was ratified on July 9, 1868.

[21] *See* Brennan (1986), Brennan (1977).

[22] *See*, e.g. Marshall (2004).

[23] The first major attempt to enforce the Fourteenth Amendment to protect Civil Rights in the States was the Civil Rights Act of 1871 (also known as the "Enforcement Act" or the "Ku Klux Klan Act") (17 Stat. 13).

expanded jurisdiction of the Federal authorities.[24] U.S. courts recognized that some "additional guarantees of human rights" were provided by the Fourteenth Amendment, along with "additional powers" for the Federal government, and the "additional restraints" upon the States (*Slaughter-House Cases*) concerning "fundamental rights" as described in the old case of *Corfield v. Coryell.*[25] But the Court could not at first accept that the Federal government should really have the power to enforce "the entire domain of civil rights heretofore belonging exclusively to the States" (*Slaughter-House Cases*, 77). The whole history of U.S. human rights law since the Supreme Court first interpreted the Fourteenth Amendment in the *Slaughter-House Cases* in 1873 has been the story of gradual progress towards broader acceptance by the Federal Courts and Congress that the Fourteenth Amendment did indeed "radically change[] the whole theory of the relations of the State and Federal governments to each other", (Ibid., 78) by protecting "the rights of person and property" against the arbitrary power of the States (Ibid., 82).

American judges disagreed initially, not about the existence of "natural and inalienable" rights,[26] "which of right belong to the citizens of all free governments" (Ibid., 97), but about whether the Federal Constitution protected these "common rights" against State action (Ibid., 89). Gradually, over decades, Federal judges and other American public officials came to accept that the Fourteenth Amendment "was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes" (Ibid., 105). Put more prosaically, more than a century after the ratification of the Fourteenth Amendment to the U.S. Constitution, the Federal and other courts in the United States now fully accept that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States"[27] through the section of the Fourteenth Amendment which declares that no State shall "deprive any person of life, liberty or property without due process of law." The controlling word in most such cases is "liberty" (*Planned Parenthood v. Casey,* 846).

The protection of liberty "against executive usurpation", "tyranny", and "arbitrary legislation",[28] has been the business of American courts from the beginning, often resting on the ancient promise of the English Magna Carta that "[n]o freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs,

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[24] For example, the Civil Rights Act of 1875 (18 Stat. 335) was struck down as unconstitutional by the United States Supreme Court in *The Civil Rights Cases*.

[25] "Rights which belong of right to the citizens of all free governments" and "embrace nearly every civil right for the protection of which civil government is instituted." Ibid., 75–76. *Cf.* above on *Corfield v. Coryell*.

[26] *See* Field dissent in *Slaughter-House Cases* (1873), 96.

[27] Justice O'Connor, Justice Kennedy and Justice Souter writing for the majority in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), quoting Justice Brandeis' concurring opinion in *Whitney v. California* (1927).

[28] *Planned Parenthood v. Casey*, 847 quoting Justice Harlan, dissenting on jurisdictional grounds in *Poe v. Ullman,* 541 (in which Justice Harlan quoted the case of *Hurtado v. California*, 537).

or be outlawed or exiled, or any otherwise destroyed… but by the law of the land" (Magna Carta 1215, 39). This final phrase, "*per legem terra*", was understood by English whigs and by the American constitutional writers who followed them, to protect life, liberty and property from deprivation except through the "due process of law".[29] Some such protection and guarantee appears in most American State bills of rights, in the U.S. Bill of Rights (Amendment V), and in the Fourteenth Amendment to the U.S. Constitution, which requires that no State shall "deprive any person of life, liberty, or property, without due process of law".

The historical antecedents of the phrases "liberty" and "due process" in the Fourteenth Amendment have colored their interpretation from the beginning. The U.S. Supreme Court,in its most detailed recent discussion of the meaning of the word "liberty" in the Due Process clause of the Fourteenth Amendment, cited the Magna Carta and quoted the phrase "*per legem terrae*" as interpreted by Supreme Court jurisprudence going back to the nineteenth century.[30] The Supreme Court has construed this fundamental "liberty" to encompass most of the rights enumerated in the U.S. Bill of Rights,[31] but also other fundamental human rights, such as the rights to marry (*Loving v. Virginia*, 12), to procreate,[32] to pursue an education,[33] or to enjoy "privacy" as privacy relates to abortion[34] and to homosexuality (*Lawrence v. Texas*, 564). To determine the scope of such rights, U.S. courts have looked to the concepts of "personal dignity" and "autonomy" that are "central to the liberty protected by the Fourteenth Amendment" (*Planned Parenthood v. Casey*, 851).

The U.S. executive, congress, and the courts feel a responsibility to strengthen and to advance the American legal tradition of "liberty",[35] "having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke" (Ibid.). This includes concern for judicial precedents in U.S. courts protecting "personal autonomy", (*Planned Parenthood v. Casey*, 860), but also the protection of other rights implicit in the concept of ordered "liberty" (Ibid., 869). A persistent but isolated minority of judges on U.S. courts has sometimes seen the concept of "tradition" as a limitation on "liberty" and fundamental rights.[36] Such attitudes misunderstand the role of liberty in the American legal tradition, which protects fundamental human rights, not because they are "traditional," but because they are just – and "unalienable" by any person or government official.[37] Tradition,

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[29] *See, e.g.,* Justice Bradley's dissent in the *Slaughter-House Cases* (1873, 50). *Cf.* Planned *Parenthood v. Casey*, 847.

[30] *Planned Parenthood v. Casey*, 847 quoting Justice Harlan's dissent in *Poe v. Ullman*, 541 which itself quoted *Hurtado v. California*, 532.

[31] *See, e.g., Planned Parenthood v. Casey*, 847; *Duncan v. Louisiana*, 147–148.

[32] *See Skinner v. Oklahoma*, 316 U.S. 535, 541–542 (1942).

[33] *See Pierce v. Society of Sisters*, 535; *Meyer v. Nebraska*.

[34] *See Roe v. Wade*, 153; *Planned Parenthood of Pennsylvania v. Casey*.

[35] *See, e.g., Planned Parenthood of Pennsylvania v. Casey*, 850 quoting Justice Harlan dissenting in *Poe v. Ullman*, 542.

[36] *See, e.g.*, Chief Justice Rehnquist dissenting in *Planned Parenthood of Pennsylvania v. Casey*, 981.

[37] *See, e.g.*, the United States Declaration of Independence (1776) on "unalienable rights" and the Constitution of the United States (1787) Preamble on "Justice" and "the Blessings of Liberty".

precedent, and American legal history play a central role in clarifying the meaning of liberty and universal human rights in U.S. courts, not because American legal precedents *create* rights, but because the American legal system and judges, seeking to understand its promise of liberty, have studied individual human rights for so long, so carefully and so well.[38]

The role of American tradition in understanding the meaning of "liberty" becomes particularly important when the U.S. Supreme Court must overturn its own mistaken precedents concerning fundamental rights, as it did recently in the cases of *Lawrence v. Texas* (2003) regarding homosexuality (*Lawrence v. Texas*) and *Roper v. Simmons* (2005) regulating to the death penalty for juvenile offenders (*Roper v. Simmons*). In both cases the Court looked for support to decisions made by State courts interpreting their own bills or declarations of rights, but also to the practices of foreign and international tribunals interpreting universal rights as applied to their own jurisdictions (*Lawrence v. Texas*). When the Supreme Court overturned its own recent precedents (*Bowers v. Hardwick*) to hold in *Lawrence v. Texas* that homosexual adults must be left free to engage in "private conduct in the exercise of their liberty under the Due Process clause of the Fourteenth Amendment to the Constitution" (*Lawrence v. Texas*), the rationale for this holding depended on the Court's own evolving jurisprudence (Ibid., 564–566), but also on the jurisprudence of the European Court of Human Rights, which had recognized similar protection of consensual homosexual conduct under the European Convention on Human Rights.[39] The *Roper v. Simmons* case invalidating the juvenile death penalty in the United States cited the United Nations Convention on the Rights of the Child (to which the United States is not a party) (*Roper v. Simmons*, 576) and the views of "leading members of the Western European community" (Ibid., 561).

Cases such as these, interpreting the fundamental requirements of "liberty" under the Due Process clause of the Fourteenth Amendment to the U.S. Constitution, cite foreign opinions to establish "civilized standards" (Ibid.), not because the opinion of the world community "controls" the outcome of American cases (Ibid., 578), but because "the express affirmation of certain fundamental rights by other nations and peoples… underscores the centrality of those same rights within our own heritage of freedom" (Ibid.). American judges interpreting "values we share with a wider civilization" (*Lawrence v. Texas*, 576) have been guided in some cases by foreign jurisdictions towards better understanding which rights (or which applications of known rights) should be protected "as an integral part of human freedom" (Ibid.). This direct reference by American courts to the fundamental and inalienable requirements of human liberty is often described (and sometimes criticized) as establishing the "substantive" due process of law.[40]

The U.S. Constitution was intended by its drafters to constitute, and accepted by the States that ratified it as having constituted, the "Supreme Law of the Land" not

[38] *See Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992).

[39] Ibid., 573 citing *Dudgeon v. United Kingdom*, par. 52.

[40] Justice Scalia dissenting in *Lawrence v. Texas*, 593.

only in itself, but also through all laws or treaties made under its provisions (US Constitution, Art. VI). With the ratification of the Fourteenth Amendment in 1868, the U.S. Supreme Court became the final arbiter of all "fundamental rights" requiring judicial protection under the concept of "liberty" confirmed by the due process clause of the U.S. Constitution.[41] To understand which rights liberty requires, judges and other officers of the State have looked to the U.S. Bill of Rights (*Roper v. Simmons*, 555), to the practices of the American State governments and courts (Ibid., 568), to the opinions of the broader world community (Ibid., 576, 578), and directly to the "purpose and function" of liberty and rights in the "constitutional design" (Ibid., 560). This allows judicial and other public understandings of the rights protected by constitutional liberty to "evolve" as society "progresses" and "matures" (Ibid., 561).

2.4 International Human Rights Standards

The U.S. Supreme Court puzzled some observers when it cited the United Nations Convention on the Rights of the Child (a treaty the United States never ratified) (Ibid., 576) and the International Covenant on Civil and Political Rights (to which the United States had made a specific reservation on this precise issue) (Ibid.) in concluding that the imposition of the death penalty on juveniles under State law would violate "liberty" rights protected by the Fourteenth Amendment.[42] Such references by American courts to treaty provisions that are not in themselves directly binding on the United States raises the broader question how American courts, legislators, and government officials apply generally accepted international human rights standards to American circumstances (Ibid.). American courts and American public officials have usually weighed foreign evidence of the requirements of universal human rights according to the legitimacy, importance, and probative value of the treaty, judicial decision, custom, or academic opinion advanced to substantiate the suggested universal standard.[43]

The use by American courts (and other public officials) of non-American authorities to better understand fundamental rights protected by the U.S. Constitution reflects a broader American tradition of looking beyond purely American precedents to clarify the requirements of international law.[44] The most detailed exposition of this American attitude was set out by the U.S. Supreme Court in the case of

[41] On the Fourteenth Amendment *see* Epps (2006), Nelson (1988), Curtis (1986).

[42] See the florid dissent of Justice Scalia in *Roper v. Simmons*, 622 for his strongly worded objections to considering the views of such "like-minded foreigners" (Ibid., 608).

[43] *Roper v. Simmons*, the most prominent recent case to make such a judgment, looks to the "express affirmation of certain fundamental rights by other nations and peoples" to underscore "the centrality of those same rights within our own heritage of freedom" 543 U.S. 551, 578.

[44] For the early history, *see* Janis (2004).

The Paquete Habana in 1900, which negated the seizure of two Cuban fishing boats as contrary to the law of nations (*The Paquete Habana*). To substantiate this "rule of international law" against the seizure of coastal fishing vessels, even in time of war, the Supreme Court referred *inter alia* to the practices of English and French kings (Ibid., 687), to treaties among various European nations (Ibid., 687–688), to French declarations (Ibid., 688–689), to a U.S. treaty with Prussia (Ibid., 690–691), and to Richard H. Dana's edition of Henry Wheaton's treatise on the *Elements of International Law* (Ibid., 691). The Court suggested that taken together such authorities tend to indicate a consensus among "civilized nations" concerning the requirements of international law (Ibid., 686). The concept of what constitutes a "civilized nation" is to a large extent circular, but still plays a significant role in Supreme Court jurisprudence concerning fundamental human rights.[45] Foreign States that generally respect universal human rights and the requirements of international law thereby show themselves to be "civilized", and their views and practices are taken as good evidence of what fundamental human rights and international law require of them and others.[46]

Courts (and others) in the United States have long recognized that "international law is part of our law" and "must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented" for determination (*The Paquete Habana*, 700), but U.S. Federal and State courts will generally look to the controlling acts of Federal executive or legislative authorities to determine the requirements of international law in practice (Ibid.). This reflects in part the natural deference of the judiciary to legislative and executive authority, but also the positive grant to Congress by the U.S. Constitution of the power "to define and punish… offenses against the law of nations" (US Constitution, Art. I §8). This can lead to serious tension, where congressional or executive conceptions of the requirements of international law are at variance with the more widely held views or practices of other nations. But even in such cases, when they concern universal human rights, the positive requirements of existing U.S. laws and the Constitution have usually been sufficient to maintain general compliance with widely accepted international standards.[47]

The most difficult question facing Americans and U.S. Courts in seeking to implement universal human rights in practice has been to determine which international institutions or foreign (or American) authorities deserve deference (or at least consideration) in specific cases.[48] For example, in the recent case of *Medellin v.*

[45] *See Roper v. Simmons*, 561 citing *Thompson v. Oklahoma*, 826.

[46] The Supreme Court usually looks to "the Western European community" and to "other nations that share our Anglo-American heritage", Ibid.

[47] *See, e.g., Hamdan v. Rumsfeld*, which relied on Federal law and the Uniform Code of Military Justice to require the U.S. government to respect the humanitarian requirements of the Geneva Conventions.

[48] *See, e.g.,* "The Use of Foreign Law in American Constitutional Adjudication: A Revealing Colloquy between Justices Scalia and Breyer" on the American University website and discussed in Dorf (2006, 213–219).

Texas, the U.S. Supreme Court concluded not only that the International Court of Justice had no binding authority to order the review and reconsideration of Texas State court convictions and, ensuing death-penalty sentences, as violations of the Vienna Convention on the Law of Treaties, but also that the President of the United States had no authority to require Texan compliance with what he judged to be the nation's binding obligations under international law (*Medellin v. Texas*). The underlying conflict arose from a difference of opinion between American and Mexican public officials about the right to life as applied to the death penalty, but this difference expressed itself in jurisdictional claims relating to the proper domain and democratic legitimacy of the International Court of Justice.[49] The Supreme Court held in the *Medellin* case both that the judgments of the International Court of Justice are *not* directly enforceable as domestic law in the United States (*Medellin v. Texas*, 1353) *and* that the President of the United States cannot order the States to treat them as such (Ibid.) without first securing Federal implementing legislation to give separate domestic effect to international obligations already created by the treaty itself (Ibid., 1357).

The *Medellin* case is particularly revealing, because the Supreme Court stressed the significance of the United States' Security Council veto in limiting the authority of the International Court of Justice (Ibid., 1359). The United States has not, and according to this rationale, *should not* cede the same authority to the United Nations or to its organs that the States ceded to the Federal government with the ratification of the Fourteenth Amendment to the U.S. Constitution (Ibid., 1360). Certain international tribunals may enjoy a special status because of implementing legislation enacted by Congress, but otherwise their power is (and should be) limited (Ibid., 1365–1366). Even the President of the United States may not act in such cases, without prior Congressional legislation that would empower him to do so (Ibid., 1367–1368). The pronounced aversion of U.S. courts and public officials to ceding final control over the meaning or interpretation of international law or human rights guarantees to foreign authorities or to international tribunals might seem at first to contradict the insight of the Fourteenth Amendment that local perceptions of universal human rights are necessarily incomplete.[50] What makes the circumstance different (from the American perspective) is that international tribunals have not yet secured the judicial autonomy or democratic legitimacy of the U.S. Supreme Court or other institutions of the U.S. Federal government.[51]

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[49] On American worries concerning the democratic legitimacy and general reliability of international courts, *see* Amann (2002, 381).

[50] Ibid., 1367. "Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections'."

[51] European Courts have showed a similar hesitancy to defer to less-than-democratic international institutions in cases affecting fundamental human rights, *see* the joined cases of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*

U.S. attitudes towards the International Criminal Court provide a striking recent example of American distrust of what some perceive as the insufficiently liberal and democratic foundations of many international institutions.[52] The U.S. government refused to ratify the Rome Statute establishing the International Criminal Court (ICC) on the theory, as it was expressed in the U.S. Senate, that ICC decision-making "will not be confined to those from democratic countries with the rule of law".[53] The fear was that since each state party to the ICC has one vote in the Assembly of States Parties (*Rome Statute of the International Criminal Court*, 1998, Art 112), this will make the selection and removal of the prosecutor and judges (Ibid., Arts. 36(6)(a); 42(4); 46(2)(a); 46(2)(b)), the development of the rules of procedure and evidence (Ibid., Arts. 9(a), 51(1)), and the alteration of the treaty through amendment (Ibid., Arts. 121, 122) all ultimately subject to the influence of undemocratic and illiberal regimes (Amman, Sellers 2002, 389). As a general rule the United States has been hesitant to cede judicial, legislative, or enforcement authority to any international institution or tribunal that is not subject (as in the United Nations) to the veto power of the United States.[54]

The confidence of Americans in their own constitutional protections of universal human rights has been so great that the United States has joined in proposed international articulations or clarifications of universal human rights only with the greatest reluctance, always taking care to maintain its own existing Federal constitutional understandings intact.[55] Whenever the United States has taken the unusual step of ratifying an international treaty governing or defining universal human rights, the motive has been to encourage greater respect for fundamental rights in other nations, rather than to change existing American constitutional guarantees.[56] For example, when the United States ratified the International Covenant on Civil and Political Rights, it was with express reservations preserving existing American conceptions of the right of free speech,[57] the right to life (Ibid., I(2)), the prohibition of cruel or degrading treatment or punishment (Ibid., I(3)), the punishment of juvenile offenders (Ibid., I(5)), and racial and other discrimination (Ibid., II (1)), as well as a general statement that "Nothing in this covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States" (Ibid., IV).

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[52] On American attitudes towards the International Criminal Court, *see* Amann, Sellers (2002).

[53] "Is a U.N. International Criminal Court in the National Interest?" Hearing on the International Criminal Court before the International Operations Subcommittee of the U.S. Senate Foreign Relations Committee (July 23, 1998) (statement of Senator Rod Grams).

[54] See *Medellin v. Texas* and particularly the remarks by Chief Justice Roberts quoted *supra*, n. 147.

[55] *See, e.g.,* Message of the President of the United States, Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. Docs. C, D, E and F, 95th Congress 2d. Session, III (February 23, 1978).

[56] *See, e.g.,* the statement of the American delegate Eleanor Roosevelt, *On the Adoption of the Universal Declaration of Human Rights*, Nations General Assembly (December 9, 1948).

[57] *See* U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Congressional Record S4781-01 (daily ed., April 2, 1992), I(1).

The United States ratified the United Nations conventions against Torture,[58] against the Crime of Genocide,[59] and against All Forms of Racial Discrimination,[60] but all with restrictive reservations, declarations, and understandings similar to those that applied in the case of the Covenant on Civil and Political Rights. These American reservations protect existing understandings of the U.S. Bill of Rights, while also usually providing that rights treaties will in any case be "non-self-executing", requiring that implementing legislation must pass through the U.S. Congress before U.S. courts will apply the provisions of international human rights conventions directly to U.S. cases and controversies.[61] The general policy of the United States with respect to all new multilateral human rights treaties has been to view the great majority of their substantive provisions as consistent with the existing Constitutions and laws of the United States, but to the extent that the treaties are not consistent with existing practice, to require a modifying reservation, understanding or declaration before giving the treaty legal effect in the Courts of the United States (Ibid.).

2.5 Conclusion and Prospects for the Future

The courts and people of the United States have been committed throughout their history to the proposition that human rights are universal, binding, and enforceable by law – or even by extra-legal action and revolution when rights are not protected fully by the State. Americans and American judges have also become accustomed through their own history and in light of the American experience of oppression, revolution, and civil war to cede jurisdiction over the protection of fundamental rights to inter-State institutions, such as the U.S. Congress and the Federal judiciary. Americans demanded, when they created their Federal Union, that the U.S. Constitution should guarantee the same protections of inalienable human rights already present in their own State constitutions, and they required in due course that the United Nations Organization also declare its commitment to fundamental human rights (Charter of the United Nations 1945, Preamble) and protect the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Ibid., Art. 55).

The first U.S. delegate to the United Nations General Assembly, Eleanor Roosevelt, played a leading role in securing the creation and unanimous approval of

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[58] *See* U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Congress, 2d session in 136 Congressional Record S17486 (October 27, 1990).

[59] *See* U.S. Reservations, Declarations, and Understandings, Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Record S1355-01 (February 19, 1986).

[60] *See* U.S. Reservations, Declarations, and Understandings, International Convention on the Prevention of All Forms of Racial Discrimination, Congressional Record S14326 (June 24, 1994).

[61] *See* Message from the President of the United States, Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. Docs. C, D, E and F, 95th Congress 2d. Session, III (February 23, 1978).

the Universal Declaration of Human Rights in 1948 (Glendon 2001). Speaking on behalf of the United States to the General Assembly of the United Nations, Roosevelt embraced the Universal Declaration as a "great event… in the life of mankind" (Roosevelt, December 9, 1948) and expressed her nation's hope that "this Universal Declaration of Human Rights may… become the International Magna Carta of all men everywhere", a document as significant for all humanity as the Bill of Rights had been for the people of the United States (Ibid.), Then, as now, the U.S. government embraced "basic principles of human rights and freedoms", applicable to "all peoples of all nations", without wishing thereby to alter in any way American law or the existing "legal obligation" of the United States (Ibid.).

The American commitment to liberty and inalienable human rights that animated the Revolution, the constitutions (State and Federal), and the legal systems of the United States, has two primary components: substantive and procedural. The substantive rights of humanity are enumerated (to the extent that this is possible) in the State declarations of rights, the U.S. Bill of Rights, and the international covenants and Universal Declaration of Human Rights. The procedural commitments to democratic deliberation, to the separation of powers, to legislative and executive checks and balances, and to an independent judiciary have been much more important in securing the rights and liberty of American citizens. As James Madison well expressed it in the *Federalist*, explaining the U.S. Constitution to the People of New York, "parchment barriers" against despotism will not be effective without "divided and balanced" institutions, so that each part of government can effectively "check" and "restrain" the excesses of the others (Madison 1788).

The independence of the judiciary has played a particularly important role in the procedural protection of universal human rights in the United States, since judges have always had the last word in interpreting the U.S. Constitution, including the Fourteenth Amendment's guarantees of "liberty" and the "due process of law".[62] The drafters of the U.S. Constitution made sure that judges would serve "during good behavior" (US Constitution, Art. III §1), which is to say for life, and that their salaries "shall not be diminished" during their continuance in office (Ibid.). Americans knew (and know) this to be "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws" (Hamilton 1788).

Alexander Hamilton, in his *Federalist* essays in favor of the U.S. Constitution, praised judicial independence and long judicial terms in office as an "excellent barrier" against despotism (Ibid.), and insisted (quoting Montesquieu) that "there is no liberty if the power of judging be not separated from the legislative and executive powers."[63] Then, as now, judges in the United States needed "complete independence"

[62] This judicial authority was famously confirmed by the United States Supreme Court in the case of *Marbury v. Madison* (1803), when Chief Justice John Marshall declared for the Court that "It is emphatically the province and duty of the judicial department to say what the law is" and reiterated that "the Constitution is superior to any ordinary act of the legislature."

[63] Ibid., citing Charles de Secondat, 181.

to exercise properly their power “to declare all acts contrary to the manifest tenor of the Constitution void” (Hamilton 1788). The framers of the U.S. Constitution knew that “without this, all reservations of particular rights or privileges would amount to nothing” (Ibid.). Alexander Hamilton and other architects of the U.S. legal system saw the independence of judges as absolutely necessary to protect the “rights of individuals” against “serious oppressions of the minor party in the community” (Ibid.). None of this could be expected “from judges who hold their offices by a temporary commission” (Ibid.).

United States judges interpreting the United States Constitution in United States Courts have been the greatest guardians of fundamental human rights throughout the history of the United States of America, and they are unlikely to cede their jurisdiction to international institutions until the procedural safeguards of liberty in international organizations, courts and tribunals have reached a considerably higher stage of development.[64] American States have ceded ultimate authority over the universal and inalienable rights of their people to the Federal government, which establishes a precedent for similar deference to international courts, but the limited terms in office of judges on most international tribunals,[65] and the participation of illiberal and undemocratic regimes in the selection of judges,[66] makes it unlikely that any such American move towards global federation will take place at any time in the near future.

The U.S. Supreme Court is the final arbiter of the fundamental rights required by liberty and the due process of law under the Fourteenth Amendment to the U.S. Constitution, and the highest State courts have similar authority over their own bills and declarations of rights. But these documents, in both instances, depend ultimately upon universal and inalienable liberties, which apply to all peoples, everywhere. American judges and public officials are far more likely to *refer* to the *substantive* views of foreign and international authorities on the requirements of universal human rights than they are to *defer* to their *procedural* authority. Because “liberty” is an absolute and universal value, guaranteed by the U.S. Constitution, American judges properly can and often do consider international and foreign perceptions of liberty and fundamental human rights, including views expressed in documents and tribunals to which the U.S. has never been a party.

Human rights are universal and binding in United States law and United States courts. They are protected by each of the States in their separate bills and declarations of rights, by the Federal government in the U.S. Bill of Rights and Fourteenth Amendment, and by the law of nations, which is part of the law of the United States and of the law of each of the States in the Union. To understand the requirements of liberty and the fundamental and inalienable rights of humanity, United States Courts

[64] *See* the remarks of Chief Justice Roberts in *Medellin v. Texas*, 1367.

[65] Judges on the International Court of Justice serve for renewable nine-year terms. *Statute of the International Court of Justice*, Art. 13 (1).

[66] Judges on the International Court of Justice are elected by the General Assembly and Security Council of the United Nations, Ibid., Art. 4 (1).

and public officials consider all sources that illuminate the requirements of "life, liberty, and the pursuit of happiness", including international conventions and foreign judicial opinions. International courts and international organizations cannot, as yet, exercise effective jurisdiction, judicial or otherwise, over the law of the United States, even as it applies to fundamental human rights, but United States law itself incorporates the requirements of universal human rights. "A decent respect to the opinions of mankind" has always illuminated American understandings of the rights of Americans (Declaration of Independence 1776). The law of the United States seeks to secure the "Blessings of Liberty" for all its subjects (US Constitution, Preamble).

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Chapter 3
Diversité culturelle et droits de la personne: la situation au Canada*

Frédérique Sabourin

La doctrine établit parfois une distinction entre les droits et les libertés[1] et, parmi les droits, entre ceux qui seraient fondamentaux et les autres. Ainsi, certains droits auxquels les États ne peuvent déroger constitueraient le coeur de la protection internationale des droits de la personne[2] (droit à la vie, prohibition de la torture et de l'esclavage, par exemple) (Kindred et Saunders, 898). Mais là encore on peut s'interroger sur les contours précis de ces droits plus fondamentaux : ainsi, par exemple, la prohibition de la torture ne se limite pas pour un État aux personnes situées sur son territoire mais commanderait d'obtenir d'un État étranger des assurances sur le sort réservé aux personnes qui y sont extradées,[3] refoulées ou qui y sont emprisonnées.[4] Par ailleurs, les particularismes locaux pourraient être tolérés en autant qu'ils portent sur des détails et non pas sur l'essentiel de ce qui constitue les droits de

* Le présent texte constitue une version considérablement réduite du rapport national canadien sur le thème intitulé « Les droits de l'Homme, sont-ils universels et normatifs? » préparé pour le XVIII congrès de l'Académie internationale de droit comparé, tenu à Washington du 25 juillet au 1er août 2008. L'auteure tient à exprimer toute sa gratitude envers ses collègues: Mes Isabelle Harnois, Dominique Jobin, Gilles Laporte, Sonia Pratte et Edouard Serbenco, ainsi que Pierre-Christian Labeau, avocat chez Ogilvy Renault, et le professeur Peter Leuprecht pour leurs judicieux commentaires. Toutefois, les opinions émises dans cet article n'engagent que l'auteure.

[1] Voir Gaudreault-Desbiens (2006, 260) et les juges minoritaires dans *R.* c. *Sharpe*, [2001] 1 R.C.S. 45.

[2] Au Canada, cette expression est préférée à celle de "droits de l'Homme" alors que le "droit humanitaire" vise les règles relatives aux conflits armés.

[3] *Németh* c. *Canada (Justice)*, 2010 CSC 56 (25 novembre 2010); *Gavrila* c. *Canada (Justice)*, 2010 CSC 57 (25 novembre 2010).

[4] Voir notamment *Canada (Affaires étrangères et Commerce international Canada)* c. *Khadr*, [2010] 1 R.C.S. 44.

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la personne.[5] Pourtant les différents organes chargés de la surveillance des traités auxquels le Canada est partie lui reprochent régulièrement le manque d'uniformité dans la mise en oeuvre des droits qu'ils protègent. Qu'en est-il au juste?

3.1 Traités et droit canadien

Le Canada est membre de l'ONU, de l'UNESCO, de l'Organisation internationale du travail (OIT), de l'Organisation des États américains (OÉA)[6] et est partie à un ensemble de traités multilatéraux (pactes, conventions, protocoles) relatifs aux droits de la personne issus de ces différentes organisations.[7] Ces organisations produisent également des textes sans valeur juridique normative à moins de les considérer comme donnant naissance à une « norme coutumière ».[8]

[5]Le rapporteur général, le professeur Arnold, pose ainsi la question dans son questionnaire à l'intention des rapporteurs nationaux: "Does universality mean equal protection standards as to the core of human rights whereas the divergences in traditions and culture can be accepted in details which are not of basic importance?". Voir également Kindred et Saunders, (2006, 849–850).

[6]Les conventions de l'OÉA introduisent parfois des divergences par rapport aux normes universelles. Or, pour un État dualiste comme le Canada qui doit introduire les normes au niveau national pour que celles-ci soient génératrices de droit, ces divergences compliquent singulièrement sa tâche. Malgré les défis auxquels ils ne manquent pas de faire face, défis qu'ils partagent avec les organisations universelles, les systèmes régionaux sont, de l'avis de plusieurs, plus efficaces que ces dernières. Il ne s'agit pas nécessairement de duplication lorsque les mêmes problématiques sont abordées au niveau régional et global, car il y a moins de systèmes différents au niveau régional et les problématiques peuvent y être abordées plus en profondeur. Les divergences entre les organisations universelles d'une part et les organisations régionales d'autre part peuvent susciter de saines stimulations entre les gouvernements et permettre le développement de meilleurs instruments, mais également engendrer des conflits de conventions. Cependant, le Canada semble favoriser une implication dans les organisations internationales, plutôt que dans les organisations régionales, comme l'OÉA. Voir Sabourin (2009).

[7]La professeure La Violette a recensé 31 conventions internationales de droits de la personne que le Canada n'a pas ratifiées bien qu'elle reconnaisse le bien-fondé de cette décision dans certains cas. Ainsi, le Canada n'est pas partie à la *Convention américaine relative aux droits de l'homme* malgré que celui-ci soit membre de l'OÉA depuis maintenant une décennie et que cette Convention soit le principal instrument de l'OÉA en matière de droits de la personne. L'un des principaux arguments militant en faveur de ce que le Canada devienne partie à la Convention, n'est pas tant qu'elle offre des garanties particulières en matière de droits de la personne, mais qu'elle permettrait au Canada de participer plus intimement au réseau des droits de la personne de l'OÉA. Toutefois, des inquiétudes ont été soulevées au Canada au sujet notamment de l'article 4 de la Convention selon lequel les États sont tenus de protéger le droit à la vie à partir du moment de la conception. Au Canada, il n'existe pas de loi réglementant l'avortement. En outre, le droit canadien ne reconnaît pas à l'enfant à naître la qualité de personne juridique titulaire de droits. Suivant E. Eid, une clause de réserve ou une déclaration d'interprétation soigneusement libellée pourrait apaiser les objections, bien que la présence de réserves relativement aux traités sur les droits de la personne soit généralement dénoncée : E. Eid, (2001-1).

[8]Le droit international coutumier fait partie du droit commun du pays – quoiqu'à ce titre, il cède le pas aux lois du pays valides qui couvrent le même sujet, voir *R.* c. *Hape*, [2007] 2 S.C.R. 292. La *Déclaration universelle des droits de l'homme* de 1948 pourrait être un exemple de droit coutumier. La *Déclaration des droits des peuples autochtones,* qui a été adoptée par 143 votes contre 4 dont précisément le Canada (Australie, Canada, Nouvelle-Zélande, et les États-Unis), pourrait en être un autre exemple. Le 12 novembre 2010, le gouvernement du Canada a officiellement appuyé la Déclaration des Nations Unies sur les droits des peuples autochtones dans le respect intégral de la Constitution et des lois du Canada.

Le Canada est également membre du Commonwealth et de la Francophonie, organisations qui œuvrent à la promotion des droits et libertés fondamentaux par l'intermédiaire de déclarations, plans d'action, programmes et autres instruments non juridiquement contraignants sur le plan international. Enfin, le statut d'observateur au Conseil de l'Europe a été accordé au Canada le 3 avril 1996.

Le Canada étant un pays de tradition dualiste, les conventions doivent être introduites en droit interne pour y être applicables (Arbour et Parent, 161 à 164, 171 et s; Brownlie, 47-48). La responsabilité de cette introduction relève du fédéral ou du provincial, selon le législateur qui a compétence en la matière en vertu de la Constitution canadienne.[9] Au fédéral[10] et au Québec,[11] la convention internationale, une fois adoptée, est déposée à la Chambre des communes, dans le cas du fédéral, et à l'Assemblée nationale, dans le cas du Québec. Par la suite seulement, le Canada ou le Québec peuvent contracter des obligations juridiques à l'égard de la convention par la signature ou l'adhésion, dans le cas du fédéral, ou par la prise d'un décret pour se déclarer lié, dans le cas du Québec.[12] Le mécanisme par lequel les autres provinces canadiennes que le Québec et les territoires contractent des obligations à l'égard des instruments internationaux est plus informel et n'implique généralement que le pouvoir exécutif.

Pour éviter d'être responsable sur la scène internationale d'obligations qu'il ne peut pas respecter, le gouvernement fédéral a adopté la pratique de consulter les provinces et territoires et d'obtenir leur consentement avant de signer et de ratifier des traités qui, en tout ou en partie, touchent aux compétences de ces derniers. En ce qui concerne les traités dans le domaine des droits de la personne, cette pratique a été officialisée en 1975 dans un accord conclu au cours d'une rencontre des ministres fédéraux et provinciaux responsables des droits de la personne. Les différents gouvernements canadiens se sont, en outre, entendus sur leur participation à la préparation de rapports périodiques et de réponses aux observations des organismes de protection des droits de la personne créés par les traités, quand des éléments de ces rapports et de ces réponses les concernent. En plus, ils participent à la préparation de réponses aux plaintes ayant trait à leurs lois et à leurs programmes. Afin de disposer d'un organisme de communication et de consultation entre les divers gouvernements en ce qui a trait aux obligations du Canada en matière de droits internationaux de la personne, les ministres présents à la conférence de 1975 ont également créé le Comité permanent de hauts fonctionnaires chargés des droits de la personne, composé de fonctionnaires représentant les ministères fédéraux concernés ainsi que chacun des gouvernements provinciaux et territoriaux.[13]

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[9] *Procureur général du Canada* c. *Procureur général de l'Ontario*, [1937] A.C. 326 (arrêt dit des conventions de travail).

[10] Voir, pour une perspective de droit comparé, Harrington.

[11] *Loi sur le ministère des Relations internationales* modifiée en 2002. Seuls les engagements internationaux importants sont déposés à l'Assemblée nationale.

[12] Au fédéral, la résolution d'approbation qui peut en résulter n'a aucune portée juridique même si sa valeur politique est indéniable: Arbour et Parent (2006, 173). Au Québec, la motion de l'Assemblée nationale rejetant l'instrument international constituerait un obstacle juridique à la prise d'un décret par le gouvernement pour se déclarer lié.

[13] Les ministères fédéraux concernés sont principalement le ministère de la Justice, celui des Affaires étrangères et Commerce international Canada (MAECI) ainsi que celui du Patrimoine canadien.

Ce comité se réunit deux fois l'an mais des échanges ont lieu régulièrement en marge de ces réunions.

La presque totalité des conventions relatives aux droits de la personne qui lient le Canada ne font pas l'objet de lois qui incorporeraient le texte des dispositions des conventions en droit interne, bien qu'elles fassent l'objet de guides, directives, politiques, programmes et de législations.[14]

> Cela est souvent dû au fait que les mêmes obligations sont prévues dans d'autres instruments de droits de la personne internationaux ou canadiens. Par exemple, le *Pacte international relatif aux droits civils et politiques* et la *Convention relative aux droits de l'enfant* comprennent une certaine forme de garantie de liberté d'expression. Légiférer pour intégrer ces différentes formes de liberté d'expression – qui sont rédigées de façon différente – pourrait générer des incohérences ce qui, au minimum, consisterait en une politique législative confuse. N'oublions pas également que toutes ces différentes dispositions législatives sur la liberté d'expression seraient sujettes à la garantie prévue à la *Charte canadienne des droits et libertés*. Quand la même garantie existe au plan national, il ne semble pas y avoir besoin d'incorporer expressément la garantie internationale (Eid, 2001-2, 3).

En effet, la convention n'a pas besoin d'être intégrée en législation si le droit interne y est déjà conforme. Bien qu'en cas d'incompatibilité, le droit interne prévaut sur le droit international, à notre connaissance, le droit interne n'a jamais été déclaré incompatible avec les droits de la personne au niveau international puisque les tribunaux canadiens tentent d'interpréter le droit interne d'une manière qui puisse respecter l'engagement contracté sur la scène internationale. Comme l'a indiqué le juge Dickson, « il faut présumer, en général, que la Charte [canadienne] accorde une protection à tout le moins aussi grande que celle qu'offrent les dispositions similaires des instruments internationaux que le Canada a ratifiés en matière de droits de la personne ».[15]

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[14]Comme l'indique E. Eid, avant la ratification d'un traité par le Canada, des fonctionnaires procèdent à l'examen et à l'analyse des lois existantes afin de déterminer si elles doivent être modifiées ou si le pays doit en adopter de nouvelles pour se conformer aux dispositions du traité, ou encore si le Canada doit émettre une réserve ou une déclaration interprétative au moment de la ratification (Eid, 2001-2, 4-5). À titre d'illustration, une nouvelle infraction a été ajoutée au *Code criminel* afin de permettre au Canada de ratifier la *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*. Une compétence universelle a ainsi été attribuée pour juger de la torture au Canada. Dans le cas de la *Convention relative aux droits de l'enfant*, la détention des jeunes avec les adultes et l'adoption coutumière autochtone ont fait l'objet de réserves plutôt que de modifications.

Cependant, après la ratification, le Canada n'a pas de système de vérification continue des mesures législatives proposées pour assurer leur compatibilité avec les obligations découlant de traités. Bien qu'il existe certains processus visant à examiner les projets de loi canadiens en vue de vérifier leur conformité aux droits de la personne, ces examens ne tiennent habituellement pas compte des obligations internationales du Canada en matière de droits de la personne. Il arrive que certaines commissions, comme la Commission canadienne des droits de la personne et la Commission de la protection des droits la jeunesse et des droits et libertés de la personne du Québec (CPDJDP), dans le cadre de leurs mandats respectifs, examinent certains projets de loi et que, ce faisant, elles incorporent dans leurs analyses le droit international en matière de droits de la personne. Voir *Rapport du Comité sénatorial permanent des droits de la personne*.

[15]Juge Dickson dans *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, 349. Comme le souligne Weiser, mis à part ce commentaire du juge Dickson repris dans *Slaight Communications inc.* c. *Davidson*, [1989] 1 R.C.S. 1038, 1056-7, la Cour suprême n'a jamais établi clairement la distinction entre les normes juridiquement contraignantes et celles qui ne le sont pas: Weiser (2004, 141, note 100).

La *Charte canadienne des droits et libertés de la personne (Charte canadienne)*[16] protège les libertés fondamentales,[17] les droits démocratiques,[18] le droit de se déplacer et de s'établir d'une province à une autre au Canada,[19] les garanties juridiques,[20] les droits à l'égalité,[21] les droits linguistiques[22] et les droits des

[16] Voir « Le système de justice du Canada » sur le site internet du ministère de la Justice du Canada. Certains critiquent la Charte à cause des effets affaiblissants du langage abstrait des droits et de la nature intrinséquement antagoniste de ce language qui, à leurs avis, contribue à la fragmentation du Canada; voir Blattberg (2008, 188; 2004, 122–127).

[17] Tels le droit de pratiquer n'importe quelle religion ou de n'en pratiquer aucune, d'exprimer sa pensée, de se réunir pacifiquement en groupes et de s'associer, à condition de ne pas enfreindre les droits juridiques et constitutionnels des autres. La liberté des médias d'imprimer et de diffuser des nouvelles et d'autres informations est également garantie par la Charte, à l'intérieur de certaines limites. Voir *Toronto Star Newspapers Ltd.* c. *Canada*, 2010 CSC 21.

[18] Tels le droit de voter et de se porter candidat. Quelques restrictions à ces droits, comme celles qui visent les mineurs, certains majeurs incapables et certains agents électoraux, ont été jugées raisonnables dans une société démocratique (voir *infra* note 24). La Charte exige que les gouvernements convoquent des élections au moins une fois tous les cinq ans. La seule exception à cette règle est une situation d'urgence nationale, comme une guerre, ou si les deux tiers des députés du Parlement ou d'une législature conviennent de retarder les élections. La Charte précise en outre que le Parlement et les législatures provinciales doivent siéger au moins une fois par année.

[19] Les citoyens canadiens ont le droit d'entrer au pays, d'y rester et de le quitter. Les citoyens et les résidents permanents ont le droit d'habiter et de chercher du travail n'importe où au Canada, et notamment le droit d'habiter dans une province et de travailler dans une autre. Toutefois, les provinces peuvent établir des exigences de résidence pour certaines prestations sociales. Voir *Godbout* c. *Longueuil (Ville)*, [1997] 3 R.C.S. 844, où la Cour suprême a indiqué, en se fondant sur la *Charte québécoise des droits et libertés de la personne*, qu'une municipalité ne pouvait obliger son employée, une préposée aux télécommunications pour le service de police de Longueuil, à résider sur son territoire en l'absence de preuve convaincante justifiant cette obligation de résidence.

[20] La Charte assure l'équité lors des procédures judiciaires, en particulier dans les affaires pénales. Le droit d'*habeas corpus*, ou droit de contester sa détention, et celui d'être présumé innocent tant que l'onn'a pas été déclaré coupable sont garantis par la Charte. Nul ne peut être privé du droit à la liberté et à la sécurité de sa personne, sauf par une procédure judiciaire en règle. La Charte protège contre les fouilles, les perquisitions ou les saisies abusives, et contre l'emploi d'une force excessive par la police même lorsqu'une fouille ou une perquisition ou saisie est autorisée par la loi. Elle protège en outre contre la détention et l'emprisonnement arbitraires. La Charte garantit le droit d'être informé de la raison de l'arrestation ou de la détention, celui de consulter un avocat sans délai, celui d'être informé de ce droit, et celui de faire déterminer rapidement par un tribunal si la détention est légale. Lorsqu'une personne est inculpée d'une infraction relevant d'une loi fédérale ou provinciale, elle a en outre le droit de ne pas être contrainte de témoigner lors de son procès; de ne pas être privée sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable; d'être protégée contre toutes peines cruelles et inusitées; de bénéficier d'un procès avec jury en cas d'accusations sérieuses; de ne pas être jugée ni punie deux fois pour la même infraction. Tout témoin, de même que l'accusé, a droit à l'assistance d'un interprète lors du procès s'il ne comprend pas la langue dans laquelle celui-ci se déroule ou s'il est malentendant. Les témoins ont en outre droit à ce qu'aucun témoignage incriminant qu'ils donnent ne soit utilisé contre eux lors de procédures subséquentes.

[21] Tous sont égaux devant la loi et ont droit à la même protection et au même bénéfice de la loi, indépendamment de leur race, de leur religion, de leur origine nationale ou ethnique, de leur couleur, de leur sexe, de leur âge ou de leurs déficiences physiques ou mentales. Des programmes spéciaux peuvent être créés pour les personnes ou les groupes pouvant être défavorisés dans la société, comme les femmes, les minorités visibles et les personnes handicapées.

[22] Voir la section 3.3.2.

Autochtones.[23] Intégrée à la Constitution, elle a préséance sur toute autre loi. Elle s'applique au Parlement fédéral, aux législatures provinciales et territoriales, à leurs branches exécutives de même qu'aux municipalités et aux entités faisant l'objet d'un contrôle gouvernemental ou exécutant des fonctions véritablement gouvernementales. Les tribunaux peuvent déclarer une règle de droit invalide dans la mesure où elle entre en conflit avec la *Charte canadienne*. Un système de justice unitaire permet que la Charte soit appliquée par les tribunaux partout au Canada. De plus, les tribunaux peuvent accorder aux personnes dont les droits ont été violés ou enfreints d'autres mesures de réparation appropriées.

Le législateur fédéral, d'une province ou d'un territoire peut limiter les droits fondamentaux, mais seulement s'il peut établir que la limitation est raisonnable et prescrite par la loi et qu'elle peut se justifier dans une société libre et démocratique.[24] Par ailleurs, les législateurs gardent un pouvoir limité d'adopter des lois pouvant violer certains des droits garantis par la *Charte canadienne* s'ils déclarent expressément qu'ils adoptent une loi « par dérogation » à des dispositions précises de la Charte. Cette déclaration doit être examinée et adoptée de nouveau tous les cinq ans, sans quoi elle ne peut rester en vigueur.[25]

Tous les gouvernements au Canada[26] ont par ailleurs adopté des lois sur les droits de la personne qui interdisent, notamment, la discrimination fondée sur différents motifs et favorisent l'égalité en matière d'éducation, d'emploi et de fourniture de biens, de services et d'installations, dans les secteurs qui relèvent de leur compétence respective.[27] Des commissions des droits de la personne ont été créées partout au Canada et des tribunaux des droits de la personne existent au fédéral, en Colombie-Britannique, au Québec, en Ontario ainsi

[23] Voir la section 3.3.1.

[24] Les droits de la personne sont assujettis au principe de la proportionnalité. Ce principe trouve son expression dans l'article 1, clause limitative générale. Tout en garantissant les droits énoncés dans la Charte, cet article les assujettit aux « limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique ».

[25] Une telle dérogation est extrêmement rare et elle est controversée, autant dans le principe que dans la pratique. Par conséquent, la dérogation législative n'est pas une option facile du point de vue politique pour les gouvernements au Canada.

[26] Pour un éclairage historique voir Backhouse.

[27] La *Déclaration canadienne des droits* ne vise que les matières qui sont de la compétence législative du Parlement du Canada. Il en est de même de la *Loi canadienne sur les droits de la personne*, qui complète la Déclaration relativement à la protection contre la discrimination et crée la Commission canadienne des droits de la personne et le Tribunal canadien des droits de la personne (TCDP). Ses dispositions interdisant la propagande haineuse ont été déclarées inconstitutionnelles par le TCDP le 2 septembre 2009 à la suite d'une contestation menée par l'activiste d'extrême droite Marc Lemire. Le négationniste de l'Holocauste Ernst Zundel avait fait l'objet d'une condamnation en 2002. Des dispositions semblables existent dans les lois de l'Alberta, de l'Ontario et de la Colombie-Britannique, notamment.

qu'au Nunavut.[28] En Nouvelle-Écosse, à l'Île-du-Prince-Édouard et à Terre-Neuve et Labrador, les commissions des droits de la personne rendent des décisions.[29]

Comme le résume très bien Elisabeth Eid:

> Dans certains domaines, la législation et la pensée canadienne sur les droits de la personne est très en avance par rapport au mouvement international. Le mariage de personnes de même sexe en est un bon exemple. La communauté internationale est encore bien loin d'un consensus sur la question de savoir si l'orientation sexuelle est un motif inacceptable de discrimination (Eid, 2001-2,3).

D'autres domaines, comme ceux des droits économiques, sociaux et culturels, ne font pas l'objet de la même protection constitutionnelle au Canada.[30] Au Québec, la *Charte québécoise des droits et libertés de la personne,*[31] protège tous les droits fondamentaux de la personne, ainsi que certains droits sociaux et économiques. Cependant, elle ne prévoit pas la prépondérance de ces derniers sur les autres lois québécoises. La condition sociale n'est pas un motif de discrimination reconnu dans toutes les législations au Canada.[32] Il existe ainsi des différences entre les protections offertes au Canada.[33] Travail, santé,[34] couverture sociale et éducation sont certes protégés au Canada et des recours existent pour en assurer le respect, mais

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[28] Ces organes administratifs offrent plusieurs avantages par rapport aux tribunaux traditionnels. En général, les commissions des droits de la personne sont composées de personnes spécialisées en droit de la personne; ont un mandat institutionnel qui inclut la promotion des droits de la personne et l'éducation du public à cet égard; sont plus accessibles aux plaignants (leurs procédures sont moins formelles et, les commissions font habituellement enquête et donnent suite aux plaintes au nom du plaignant); peuvent entreprendre de leur propre chef l'examen des politiques et des pratiques, même lorsque aucune plainte n'a été déposée, et peuvent publier des rapports à ce sujet; sont tenues de faire rapport périodiquement au Parlement ou aux assemblées législatives provinciales ou territoriales, selon le cas, non seulement sur leurs propres activités, mais également sur la situation des droits de la personne dans leurs secteurs de compétence respectifs. Ces organes ainsi que les organisations non gouvernementales, les médias et les instances judiciaires jouent un rôle fondamental dans la promotion du respect des droits de la personne.

[29] L'on peut diviser les mesures de protection des droits de la personne à l'échelle nationale au Canada en deux catégories : 1) les libertés civiles traditionnelles et les droits politiques, qui sont essentiellement des limites imposées à l'action gouvernementale et législative; 2) les lois antidiscrimination qui interdisent la discrimination basée sur divers motifs dans la société en général et qui s'appliquent aussi bien aux acteurs publics que privés. L'application de la première catégorie de mesures de protection des droits de la personne à l'échelle nationale est en grande partie confiée aux tribunaux. Par contre, la deuxième catégorie des droits est, au moins en première instance, mise en application par des organismes administratifs.

[30] Voir par exemple: *Finlay* c. *Canada (Ministre des Finances)*, [1993] 1 R.C.S. 1080; *Gosselin* c. *Québec (Procureur général)*, [2002] 4 R.C.S. 429; *Masse* c. *Ontario (Ministry of community and Social Services)*, (1996) 134 D.L.R. (4th) 20 (C.D. Ont.) et Porter.

[31] La *Charte québécoise*, adoptée en 1975, a notamment été amendée en 2006 pour y ajouter un nouvel article 46.1, suivant lequel « Toute personne a droit, dans la mesure et suivant les normes prévues par la loi, de vivre dans un environnement sain et respectueux de la biodiversité ».

[32] Voir Comité sénatorial permanent des droits de la personne, p. 27, notes 48 et 49.

[33] On obtiendra un survol de la situation sur le site Web de la Commission canadienne des droits de la personne.

[34] Voir notamment les publications de Martha Jackman.

leur justiciabilité[35] demeure moindre que celles des libertés fondamentales, du droit à l'égalité et des garanties juridiques.[36] Par ailleurs, de l'avis de certains auteurs, le droit au respect de la vie privée (Schabas, 47) et le droit à la vie familiale accuseraient un certain retard au Canada par rapport aux normes internationales (Leuprecht, note 42). Un débat a actuellement cours au sujet de l'existence d'un droit à l'eau indépendant du droit à la vie et sur ce qu'il pourrait comprendre.[37]

3.2 Actes unilatéraux des organisations internationales et droit canadien

Les différentes conventions internationales de droit de la personne, qu'elles soient issues de l'ONU[38] ou de l'OIT,[39] par exemple, mettent toutes en place des organes chargés de la surveillance de leur application par les États qui y sont parties.

[35] Voir notamment les publications de Bruce Porter.

[36] Voir sur les délais d'attente en matière de santé publique l'affaire *Chaoulli* c. *Québec – Procureur général*, [2005] 1 R.C.S. 791.

[37] Voir Observations finales du Comité des droits économiques, sociaux et culturels. Suivant le site web d'Environnement Canada, les ressources hydriques du Canada représentent environ 7 pourcent de l'eau douce renouvelable dans le monde.

[38] Il existe ainsi neuf comités à l'ONU qui examinent les rapports périodiques que les États leur soumettent. À la suite de cet examen, ces comités émettent leurs observations finales (des recommandations). Ils élaborent également des observations générales qui sont des guides interprétatifs des instruments internationaux. Certains comités détiennent un pouvoir d'enquête et reçoivent même des communications (plaintes) par des individus ou des groupes d'individus. Ils peuvent alors ordonner des mesures intérimaires et rendre des décisions. À ce jour, le Canada a déjà fait l'objet de plaintes au Comité des droits de l'homme et au Comité contre la torture; dans ce dernier cas, principalement pour des cas d'expulsion vers des pays où les plaignants estimaient être à risque de subir la torture. D'autres comités peuvent également recevoir des plaintes individuelles mais le Canada n'a pas accepté la compétence de ceux-ci. Il s'agit notamment du Comité pour l'élimination de la discrimination raciale et du Comité des travailleurs migrants. Dans ce dernier cas, le Canada n'est pas partie à la Convention qui l'institue. Toutefois, les opinions et décisions de ces organismes de surveillance ne sont pas exécutoires contre le Canada en vertu du droit international, ni en vertu du droit canadien. De l'avis du Comité sénatorial, « leur effet politique est amoindri par le fait qu'il n'existe au Canada aucune procédure officielle ou publique visant à faire le suivi des observations, conclusions et recommandations de ces organismes en ce qui a trait aux dossiers canadiens en matière de droits de la personne ». Le ministère du Patrimoine canadien, qui participe à l'établissement des rapports périodiques du Canada, publie sur son site Web les rapports du Canada, les observations et les décisions des organismes chargés des conventions.

[39] À l'OIT, les États doivent également soumettre des rapports périodiques au Bureau international du travail (BIT), un organe tripartite composé de représentants des employeurs, des employés et des gouvernements. De plus, une organisation professionnelle d'employeurs ou de travailleurs d'un État membre peut porter plainte contre cet État devant un comité tripartite (art. 24 et 25 de la Constitution de l'OIT) ou une commission d'enquête (art. 26 à 34 de la Constitution de l'OIT), formés par le Conseil d'administration, et qui émettront des recommandations. Le Conseil d'administration est l'organe exécutif du BIT lequel assure le secrétariat de l'Organisation. Lorsqu'il s'agit d'une réclamation concernant l'application des conventions n° 87 ou 98, le Comité de la liberté syndicale en est généralement saisi. Un État membre peut également porter plainte contre un autre État membre. Enfin, des rapports globaux et des études permettent de dégager des principes d'interprétation des différents instruments internationaux.

Du fait de son appartenance à l'OÉA, le Canada est en outre soumis à la compétence de la Commission interaméricaine des droits de l'homme pour toute violation alléguée aux droits protégés par la *Déclaration américaine des droits et devoirs de l'homme.*[40] Suivant le professeur Schabas, certains avocats canadiens ont trouvé un intérêt particulier à cette procédure du fait de la présence dans la *Déclaration* de certains droits qui ne peuvent pas être invoqués devant le Comité des droits de l'homme, parce qu'ils ne se trouvent pas dans le *Pacte international relatif aux droits civils et politiques* (PIDCP) (Schabas,166).

Dans la perspective de ces différentes organisations, les droits et libertés fondamentaux sont certainement normatifs et même juridiquement contraignants au niveau international et tendent à être observés universellement. Ces organes considèrent souvent leurs observations finales,[41] leurs observations générales,[42] leurs mesures intérimaires[43] et leurs décisions[44] comme tout aussi normatives et contraignantes que les traités eux-mêmes. Or, celles-ci ne s'inscrivent dans aucune des catégories envisagées par l'article 38 du *Statut de la Cour internationale de justice*[45] qui rappelle les sources du droit international. Au mieux, on pourrait considérer ces documents des différents comités « comme moyen auxiliaire de détermination des règles de droit ». Cependant, les auteurs ajoutent les actes unilatéraux des États et des organisations internationales au nombre des sources du droit international.

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[40] La Commission interaméricaine décide d'abord de l'admissibilité de la pétition. Ses « décisions » sont publiques mais non exécutoires. Jusqu'ici, elle s'est prononcée en faveur de l'admissibilité de deux plaintes contre le Canada. Dans *Grand Chief Michael Mitchell*, la plainte allègue que le Canada a engagé sa responsabilité internationale en ne reconnaissant pas le droit des Autochtones d'importer des États-Unis des marchandises sans payer de tarifs douaniers. Le territoire de la communauté autochtone en question est partagé de part et d'autre par la frontière canado-américaine. En 2001, la Cour suprême avait établi que le droit ancestral revendiqué n'avait pas été établi : *Mitchell* c. *M.R.N.*, [2001] 1 R.C.S. 911. Dans *Manickavasagam Suresh*, la Commission n'est pas saisie de la question de savoir si M. Suresh peut être déporté au Sri Lanka puisque les recours internes ne sont toujours pas épuisés. Voir *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3. La Commission doit déterminer si M. Suresh a le droit d'avoir la légalité de sa détention déterminée sans délai, par une procédure brève et simple devant un tribunal et si sa détention de 2 ans et 5 mois comme un étranger non-résident viole la Déclaration américaine.

[41] Voir, par exemple, les différentes observations finales à la suite des examens périodiques relatifs aux rapports du Canada sur le site du ministère du Patrimoine canadien.

[42] Voir, par exemple, le Comité des droits économiques, sociaux et culturels qui rappelle que, dans les limites de l'exercice de leurs fonctions de contrôle judiciaire, les tribunaux doivent tenir compte des droits énoncés dans le PIRDESC conformément à son Observation générale n° 9 (1998), 14.

[43] Voir Observations finales du Comité des droits de l'homme. Selon le Canada, les termes employés dans l'article 86 du *Règlement* démontrent la nature non contraignante du point de vue exprimé par le Comité. Ni le PIDCP ni le Protocole facultatif ne donnent au Comité le pouvoir de rendre des ordonnances qui ont force exécutoire pour les États parties. Voir : Réponses du Canada à la liste de points soulevés par le Comité des droits de l'homme lors de la présentation du cinquième rapport sur le pacte international relatif aux droits civils et politiques, octobre 2005, question 6.

[44] Sabourin (2011) et Mérette et Sabourin.

[45] Le Statut de la Cour internationale de Justice est annexé à la Charte des Nations Unies, dont il fait partie intégrante. L'objet principal du Statut est d'organiser la composition et le fonctionnement de la Cour.

Si ceux-ci sont parfois normatifs, ils n'en sont pas pour autant toujours juridiquement contraignants en droit international.

En droit interne canadien, les observations finales et générales, les mesures intérimaires et autres décisions, y compris les traités eux-mêmes, n'ont pas de valeur contraignante mais les tribunaux alimentent une certaine confusion à cet égard.

Ainsi, dans *Health Services and Support - Facilities Subsector Bargaining Assn.* c. *Colombie-Britannique,*[46] la Cour suprême indique que la négociation collective fait partie intégrante de la liberté d'association selon le droit international qui peut inspirer l'interprétation des garanties reconnues par la *Charte canadienne.*[47] Pour ce faire, la Cour s'appuie sur des traités qui lient le Canada, sur une déclaration[48] et sur différents textes non contraignants sans toujours faire les distinctions qui s'imposeraient.[49] Le même flou se retrouve dans l'arrêt *Dunmore.*[50]

Le Tribunal des droits de la personne du Québec réfère parfois à des décisions du Comité des droits de l'homme, que le Canada y soit impliqué ou non, mais sans toujours justifier sur quelle base il le fait.[51]

Dans *Charkaoui,*[52] la Cour fédérale a référé à une décision du Comité des droits de l'homme[53] qui concernait le Canada et qui visait spécifiquement les mêmes dispositions de la *Loi sur l'immigration et la protection des réfugiés*[54] que celles en cause devant elle. Il faut dire que cette loi requiert expressément que l'interprétation et la mise en œuvre de celle-ci se conforment aux instruments internationaux sur les droits de l'homme que le Canada a signés.

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[46] *Health Services and Support - Facilities Subsector Bargaining Assn.* c. *Colombie-Britannique*, [2007] 2 R.C.S. 391.

[47] *Ibid*., par. 20 et 69.

[48] *Ibid*., par. 78.

[49] Voir, pour une critique de l'utilisation que fait la Cour du droit international dans cette affaire, Langille et la réplique d'Adams.

[50] *Dunmore* c. *Ontario (Procureur général)*, [2001] 3 R.C.S. 1016. Les juges majoritaires ont appliqué la « jurisprudence » de la Commission d'experts pour l'application des conventions et recommandations ainsi que du Comité de la liberté syndicale du Conseil d'administration de l'OIT. Ils ont également retenu, pour appuyer l'affirmation suivant laquelle l'OIT avait maintes fois interprété le droit syndical comme étant un droit collectif, une allocution d'un délégué des travailleurs reprise dans une publication du BIT. La Cour réfère finalement à la *Convention no 11 concernant les droits d'association et de coalition des travailleurs agricoles* même si, selon ce qu'elle indique, la compétence des provinces a empêché le Canada de la ratifier. *Ibid.*, par. 27.

[51] Voir à cet effet les décisions suivantes: *CDPDJ* c. *9113-0831 Québec inc. (Bronzage Évasion au soleil du monde)*, 2007 QCTDP 18 (T.D.P.Q.); *CDPDJ c. Laval (Ville de)*, [2006] R.J.Q. 2529 (T.D.P.Q); *CDPDJ c. 140998 Canada inc*., AZ-50144821, J.E. 2002-1901, (T.D.P.Q.); *CDPDJ c. Michaud*, AZ-98171007, J.E. 98-743 (T.D.P.Q); *CDPDJ c. Martin*, AZ-97171030, J.E. 97-1476 (T.D.P.D.Q.); *CDPDJ c. Immeubles Ni/Dia inc.*, [1992] R.J.Q. 2977 (T.D.P.Q.).

[52] *Charkaoui (Re)*, [2005] 2 R.C.F. 299; renversé en appel à la Cour suprême pour d'autres motifs: *Charkaoui* c *Canada (Citoyenneté et Immigration),* [2007] 1 R.C.S. 350, par. 140.

[53] Le Comité des droits de l'homme avait jugé que ces dispositions ne violaient pas le *PIDCP* dans Ahani.

[54] *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, Chap. 27.

Les instruments internationaux de l'OÉA sont moins souvent cités par les tribunaux canadiens que le sont ceux de l'ONU.[55]

Depuis l'arrêt *Baker* de la Cour suprême,[56] la doctrine canadienne s'est beaucoup penchée sur les théories de réception du droit international en droit interne.[57] Pour certains auteurs, les conditions d'application de la présomption de conformité[58] avec le droit international qu'appliquent les tribunaux[59] se sont considérablement obscurcies dans la jurisprudence issue de la Cour suprême du Canada depuis une dizaine d'années. La présomption s'applique normalement en cas d'ambiguïté et s'il s'agit d'une loi de mise en œuvre. Ces conditions mettent en évidence les tensions entre deux perspectives théoriques sur le concept de la primauté du droit: l'une donne préséance au principe de la séparation des pouvoirs; l'autre, aux droits fondamentaux de la personne. Ainsi, pour les auteurs fervents de la première perspective, il faudrait distinguer entre les instruments ratifiés par le Canada et les autres.

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[55]*R.* c. *Morgentaler*, [1988] 1 R.C.S. 30; *CDPDJ* c. *Immeubles Ni/Dia inc.*, précitée; *CDPDJ* c. *Caumartin*, 2007 QCTDP 22 (T.D.P.D.J.); *CDPDJ* c. *Quévillon*, [1999] J.L. 193 (T.D.P.D.Q.).

[56]*Baker* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 81, aux par. 69 à 73. Rappelons que dans cette affaire, les juges de la majorité ont statué que, même si le Canada n'a pas incorporé au droit canadien la *Convention relative aux droits de l'enfant*, le principe de considérer « l'intérêt supérieur de l'enfant » comme étant primordial dans la prise de décisions concernant les enfants doit être pris en compte lorsque le ministère exerce son pouvoir discrétionnaire humanitaire dans les cas d'expulsion. En l'espèce, les autorités avaient ordonné le renvoi d'une mère de quatre enfants nés au Canada. Pour les juges de la minorité, le principe qu'une convention internationale ratifiée par le pouvoir exécutif n'a aucun effet en droit canadien tant qu'elle n'est pas incorporée dans le droit interne ne peut pas survivre intact après l'adoption d'un principe de droit qui autorise le recours, dans le processus d'interprétation des lois, aux dispositions d'une convention qui n'a pas été intégrée dans la législation. Comme le souligne Weiser, il s'agissait davantage dans *Baker* de révision judiciaire d'un geste administratif que d'interprétation d'une loi, la question étant de savoir si l'Éxécutif doit être contraint de respecter les obligations internationales: Weiser (2004, 134 et 136).

[57]Comme le souligne Houle, une autre voie se dessine dans la doctrine canadienne. S'appuyant sur l'arrêt Baker, Dyzenhaus et Walters estiment que le juge doit donner préséance aux normes relatives à la protection des droits de la personne tel que cela est prescrit par la constitution de common law. Cette philosophie de la légitimité place la notion d'intégrité du système juridique au coeur du débat. Ces auteurs posent donc la nécessité de justifier cette intégrité à l'aune de critères, mais sans la soumettre à une idéologie morale. C'est pour cette raison que ces critères doivent « être puisés au sein même de l'ordre juridique ». Houle (2004, 324).

[58]Une doctrine de la common law, qui s'applique au Canada, veut que dans leur interprétation des lois, les tribunaux présument que le Parlement avait l'intention d'adopter des mesures législatives compatibles avec ses obligations en vertu de traités internationaux. Voir *Health Services and Support Facilities Subsector Bargaining Assn.* c. *Colombie-Britannique*, précitée, par. 69. « L'examen des obligations internationales du Canada peut toutefois aider les tribunaux chargés d'interpréter les garanties de la Charte (voir *Suresh* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, précitée, par. 20, 46). D'ailleurs, la Charte canadienne n'est pas considérée comme une loi de mise en oeuvre de traités internationaux et elle n'est donc pas assujettie à la présomption de conformité: Weiser (2004, 129, note 56; 147–150).

[59]La présomption est interprétée « de façon large dans la mesure où ses conditions préliminaires d'application – l'ambiguïté du texte législatif et les traces d'une volonté législative de donner effet au droit international – ne sont plus, somme toute, discriminantes ». Houle (2004, 323).

Pour les instruments ratifiés, qu'ils aient été incorporés ou non, il conviendrait de leur accorder une valeur obligatoire. Pour les autres instruments, une simple valeur persuasive suffirait. Pour les auteurs fervents de la deuxième perspective, les juges doivent donner préséance aux normes relatives à la protection des droits de la personne, tel que cela est prescrit par la constitution,[60] que le Canada ait ratifié ou non les instruments internationaux qui soustendent ces normes. Il est toutefois encore trop tôt pour affirmer l'existence d'une pensée achevée à cet égard, que ce soit dans la doctrine ou la jurisprudence.[61]

Les décisions des différents organes chargés de la surveillance des traités qui concluent à une violation par le Canada de l'un des droits protégés sont généralement mises en application, mais pas toujours.[62] D'autres préoccupations à l'égard du Canada ressurgissent de l'étude des conclusions des différents comités. Ainsi, ils rappellent régulièrement au gouvernement fédéral sa responsabilité de veiller à ce que les provinces et les territoires respectent tous les instruments ratifiés par le Canada.[63]

Le Comité de la liberté syndicale a également rappelé au gouvernement fédéral du Canada que les principes de la liberté syndicale doivent être intégralement appliqués sur l'ensemble de son territoire.[64]

De plus, les différents comités se préoccupent particulièrement de la mise en oeuvre législative des différentes conventions dont ils sont chargés de surveiller le suivi par les États parties.[65] C'est le Comité des droits économiques, sociaux et culturels qui se fait le plus critique à l'égard du Canada.[66]

Pourtant, les comités ne sont pas sans méconnaître la situation juridique du Canada en vertu de laquelle les droits de la personne sont de responsabilité partagée. De plus, l'Assemblée générale des Nations unies a indiqué qu' "[i]l convient certes de garder à l'esprit l'importance des particularités nationales et régionales et de la diversité des contextes historiques, culturels et religieux".[67] Le Comité sur les droits de l'enfant a d'ailleurs indiqué que les coutumes et pratiques locales doivent être respectées, sauf si elles sont contraires aux droits de l'enfant.[68]

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[60] Houle souligne que les théories proposées par les juristes canadiens depuis l'arrêt Baker convergent sur un point: tous les actes étatiques constituent des indications utiles, bien qu'ils n'aient pas tous la même valeur, pour le juge afin de déterminer l'effet du droit international en droit interne. Toutefois, cela ne signifie pas que la question de savoir quel acteur étatique doit avoir le dernier mot soit réglée. La tendance doctrinale et jurisprudentielle penche en faveur du juge à qui l'on accorde une plus grande confiance lorsqu'il s'agit de choisir les orientations normatives qui auront préséance en droit canadien. Ibid., 323.

[61] Suivant Houle, « une théorie plus complète et mieux articulée reste à formuler », ibid, 324.

[62] *Waldman* et *Tcholatch* par exemple.

[63] Observations finales du Comité des droits de l'enfant, du Comité pour l'élimination de la discrimination raciale et du Comité pour l'élimination de la discrimination à l'égard des femmes.

[64] Rapport 342 concernant le Cas no 2257 (Canada/Québec).

[65] Observations finales du Comité pour l'élimination de la discrimination raciale, du Comité pour l'élimination de la discrimination à l'égard des femmes et du Comité des droits économiques, sociaux et culturels.

[66] Observations finales du Comité des droits économiques, sociaux et culturels.

[67] Document final du Sommet mondial de 2005, par. 121.

[68] Comité sur les droits de l'enfant, Observation générale no 7, mise en oeuvre des droits de l'enfant dans la petite enfance.

À notre avis, les divergences dans les traditions et les cultures des provinces et des territoires et également au sein des gouvernements autochtones autonomes peuvent être tolérées tant que les obligations internationales demeurent respectées. Bien plus, ces divergences peuvent engendrer de saines stimulations entre les gouvernements. Cette affirmation implique cependant de considérer que les droits de la personne ne sont fondamentaux que dans leurs grands principes et que les conventions internationales en la matière permettent une variété d'interprétation dans leur mise en œuvre effective. Certaines divergences de vue semblent subsister entre les différents comités et le Canada sur ce qui constitue l'essentiel et sur ce qui relève de l'accessoire.

3.3 Particularismes locaux canadiens

Il sera ici question des peuples autochtones canadiens ainsi que des minorités linguistiques, ethniques et religieuses canadiennes.

3.3.1 Peuples autochtones canadiens

Environ 4 % des Canadiens(nes) se déclarent d'origine autochtone.[69] C'est le gouvernement fédéral qui a compétence à l'égard des Indiens (ce qui inclut les Inuits[70]) et des terres réservées aux Indiens.[71] L'article 67 de la *Loi canadienne sur les droits*

[69] Document de base du Canada. En 1991, ce pourcentage était de 4,1 %. Le dernier recensement, en date de 2006, indique le pourcentage de 3,8 %. La population canadienne compte différents groupes autochtones dont les Indiens d'Amérique du Nord (composés de plus de cinquante nations différentes regroupées en plus de six cents collectivités), les Métis et les Inuits.

[70] Art. 91 (24) de la *Loi constitutionnelle de 1867*. Il a cependant choisi de ne pas légiférer à l'égard des Inuits. *Renvoi sur les esquimaux*, [1939] R.C.S. 104. Ceux-ci, ainsi que les Métis, ne sont donc pas visés par la *Loi sur les Indiens*.

[71] La *Loi sur les Indiens* accorde aux Indiens inscrits certains pouvoirs délégués du fédéral, très limités : possession et occupation plutôt que propriété, restrictions au niveau testamentaire et de la disposition des biens. Selon certains, les conseils de bande ont des responsabilités comparables aux gouvernements provinciaux ou territoriaux (plutôt qu'aux municipalités) mais n'ont pas accès à l'autofinancement par la fiscalité. Leurs fonds proviennent principalement des gouvernements et en particulier du gouvernement fédéral ainsi que d'entreprises communautaires lesquelles ne génèrent jamais plus de 25 % des recettes totales. La loi leur confère des avantages (exemption de taxes et d'impôts sur les salaires et les achats de biens et services sur les réserves, insaisissabilité des biens, etc.) qui engendrent leur lot d'inconvénients (salaires inférieurs, non-accès au crédit, etc.). Ces avantages sont souvent enviés par les populations non autochtones qui ne sont pas toujours au fait de leurs revers notamment qu'ils ne permettent pas aux autochtones de s'assurer un développement économique viable. Les conseils de bande peuvent imposer un impôt foncier mais peu l'ont fait. Pour avoir accès à de l'autofinancement, une quinzaine de bandes ont signé des ententes avec le gouvernement fédéral (Finances Canada) qui impliquent qu'elles renoncent à l'exemption fiscale que leur accorde la *Loi sur les Indiens*. Voir Lepage.

Le Comité des droits économiques, sociaux et culturels et le Comité des droits de l'homme ont émis à l'endroit du Canada différentes préoccupations à l'égard des Autochtones dans leurs observations finales.

de la personne, qui ne permettait pas aux membres des Premières Nations de porter plainte pour discrimination devant la commission canadienne des droits de la personne ou le tribunal des droits de l'homme, a été abrogé en 2008. Les lois provinciales d'application générale s'appliquent aux Indiens et aux terres de réserve, sauf exceptions.[72]

Les gouvernements autochtones sont assujettis à la *Charte canadienne*. Celle-ci prévoit d'ailleurs un article particulier à la question autochtone, l'article 25,[73] destiné à réconcilier les droits individuels et collectifs mais jusqu'ici très peu analysé dans la jurisprudence.[74] Par ailleurs, l'article 35 de la *Loi constitutionnelle de 1982*

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[72] Hogg (2009, 28-10 et s.), Brun, Tremblay et Brouillette (2009, 524–53). Les législations provinciales de droit de la personne bénéficient donc aux Autochtones mais elles ne peuvent leur être opposées que dans la mesure où elles n'entravent pas un aspect jugé essentiel de la compétence fédérale en la matière. Ibid., 940.

[73] L'article 25 se lit comme suit :

Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment:

a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

[74] *A.G. Ontario c. Bear Island Foundation et al.*, (1984), 49 O.R. (2d) 353 (C.S. Ont.); pourvoi rejeté, (1989), 68 O.R. (2d) 394 (C.A. Ont.); pourvoi rejeté [1991] 2 R.C.S. 570; *Steinhauer c. R.*, (1985), 15 C.R.R. 175 (B.R. Alb.); *R. c. Agawa*, (1988), 43 C.C.C. (3d) 266 (C.A. Ont.); autorisation de pourvoi refusée (C.S.C, 8 novembre 1990); *R. c. Fiddler*, (1994), 22 C.R.R. (2d) 82 (C. Ont., Div. gén.); *R. c. Yooya*, [1995] 2 W.W.R. 135 (B.R. Sask.); *R. c. Redhead*, (1995), 99 C.C.C. (3d) 559 (B.R. Man.).

Dans *R.* c. *Kapp*, [2008] 2 S.C.R. 483, les juges étaient divisés sur cette disposition. Voir également Arbour. Dans cette affaire, les permis, dont des pêcheurs non autochtones contestaient la validité, permettaient aux pêcheurs désignés par les premières nations de récolter du saumon sockeye 24 heures avant les pêcheurs non autochtones, d'utiliser le poisson ainsi récolté à des fins alimentaires, sociales et cérémonielles et de le vendre. Le paragraphe 15(2) de la *Charte* accorde aux gouvernements le droit de mettre sur pied des programmes « destinés à améliorer la situation d'individus ou de groupes défavorisés ». La Cour a jugé que la délivrance de permis de pêche communautaire aux premières nations Musqueam, Tsleil-Waututh et Tsawwassen satisfaisait au critère applicable aux groupes « défavorisés ».

Dans *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203, pp. 226, 272–73, la Cour suprême a déclaré inconstitutionnelles les dispositions de la *Loi sur les Indiens* qui ne permettaient qu'aux Indiens résidant sur les réserves de voter et de se présenter comme candidats aux élections de conseils de bandes. Dans certains traités, tel celui avec les Nisga'a de la Colombie-Britannique, il est prévu que les non-Autochtones sont consultés et paient des taxes, mais ils n'ont pas le droit de vote aux élections des conseils de bande, ce qui semble contrevenir au principe démocratique suivant lequel nul ne doit être taxé sans représentation. Voir Ignatieff (2001, 67–68); *Huyck et al.* c. *Musqueam Indian Band Council*, 2000 CanLII 15410 (C.F.); *Canadien Pacifique Ltée* c. *Bande indienne de Matsqui*, [1995] 1 R.C.S. 3.

qui protège les droits ancestraux ou issus de traités a fait l'objet d'une abondante jurisprudence.[75]

Les traités modernes conclus au Canada comportent des chapitres consacrant une large autonomie aux Autochtones tout en préservant la sécurité juridique des gouvernements en les assurant qu'il n'y aura pas de revendication territoriale.[76] Le droit canadien reconnaît, plutôt qu'une obligation d'obtenir un consentement éclairé, une obligation de consulter.[77]

Comme le rapporte Ignatieff : « plusieurs nations autochtones ne reconnaissent pas l'autorité de la Constitution et de la Charte sur des matières comme le droit des femmes de prendre part aux décisions, celui des Blancs de résider sur des territoires autochtones. Certaines bandes refusent même d'accepter sur leurs terres des autochtones d'autres tribus » (Ignatieff 2001, 66, 78). Récemment, le Conseil de bande de Kahnawake au Québec a remis des avis d'expulsion à 26 personnes habitant sur la réserve qui ne sont pas Mohawks. Plusieurs de ces résidents vivent en couple avec un Autochtone, mais ne sont pas eux-mêmes Autochtones (Buzzetti, 2010).

Les droits des peuples autochtones posent certains défis conceptuels, puisqu'ils sont spécifiques à certains individus plutôt que d'être universels (Fox-Decent). De plus, l'émergence d'un ordre autochtone autonome, revendiqué par les Autochtones, pose la question du respect des droits fondamentaux des individus (qu'ils appartiennent ou non au groupe autochtone) au sein de structures politiques dont la finalité même est

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[75] L'article 35 se lit comme suit :

(1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

L'article 35 est sujet à un test semblable à celui développé à l'article 1 de la partie 1 de la *Loi constitutionnelle de 1982*: *Bande et nation indiennes d'Ermineskin* c. *Canada*, 2009 CSC 9. Dans cette décision, la Cour a déterminé qu'étant donné l'absence d'un droit issu de traité à l'investissement des redevances des bandes par la Couronne, le par. 35(1) de la *Loi constitutionnelle de 1982* ne s'appliquait pas.

[76] Le gouvernement fédéral a adopté en 1995 une politique dans laquelle il indique que le droit inhérent à l'autonomie gouvernementale est un droit existant au sens de cet article 35. Tout en notant que le Canada a retiré, depuis 1998, son exigence d'une mention expresse de l'extinction des droits ancestraux et des titres autochtones dans les accords sur les règlements de revendications territoriales globales ou dans les lois ratifiant de tels accords, le Comité des droits économiques, sociaux et culturels a indiqué rester préoccupé de ce que les nouvelles approches ne soient pas très différentes des anciennes. Il a prié instamment le Canada de revoir ses politiques et pratiques relatives aux droits et titres naturels des autochtones, afin que ces politiques et pratiques n'entraînent pas l'extinction de ces droits et titres.

[77] *Nation haïda* c. *Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511 et sa revue de jurisprudence.

la préservation de l'identité culturelle de la collectivité autochtone. L'individu sera-t-il victime de la tutelle identitaire de l'organisation? Les droits et libertés individuels devront-ils être systématiquement sacrifiés à l'objectif communautaire de maintien des traditions ou de pérennisation de l'identité (Otis et Melkevik 1996, 33-34)? Dans quelle mesure, par exemple, les citoyens non-Indiens résidant sur le territoire relevant de la compétence d'un gouvernement autochtone pourront participer à la vie politique à la suite d'un accord d'autonomie gouvernementale (Kontos, 2005)?

Selon Otis et Melkevik : « les droits collectifs et les particularismes autochtones ne pourraient, de manière automatique, faire échec à l'universalité des droits fondamentaux, ce qui n'exclut bien sûr pas la possibilité de justifier certaines restrictions ou limitations ponctuelles des droits individuels en fonction des différences culturelles ou des intérêts identitaires vitaux du groupe » (Otis et Melkevik, 34). La question de savoir comment parvenir à ce juste équilibre demeure entière.[78]

Pour le professeur Schabas, « il faut reconnaître une certaine marge d'appréciation des normes, marge qui tient compte du contexte culturel de chaque société et de son état de développement » (Schabas, 47). Toujours selon Otis et Melkevik:

> L'acceptation graduelle de droits subjectifs collectifs et de la personnalisation juridique du groupe qui en résulte exige certes une adaptation de la mentalité libérale occidentale foncièrement individualiste. Elle trouve néanmoins sa justification dans les concepts liés aux droits de l'homme que sont le pluralisme, la tolérance, l'égalité et la liberté identitaire. Ces mêmes valeurs viennent toutefois relativiser les droits collectifs afin de contenir le pouvoir communautaire et ainsi assurer la liberté de l'individu par rapport au groupe de même qu'en son sein (Otis et Melkevik 1996, 19).

Le 12 novembre 2010, le gouvernement du Canada a officiellement appuyé la Déclaration des Nations Unies sur les droits des peuples autochtones dans le respect intégral de la Constitution et des lois du Canada.

3.3.2 Minorités linguistiques canadiennes

Outre les deux langues officielles,[79] l'anglais et le français[80] (57,2 % et 21,8 %, respectivement de la population), la population canadienne s'exprime dans une

[78] Le Comité des droits de l'homme a, dans ses observations finales à l'égard du Canada, noté que la recherche d'équilibre entre les droits collectifs et individuels sur les réserves ne peut se faire au seul détriment des femmes car cela contrevient aux articles 2, 3, 26 et 27 du Pacte.

[79] La *Loi sur les langues officielles* accorde entre autres au public le droit d'utiliser le français ou l'anglais pour communiquer avec l'administration centrale des institutions fédérales assujetties à la *Loi* ainsi qu'avec les bureaux désignés bilingues de ces institutions, aux fonctionnaires fédéraux le droit de travailler dans la langue officielle de leur choix dans les régions désignées bilingues aux fins de la langue de travail; et à tous les Canadiens et Canadiennes, d'expression française ou anglaise, sans distinction d'origine ethnique ni égard à la première langue apprise, le droit de bénéficier de l'engagement du gouvernement fédéral à veiller à ce qu'ils aient les mêmes chances d'emploi et d'avancement dans les institutions fédérales.

[80] Parmi les 22,1 % de francophones du Canada, environ 18 % résident au Québec. Dans cette province, plus de 80,8 % de la population parle le français à la maison et moins de 10 % l'anglais,

multitude de langues parlées et écrites dans ses relations privées.[81] Les articles 16 à 23 de la *Charte canadienne* énoncent certains droits en matière de langues officielles.[82] Ces droits ne peuvent faire l'objet d'une clause dérogatoire (voir *supra* note 25).

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principalement à Montréal. Seulement 17,4 % de la population canadienne parle les deux langues officielles, principalement des Québécois : 40,6 % des Québécois peuvent parler anglais, alors que dans le reste du pays, seulement 10,2 % peuvent parler français. À l'extérieur du Québec, les plus importantes communautés francophones se trouvent au Nouveau-Brunswick (32,7 %), en Ontario et à l'Ile-du-Prince-Édouard (4,2 % chacun), au Manitoba (4 %) et au Yukon (3,9 %).

Les trois territoires fédéraux (le Nunavut, les Territoires du Nord-Ouest et le Yukon) et le Nouveau-Brunswick comptent le français comme langue officielle. Le Québec est la seule province ayant cette seule langue comme langue officielle et toutes les autres provinces ont seulement l'anglais comme langue officielle. L'inuktitut a également valeur de langue officielle au Nunavut et neuf langues autochtones ont ce statut dans les Territoires du Nord-Ouest : le chipewyan, le cri, l'esclave du Nord, l'esclave du Sud, le gwich'in, l'inuinnaqtun, l'inuktitut, l'inuvialuktun et le tåîchô (dogrib).

[81] 19,7 % suivant le dernier recensement. Chinois, punjabi, espagnol, italien, néerlandais, ukrainien, arabe, allemand, autochtones (une cinquantaine dont les suivantes : cri, inuktitut, ojibway, innu, et dene, par exemple), etc.

[82] Voir Bastarache. Les deux langues ont un statut et des droits et privilèges égaux au sein du Parlement et du gouvernement du Canada. De plus, toute personne a le droit d'employer le français ou l'anglais dans les débats et travaux du Parlement (art. 17), et les lois, archives, comptes rendus et procès-verbaux de celui-ci doivent tous être imprimés et publiés dans les deux langues (art. 18). Toute personne a le droit d'employer le français ou l'anglais dans les procédures devant tout tribunal établi par le Parlement (art. 19). Les membres du public ont en outre le droit d'employer le français ou l'anglais pour communiquer avec l'administration centrale des institutions fédérales et des autres bureaux fédéraux et pour recevoir leurs services là où l'emploi du français ou de l'anglais fait l'objet d'une demande importante et là où la prestation des services dans les deux langues se justifie (art. 20). La situation est la même au niveau provincial au Nouveau-Brunswick, seule province officiellement bilingue selon la *Charte canadienne*. La *Loi constitutionnelle de 1867* et la *Loi de 1870 sur le Manitoba* ont donné aux habitants du Québec et du Manitoba, respectivement, le droit de s'exprimer en français ou en anglais dans les débats législatifs et dans les tribunaux, et l'obligation de publier dans les deux langues les procès-verbaux, journaux et archives des législatures et les décisions judiciaires de ces provinces, et elles exigent que les lois provinciales soient adoptées et publiées dans les deux langues.

Suivant l'article 23 de la *Charte canadienne*, dans toutes les provinces, à l'exception du Québec, et dans les territoires, les citoyens dont la langue maternelle est le français, ou qui ont reçu leur instruction primaire en français, et ceux dont un enfant a reçu ou reçoit son instruction en français au niveau primaire ou secondaire, ont le droit constitutionnel de faire instruire leurs enfants en français. Ce droit à l'instruction française s'exerce partout où il y a suffisamment d'enfants dans la même situation pour justifier la prestation de l'enseignement dans cette langue, et il comprend le droit de ces enfants à recevoir leur instruction dans des écoles et établissements d'enseignement de la minorité linguistique. Au Québec, les citoyens qui ont reçu leur instruction primaire en anglais, ont le droit constitutionnel de faire instruire leurs enfants dans des écoles anglaises. Récemment, des modifications ont été apportées à la *Charte de la langue française*, à la suite de l'arrêt de la Cour suprême dans *Nguyen* c. *Québec (Éducation, Loisir et Sport)*, [2009] 3 R.C.S. 208, qui avait déclaré inconstitutionnels les paragraphes de la *Charte de la langue française* qui limitaient l'accès aux écoles anglaises financées par l'État. Certains élèves fréquentent en effet des écoles anglophones non subventionnées (écoles dites « passerelles ») pendant une courte période aux seules fins d'établir leur admissibilité et d'intégrer par la suite, avec leurs frères et soeurs, le cas échéant, le réseau public anglophone.

Le Comité des droits de l'homme a déjà indiqué dans une affaire concernant la *Charte de la langue française*[83] que les anglophones au Québec ne constituaient pas une minorité au sens de l'article 27 du Pacte.

3.3.3 Minorités ethniques et religieuses canadiennes

La population du Canada s'est historiquement constituée à la faveur de vagues successives d'immigration. Aujourd'hui, bien que la proportion d'immigrants dans la population soit de moins de 20 %,[84] il n'existe plus de groupe ethnique majoritaire au Canada.

Or, les gouvernements et la population ne s'accomodent pas toujours bien de ces nouveaux arrivants aux cultures et aux religions de plus en plus diverses et éloignées du modèle occidental traditionnel. Au Québec,[85] en Ontario[86] et en

[83] Ballantyne and Davidson, and McIntyre. Les articles 58 et 68 de la *Charte de la langue française*, dispositions qui étaient au cœur des griefs des auteurs des communications, ont été modifiés par un projet de loi, entré en vigueur en 1994. En 2005, le Comité a été saisi d'une autre affaire relative à la langue d'affichage qui concernait le Québec, mais la plainte, déclarée irrecevable, n'a pas été examinée au fond: *Walter Hoffman & Gwen Simpson c. Canada*.

[84] Ce pourcentage comprend les immigrants arrivés au Canada avant le jour du recensement, le 16 mai 2006. Les immigrants sont des personnes qui sont, ou qui ont déjà été, des immigrants reçus au Canada. Un immigrant reçu est une personne à qui les autorités de l'immigration ont accordé le droit de résider au Canada en permanence. Certains immigrants résident au Canada depuis un certain nombre d'années, alors que d'autres sont arrivés récemment. La plupart des immigrants sont nés à l'extérieur du Canada, mais un petit nombre d'entre eux sont nés au Canada. Leur pourcentage s'établirait à environ 16 % suivant le Document de base, par. 10, et à 19,8 % suivant le dernier recensement. Voir également le rapport de la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles (CCPARDC, 122) : il n'existe plus (du moins démographiquement) de groupe ethnique majoritaire au Canada. En 1986, les citoyens d'origine britannique y représentaient environ 34 % de la population. À partir du recensement de 1991, cette proportion ne peut plus être calculée à cause des modifications introduites dans les rubriques des recensements. Mais elle a certainement baissé au cours des vingt dernières années.

[85] Au Québec, certains incidents rapportés par les médias, impliquant l'accommodement de pratiques religieuses de groupes minoritaires ont suscité des débats et des préoccupations parmi la majorité. Une Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles a été créée et a rendu public son rapport. Suivant ce rapport, le modèle du multiculturalisme canadien ne semble pas bien adapté à la réalité québécoise, et ce, pour quatre raisons : a) l'inquiétude par rapport à la langue n'est pas un facteur important au Canada anglais; b) l'insécurité du minoritaire n'y est pas présente; c) il n'existe plus de groupe ethnique majoritaire au Canada (les citoyens d'origine britannique y représentent 34 % de la population, alors que les citoyens d'origine canadienne-française forment au Québec une forte majorité d'environ 77 %); d) il s'ensuit qu'au Canada anglais, on se préoccupe moins de la préservation d'une tradition culturelle fondatrice que de la cohésion nationale. Voir également Eid, Bosset, Milot, Lebel-Grenier, 2009. Enfin, un projet de loi a été soumis à une consultation publique générale en ce qui concerne les demandes d'accomodements dans l'Administration gouvernementale et dans certains établissements : le projet de loi 94.

[86] En Ontario, l'existence de tribunaux musulmans appliquant la sharia avait soulevé des préoccupations dans la population si bien que le gouvernement a mandaté une étude sur le processus

Colombie-Britannique[87] notamment des débats ont cours. Le pluralisme ethnique dans un contexte d'insécurité à la suite des attentats du onze septembre 2001 et de crise financière et économique pose des défis. Le pluralisme religieux exerce également des pressions sur la coexistence et la cohésion sociale, la population canadienne demeurant majoritairement chrétienne.[88]

La *Charte canadienne* comporte une référence à Dieu[89] et son interprétation doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.[90] Elle comporte toutefois une garantie claire de la liberté de religion qui a donné lieu à une série de jugements rendus par la Cour suprême conférant à cette garantie une portée étendue.

En 2004,[91] la Cour suprême a estimé que des Juifs orthodoxes, copropriétaires de luxueux immeubles, pouvaient installer des « souccahs » sur leurs balcons respectifs pour se conformer à leurs convictions religieuses personnelles, malgré le règlement

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d'arbitrage et son impact sur les personnes vulnérables. Par la suite, en 2006, l'Assemblée législative de l'Ontario a adopté des modifications législatives suivant lesquelles les arbitrages familiaux fondés sur des lois et des principes qui ne sont pas canadiens, y compris des principes religieux, sont privés d'effet juridique et ne seront pas exécutoires par les tribunaux. Par ailleurs, le retrait d'un sapin de Noël du hall d'entrée d'un palais de justice de Toronto en Ontario, ce symbole risquant d'offenser des non-chrétiens, a provoqué une levée de boucliers en 2006. Enfin, la Cour d'appel a récemment élaboré des critères pour permettre à une personne entièrement voilée de témoigner dans un procès judiciaire au criminel dans *R.* c. *N.S.*, [2010] ONCA 670.

[87]En Colombie-Britannique, le gouvernement a demandé à la Cour de première instance de la province de statuer sur la constitutionnalité des dispositions du *Code criminel* qui prohibent la polygamie. Un rapport préparé pour le ministre fédéral de la Justice indique que la prohibition de la polygamie pourrait être trouvée en violation des obligations internationales du Canada: Cook et Kelly.

[88]En 1991, près de 84 p. 100 des Canadiens et Canadiennes étaient de foi chrétienne; on dénombrait 46 p. 100 de catholiques, 36 p. 100 de protestants et 1 p. 100 de personnes de religion orthodoxe orientale. La proportion de personnes disant appartenir à une religion autre que chrétienne est passée à environ 4 p. 100, dont un peu plus de 1 p. 100 se déclarent de religion juive. Quant à la proportion de personnes déclarant n'appartenir à aucune religion, elle dépassait les 12 p. 100. Document de référence, par. 22. Le recensement de 2001 révèle de nouveaux pourcentages comparables aux précédents: plus de 70 % sont chrétiens; 16 % n'appartiennent à aucune religion; à peu près 2 % sont musulmans; 1 % juifs; bouddhistes : 1 % ; hindous : 1 % ; sikhs : 1 %. Le recensement de 2006 ne comporte pas de données à cet égard.

[89]Le préambule de la Charte énonce ce qui suit : « Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit ». Suivant la jurisprudence, cela ne l'empêcherait pas de devenir un État laïque: *O'Sullivan* c. *M.R.N.,* (1992) 1 C.F. 522; *Baquial* c. *Canada (Minister of Employment and Immigration)*, (1995) 28 C.R.R. (2d) D-4 (C.F.) (résumé); une prière récitée lors des assemblées d'une municipalité ne porterait pas atteinte à la liberté de religion : *Allen* c. *County of Renfrew*, (2004) 69 O.R. (3d) 742 (C.S.) et *Freitag* v. *Town of Penetanguishene*, 1999 CanLII 3786 (ON. C.A.), c*ontra* en 2006, Laval avait dû abandonner la pratique de la prière après un jugement rendu à cet effet par le TDPQ, précité. En décembre 2009, la CDPDJ a également rendu une décision semblable concernant la ville de Trois-Rivières. La prière n'y a toutefois pas été abolie. En février 2011, la décison du TDPQ visant à interdire la prière à la ville de Saguenay a été portée en appel : *Simoneau* c. *Tremblay*, 2011 QCTDP 1.

[90]Article 27 de la *Charte canadienne*.

[91]*Syndicat Northcrest* c. *Amselem*, [2004] 2 R.C.S. 551.

de copropriété qui l'interdisait. En 2006, elle a jugé qu'un élève sihk aurait dû être autorisé à porter son kirpan à l'école, à certaines conditions matérielles destinées à assurer la sécurité.[92] En 2009,[93] elle a maintenu la constitutionnalité d'un nouveau règlement de l'Alberta qui oblige toutes les personnes qui conduisent un véhicule automobile sur la voie publique à détenir un permis de conduire avec une photo de son titulaire. Les membres de la colonie huttérite Wilson refusent, pour des motifs religieux, de se laisser photographier. Ils ont contesté la validité constitutionnelle du règlement en alléguant qu'il portait une atteinte injustifiée à leur liberté de religion. Les juges majoritaires de la Cour suprême ont estimé que cette atteinte était justifiée[94] puisque l'objectif du règlement contesté était de préserver l'intégrité du système de délivrance des permis de conduire d'une façon qui réduit au minimum le risque de vol d'identité. La photo obligatoire universelle permet au système de garantir que chaque permis correspond à une seule personne, que personne ne détient plus d'un permis et que seules les personnes légalement qualifiées pour conduire détiennent un permis.

Dans *Waldman* c. *Canada,*[95] le Comité des droits de l'homme a décidé que constitue une violation de l'article 26 du PIDCP le fait pour l'Ontario de financer les écoles catholiques, en vertu d'une obligation constitutionnelle canadienne (art. 93 de la *Loi constitutionnelle, 1867)*, à l'exclusion de toutes les autres écoles, hormis celles du secteur public. On est ainsi amené à constater que parfois le droit international n'est pas exactement conforme au droit interne canadien et vice-versa. Par exemple, on ne retrouve pas dans le PIDCP de disposition générale semblable à l'article 1 de la *Charte canadienne.*[96] Ce texte de l'article 1 de la *Charte canadienne*, qui permet de restreindre un droit ou une liberté par une règle de droit dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, n'existe, semble-t-il, dans le PIDCP, qu'en vertu de l'interprétation que donne le Comité des droits de l'homme à l'égard

[92] *Multani* c. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256. Des sondages effectués dans la population ont démontré qu'une majorité de Canadiens désapprouve cette décision.

[93] *Alberta* c. *Hutterian Brethren of Wilson Colony*, 2009 CSC 37. En première instance et en appel, les tribunaux leur ont donné raison. L'acceptation de la burqa semble diviser l'opinion publique alors que les Canadiens sont unanimes à dénoncer les mutilations génitales féminines, les crimes d'honneur, les mariages arrangés. Voir en ce qui concerne les élections fédérales, le site Web du directeur des élections.

[94] Au regard de l'article premier de la Charte tel que défini par le texte de l'arrêt Oakes *R. c. Oakes*, [1986] 1 R.C.S. 103 (voir *supra* note 24).

[95] Une communication visant à faire supprimer le financement public des écoles catholiques séparées a été jugée irrecevable (*Tadman* c. *Canada*).

[96] L'article 4 du *Pacte international relatif aux droits économiques, sociaux et culturels* s'en rapproche puisqu'il prévoit que: « Les États parties au présent Pacte reconnaissent que, dans la jouissance des droits assurés par l'État conformément au présent Pacte, l'État ne peut soumettre ces droits qu'aux limitations établies par la loi, dans la seule mesure compatible avec la nature de ces droits et exclusivement en vue de favoriser le bien-être général dans une société démocratique ».

de l'article 26 (discrimination) et est donc beaucoup plus circonscrit. Les possibilités de justifier une atteinte à une liberté comme la liberté d'expression sont donc beaucoup plus limitées suivant le PIDCP que suivant la *Charte canadienne*.

3.4 Conclusion

Le Canada est membre des grandes organisations internationales et partie aux principaux instruments en matière de droits de la personne. Les textes internationaux qui protègent les droits de la personne ne sont généralement pas introduits en droit interne canadien, soit que l'on estime que le droit interne y est déjà conforme, soit que l'introduction de nouvelles normes risquerait de créer des incompatibilités. S'agissant de compétences partagées entre le gouvernement fédéral et les gouvernements provinciaux et territoriaux, divers mécanismes ont été mis en place pour assurer que le droit interne canadien soit conforme aux obligations internationales que le Canada contracte, car en cas d'incompatibilité, le droit interne prévaut. Même si l'on devait conclure que les droits et libertés fondamentaux sont de droit coutumier, le droit interne pourrait y déroger. Le recours à différentes techniques d'interprétation permet d'éviter de constater des situations d'incompatibilités. Les tribunaux nationaux réfèrent fréquemment aux textes internationaux. Une difficulté persiste : elle réside dans la continuité de l'examen des nouvelles initiatives de nature législative et autre à la lumière des instruments internationaux déjà ratifiés.

La *Charte canadienne* et les lois fédérales, provinciales et territoriales protègent les droits et libertés au niveau national. Ces instruments sont interprétés à la lumière des conventions internationales. On peut ainsi observer une certaine convergence entre les normes nationales et universelles.

Par ailleurs, la population canadienne entretient des rapports ambivalents avec les droits et libertés de la personne et l'action de ses gouvernements. Il y a encore beaucoup de progrès à faire au niveau de notre compréhension des droits collectifs et de leur interaction avec les droits individuels. Les droits des Autochtones et des Québécois doivent-ils se confondre entièrement avec le souhait de beaucoup d'immigrants de conserver leur langue et leur culture?[97]

Enfin, les différents organes chargés de l'application des instruments internationaux de droit de la personne émettent des préoccupations au sujet du Canada. Ces différents comités rappellent régulièrement au gouvernement fédéral sa responsabilité de veiller à ce que les provinces et les territoires respectent tous les instruments ratifiés par le Canada. Pourtant, les droits de la personne sont de responsabilité partagée au Canada et les divergences dans les traditions et les cultures des provinces et des territoires et également au sein des gouvernements autochtones autonomes peuvent être tolérées tant que les obligations internationales demeurent respectées.

[97] Ignatieff ne le croit pas, Ignatieff (2001, 66).

Bien plus, ces divergences peuvent engendrer de saines stimulations entre les gouvernements.

Faut-il voir dans ce mutuel mécontentement de la population canadienne et des organes chargés de l'application des instruments internationaux, à l'endroit des gouvernements canadiens, un signal? Si c'est le cas, quel est le message?

À notre avis, des changements sont souhaitables. La paix et la sécurité, l'aide humanitaire, le développement et le droit international ne peuvent être dissociés des droits de la personne. Les sociétés doivent s'approprier les valeurs de la reconnaissance de la dignité inhérente de l'Autre, du respect mutuel que nous devons avoir de nos spécificités, de l'acceptation de nos différences, dans une démarche holistique afin que le vœu que les droits de la personne soient universels et normatifs devienne une réalité.

Comme l'écrivait si bien, John Saul :

> La civilisation canadienne repose sur des idées qui ont été façonnées et appliquées pendant quatre siècles : celle de la citoyenneté comme un cercle qui accueille et s'adapte, par exemple, et celle qui fait de l'équité et de l'inclusion nos pincipes opérants. […] Le Canada n'a pas de modèle à proposer au monde. Mais sa longue expérience de la complexité et de l'équité n'a jamais semblé plus moderne (Saul, 2008, 322).

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Annexe - Conventions auxquelles le Canada est partie

Convention pour la prévention et la répression du crime de génocide;
Convention relative au statut des réfugiés;
Convention sur les droits politiques de la femme;
Convention relative à l'esclavage signée à Genève le 25 septembre 1926 et amendée par le Protocole du 7 décembre 1953;
Convention supplémentaire relative à l'abolition de l'esclavage, de la traite des esclaves et des institutions et pratiques analogues à l'esclavage;
Convention sur la nationalité de la femme mariée;
Convention sur la réduction des cas d'apatridie;
Convention internationale sur l'élimination de toutes les formes de discrimination raciale;
Pacte international relatif aux droits économiques sociaux et culturels;
Pacte international relatif aux droits civils et politiques;
Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques;
Protocole relatif au statut des réfugiés;
Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes;
Convention contre la torture et autres peines ou traitement cruels, inhumains ou dégradants;
Convention relative aux droits de l'enfant;
Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés;
Convention des Nations Unies contre la criminalité transnationale organisée;
Protocole additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants;
Protocole contre le trafic illicite des migrants par terre, air et mer, additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée;
Protocole facultatif à la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes;
Protocole facultatif à la Convention relative aux droits de l'enfant, concernant la vente des enfants, la prostitution des enfants et la pornographie mettant en scène des enfants; et à la
Convention relative aux droits des personnes handicapées depuis le 11 mars 2010.
Convention sur la protection et la promotion de la diversité des expressions culturelles 2005; Convention sur la reconnaissance des études et des diplômes, relatifs à l'enseignement supérieur dans les états de la région Europe, Paris, le 21 décembre 1979.
Convention (n° 87) concernant la liberté syndicale et la protection du droit syndical;
Convention (n° 100) concernant l'égalité de rémunération des travailleurs et travailleuses pour un travail de valeur égale;
Convention (n° 105) concernant l'abolition du travail forcé;
Convention (n° 111) concernant la discrimination en matière d'emploi et de profession;

Convention (n° 122) concernant la politique de l'emploi;
Convention (n° 182) sur les pires formes de travail des enfants.
De plus, le Canada a l'obligation, comme l'ensemble des autres membres de l'OIT, du seul fait de son appartenance à l'Organisation, de respecter, promouvoir et réaliser, de bonne foi et conformément à la Constitution de l'OIT, les principes concernant les droits fondamentaux suivants en vertu de la Déclaration de l'OIT relative aux principes et droits fondamentaux au travail, 6IHRR 285 (1999) : la liberté d'association et la reconnaissance effective du droit de négociation collective;
a) l'élimination de toute forme de travail forcé obligatoire;
b) l'abolition effective du travail des enfants;
c) l'élimination de la discrimination en matière d'emploi et de profession.
Ceux-ci correspondent à certaines conventions que le Canada n'a pas ratifiées. Association et négociation : C98 Convention sur le droit d'organisation et de négociation collective; Élimination travail forcé: C29 Convention sur le travail forcé, 1930; Abolition travail des enfants: C 138 Convention sur l'âge minimum, 1973
Convention sur la nationalité de la femme,
Convention interaméricaine sur la concession des droits politiques à la femme
Convention interaméricaine sur la concession des droits civils à la femme
Convention concernant l'assistance administrative mutuelle en matière fiscale (127);
Convention sur la reconnaissance des qualifications relatives à l'enseignement supérieur dans la région européenne (165);
Convention sur la cybercriminalité (185);
Protocole additionnel à la Convention contre le dopage (188);
Protocole additionnel à la Convention sur la cybercriminalité, relatif à l'incrimination d'actes de nature raciste et xénophobe commis par le biais de systèmes informatiques (189).
Convention sur le transfèrement des personnes condamnées (112);
Convention contre le dopage (135).

Chapter 4
The Impact of the Jurisprudence Inter-American Court of Human Rights on the Chilean Constitutional System

José Ignacio Martínez Estay

4.1 Introduction

Today, the idea is being settled each time more strongly that the fundamental rights and liberties are above the states, to the point that international systems have been created to guarantee and protect them. Among other things, this translates to the state considering not only national but also international law, contained in treaties ratified by the states. Furthermore, the states may even be condemned by international agencies in case of infringement of those rights and liberties. Chile has adhered to this idea through the Constitution Article 5, paragraph 2, by virtue of which the state's instruments shall not only respect and guarantee the rights established in the Constitution but also those contemplated in "the international treaties ratified by Chile and that are in force".

One of the most relevant treaties signed by Chile on these matters is the American Convention on Human Rights, also known as *Pacto de San José de Costa Rica*. From its ratification, Chile has seen how the application of its norms involves important challenges, above all when the agent responsible for their application understands that the State has concurred in their infringement. This is because "one of the fundamental obligations originated from the compromise of respect and guarantee of the rights recognized in the Inter-American agencies consists in taking said measures at a local level that facilitates the implementation of the Inter-American system decisions" (Krsticevic 2007, 39).

This Chapter will analyze the human rights Inter-American system, the relationship between Constitution and rights in Chile, as well as the position of the

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treaties on human rights concerning the Constitution and the Chilean national law. Finally, the four cases in which Chile has been condemned for infringement of the San José Pact will be briefly revised, as well as how it has affected the national juridical system.

4.2 The Inter-American System of Human Rights

The Inter-American system of human rights has been conceived under the framework of the Organization of the American States (OAS). As a matter fact, it began in 1948, with the creation of the OAS, at the same conference in which the Articles of Incorporation of the international organizational were signed (May 1984, Bogotá, Colombia). Therein the American Declaration of the Rights and Duties of Man was also approved. Both instruments created the so-called Inter-American system of human rights.

Considering that the Inter-American system is based on two different legal sources (the OAS Charter and the American Convention on Human Rights), they are usually referred to as Inter-American systems of human rights. The systems differ in the scope of their application. The one based on the OAS Charter is applied to all member states, while that of to the Convention only obliges the states that form part of it. Nevertheless, it should be specified that at present a new trend has emerged unifying both categories. For the time being, a new organization exists named the Inter-American Commission on Human Rights, which is common for both systems; the procedures of action of one as well as the other are practically identical.

4.2.1 The System Based on the OAS Charter

The basis of this system is found on the OAS Charter and the American Declaration of the Rights and Duties of Man. From these instruments it went through an evolutionary process that reached its climax with the creation of the Inter-American Commission on Human Rights, the 1967 Protocol of Amendment to the OAS Charter and entry into force of the Inter-American Convention on Human Rights. Although the latter created a special system, it also meant important developments for the Inter-American system based on the OAS Charter.

The OAS Charter is the Organization's multilateral treaty of a constitutional character. It was signed on 30 April 1948 in Bogotá,[1] and became effective

[1]It was signed by Argentina, Bolivia, Brasil, Colombia, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Estados Unidos, Guatemala, Haití, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, República Dominicana, Uruguay, Venezuela.

3 years later.[2] Even though the allusions to the Charter of human rights are scarce and it does not institute organizations devoted to their observance, this has not been an obstacle for drawing up a protection system. At the 9th Pan-American Conference held in May 1948, the American Declaration of the Rights and Duties of Man was passed that contains a catalogue of 27 rights and 10 obligations. Even though originally this Declaration was adopted through a non-obligatory Resolution, the Inter-American Court has held that "for the Member States of the Organization, the Declaration is the text that defines human rights referred to by the Charter. For these States, the Declaration is a source of international obligations concerning the Organization's Charter".[3]

According to the Organization's Charter, the Commission is largely preoccupied with the development of activities of promotion, consultation, national studies and taking into account individual requests. Within the category of promotion and consultation functions, the Commission shall or may be, for example, a consultant instrument of OAS Permanent Council and General Assembly; it may sponsor conferences, publish documents on human rights, design OAS Human Rights documents, and *inter alia* adopt a role as human rights mediator and protector in civil war situations and armed conflicts.

In its efforts to protect human rights, the Commission investigates the situation of human rights in each country. Normally, such investigation begin after receiving accusations or other credible evidence pointing out that a government has committed important violations of human rights. These investigations are carried out on site of the facts occurrence (*in loco* investigation). The Commission requests the authorization to visit the country in question and creates a special commission made up by the number of members decided by the Commission; no nationals or residents of that country may form part of it. Once the permission is granted, the special commission has all the facilities to perform its mission.

At the end of the investigation, a report is prepared with provisional conclusions and is given to the state under investigation. The Commission analyzes the state's response and then decides whether to publish the report. Such publication is compulsory if there is no answer from the state; however, if there is one and the state undertakes to fulfill the recommendations suggested in the report, there is no Commission's obligation to publish the report on the results of the investigation.

[2]The Charter was amended four times: "Protocolo de Buenos Aires" February 27, 1967, "Protocolo de Cartagena de Indias" December 5, 1985, "Protocolo de Washington" December 14, 1992 and the "Protocolo de Managua" June 10, 1993. Thirty-five countries ratified the OAS Charter and become Members of the Organization: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brasil, Canada, Chile Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, United States, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, México, Nicaragua, Panama, Paraguay, Perú, Republica Dominicana, St.Vincent and the St. Kitts and Nevis, Santa Lucía, Suriname, Trinidad and Tobago, Uruguay, Venezuela.

[3]Advisory Opinion 10/89, I-A. Court H.R., Serie A.

Another important function concerning the human rights protection relates to individual requests. Formerly, this possibility was quite limited, but now the Commission Regulation stipulates a procedure that allows the Commission to receive individual requests wherein human rights violations are alleged.

4.2.2 System Based on the Convention

The American Convention on Human Rights was signed in San José de Costa Rica in 1969, coming into effect in 1978. The Convention establishes a comprehensive catalogue of guarantees regarding civil and political rights. In addition it contains an open clause which expresses the commitment of States parties to take steps towards "the full realization of the economics, social, educational, scientific and cultural rights established in the Charter" (Article 56 of the Rules of Procedure of the Inter-American Commission on Human Rights).

The organs established by the Convention for the protection of the rights guaranteed in its text are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Both organs are made up of seven members that act in an individual capacity but are proposed and elected by the States as established in the Convention. The members of the Commission perform their functions for 4 years, being eligible for reelection only once. The Court members remain in their positions for 6 years and are also eligible for one reelection. Both the Commission and the Court generally hold two or three periods or ordinary sessions that extend for approximately 3 weeks at their respective seats (Washington and San José of Costa Rica respectively).

The Convention grants the Commission the faculty to receive individual requests (presented by the victims of human rights violations or by groups or non-governmental organizations) and inter-state communications. Therefore in the system of the Convention, the Commission also has functions related to the receipt of requests, but only applicable to the States Parties of the Convention that accepted its jurisdiction.

The conditions for the request to overcome the eligibility review are: the indigenous resources; the request being formulated within 6 months since the notice of the final national judgment; the request not being unfounded, not being obviously out of order. Once these requirements are fulfilled, the request is accepted for processing and the Commission receives background materials from the government in question, investigates and hears pleas.

If it comes to a friendly solution between the parties involved, the Commission prepares a report describing the facts of the case and settlement proposal. Should that not be possible, the Commission draws a report on the facts and conclusions reached. In case the Commission verifies violations of rights, the report is sent to the referred state so that its recommendations may be fulfilled or refuted within a 3-month term. In that period, both the Commission and the states involved may remit the case to the Court but not its particulars, since this option is excluded.

Furthermore, the Commission participates in all contentious proceedings occurring before the Court. This has led some authors to describe the Commission, in such cases, as a sort of "Public Minister of the Inter-American system" (Buergenthal 1994, 216).

As already mentioned, the other organ provided for by the Convention is the Court. It has jurisdiction to decide cases and to give advisory opinions. Article 62.3 of the Convention refers to the Court's competence to resolve cases:

> The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

According to Article 61 of the Convention "only the State parties and the Commission are entitled to submit a case to the Court decision". The Court may revise the background compiled by the Commission both in fact and in law. It also reviews the objections raised against its jurisdiction based on breach of procedure laid down in Articles 48–50 of the Convention

Article 67 of the Convention stipulates that a judgment pronounced by the Court is final and not susceptible of appeal. However, in case of doubts over the judgment's meaning and scope, the Court may be requested to clarify those doubts by means of an interpretation resource.

The Convention has no specific mechanisms for supervising the fulfillment of the judgments issued by the Court. The only means of supervising the judgment's effective fulfillment is the report which the Court must send to the OAS General Assembly pursuant to Article 65 of the Convention, the objective of which is the adoption of the pertinent political measures.

As far as advisory opinions are concerned, their scope is quite wide. Any OAS member state (i.e. not only the state party to the Convention) is entitled to request an advisory opinion regarding the interpretation of the Convention or any other treaty connected to the Inter-American human rights protection. It is even possible to request an advisory opinion on whether the internal laws of a state are in accordance with the Convention or other treaties dealing with human rights. The organs of the OAS should have a legitimate interest in the subject, and it must be a matter within their competences.

4.3 Constitution, Law and Rights in Chile

Since its independence, Chile has had ten constitutions,[4] but only three of them are especially important, in view of their common characteristics and duration: the 1833, 1925 and 1980 Constitutions. They adopted and consolidated a unitary state,

[4] "Regulation for the Provisional Executive Authority of Chile" of 1811, "Constitutional Regulation" of 1812, "Regulation for the Provisional Government" of 1814, Constitution of 1818, Constitution of 1822, Constitution of 1823, Constitution of 1828, Constitution of 1833, Constitution of 1925 and Constitution of 1980.

with a presidential system and the same separation of powers (President, Congress and Judiciary). But the 1833 and 1925 Constitutions formed part of a period wherein the influence of the classical European continental tradition was very strong. That is why those constitutions were seen as political instruments without direct legal value.[5] They were not enforceable before the courts, except before the Supreme Court, with a kind of judicial review procedure called *recurso de inaplicabilidad*. In the 1833 and 1925 Constitutions there were lists of rights, but they were not directly enforceable in courts.

The 1980 Constitution departs from the classical European tradition. This Constitution includes a Constitutional Court[6] that makes a judicial review *a priori* and *a posteriori*. *A priori* the Constitutional Court reviews some legislative projects because to do so is mandatory: interpretative acts of the Constitution (*leyes interpretativas de la Constitución*)[7] and constitutional organic acts (*leyes orgánicas constitucionales*).[8] Others are reviewed if the President, or the Senate, a quarter of senators, the Chamber of Deputies or a quarter of deputies request it (Article 93, number 3). The 2005 Constitutional amendment gave the Constitutional Court the power to decide on the *recurso de inaplicabilidad*, replacing the Supreme Court.

Likewise, Chapter III of the 1980 Constitution contains a long list of rights and liberties (Article 19), and includes a special mechanism to protect them before courts of law called *recurso de protección*. Since then the Constitution is not only a political document with a little influence on law and has become enforceable before courts, and human rights are not seen only as philosophical or political issues. They became juridical faculties therefore judges play an important role because in the new constitutional order they are defenders of the Constitution, including rights and liberties.

Another important innovation is the conception of rights and liberties as not only against the state. The 1980 Constitution stipulates that human rights had to be observed by every person.[9] Article 6 says that the norms of the Constitution are binding not only on the State powers but also on people. Accordingly, the *recurso de protección* may be used against private acts (Article 20 permits this).[10]

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[5] This is a clear influence of the European continental political and juridical tradition.

[6] The Constitutional Court had been created by the 1970 amendment to the Constitution of 1925.

[7] These laws are enacted to interpret the Constitution. Article 66 of the Chilean Constitution required three-fifths of the senators and deputies.

[8] According to Article 66 of the Chilean Constitution, these laws required a special quorum of four-sevenths of the senators and deputies. The Constitution required this special quorum because these laws regulate certain matters that the constituent power considered especially important, for instance, some rights and liberties, or the regulation of the powers.

[9] It is the German doctrine of *Drittwirkung der Grundrechte* (horizontal effect of fundamental rights).

[10] The problem is that this provision is widely used to bring to the courts private law problems and not constitutional problems. That is why nowadays, an important percentage of *recursos de protección* is connected with this kind of subjects, because lawyers prefer this mechanism, which is faster than other procedures. The *recursos de protección* are tried by courts of appeal. It is possible to appeal to the Supreme Court against their judgments.

The *recursos de protección* jurisprudence is an important way to know the limits and content of rights and liberties in the Chilean constitutional system. Nowadays in Chile, in order to know and learn constitutional law, it is necessary to study this jurisprudence. This is the best demonstration that things have changed in the last 30 years; thanks to the *recurso de protección*, the Constitution is enforceable before courts of law. This and the work of an important group of public law professors, has transformed the attitude of the judges, lawyers and law students. Some decades ago they saw the Constitution only as a political instrument. Now they agree that the Constitution has not only a political nature, but also a juridical one.

4.4 The Position of the International Treaties on Human Rights in the Chilean Constitutional System

4.4.1 The Hierarchy of International Treaties on Human Rights

The Chilean Constitution does not enunciate explicitly the hierarchy of the various international treaties on human rights. In particular, a wide-ranging discussion has been initiated since the incorporation of the second sentence of Article 5, paragraph 2 by the constitutional reform of 1989. This Article says that sovereignty is limited by the respect of human rights. The amendment added the obligation of the state powers to respect and promote the rights recognized in the Constitution and in international treaties on human rights, ratified by Chile and which are in force. Some argue that such treaties have a constitutional effect, since upon ratifying the treaty the Constitution would be modified. Thus, "the treaty on human rights becomes a secondary proceeding of constitutional reform established by the proper constituent, upon carrying out the 1989 constitutional reform, different from the constituent proceeding derived from Chapter XIV" (Nuñez Poblete, 86). Others, on the contrary, assert that such treaties have a legal effect inferior to that of the Constitution, since their range is equal to that of the law.

A third position states that international treaties on human rights are norms of an infra-constitutional character, but supra-legal. To sustain this position the following arguments have been resorted to.

4.4.2 The History of Article 5 (2) Second Sentence of the Constitution

The norm envisaged in Article 5 (2) second sentence of the Constitution is a product of the 1989 constitutional reform. It was a consensual reform between the military government and the opposition at that time (*Concertación de Partidos por la Democracia*).

The proposal of the opposition and of one of the parties that supported the military government (*Renovación Nacional*) stated: "It is the duty of the state's agents to respect and promote the rights, guaranteed by this Constitution and by the international norms that bind Chile". Eventually, the proposal was unsuccessful. For some, the proposal extension was "clear evidence as to the legal effect of international treaties on human rights in the Chilean Constitution, considering that their legal effect is the same as that was originally raised for those undetermined 'international norms that bind Chile', and (…) nobody may sustain that such norms, that include even international organizations resolutions (…) would have been of a constitutional effect" (Bertelsen Repetto 1998, 218).

The bill report that "Introduced modifications to the Political Constitution of the Republic" sent by the Joint Commission to the Board of Government, contained a statement which shed light on the hierarchy of these treaties. It was stated that "human rights that emanate from human nature are not established by the Constitution; the Constitution limits itself to recognize and describe them; the laws and international treaties being able to develop them without affecting their essence". Consequently, international treaties on human rights, just as ordinary laws, are subordinated to the Constitution and, therefore, their role is limited to developing these rights.

Further on, the same report points out that the treaties' effectiveness to which this norm refers "does not oppose the legal basis of the judicial review[11] due to unconstitutionality pursuant to general rules". According to the Chilean Constitution it is possible to appeal the constitutionality of laws ("legal precept", Article 93 N° 6). In the Chilean constitutional system the treaties have the same legal status as ordinary laws. So it is possible to appeal against treaties that deal with human rights, because they are hierarchically below the Constitution. That is why they can be reviewed in order to determine whether they are in accordance with the Constitution.

4.4.3 The Principle of Harmonious Interpretation of the Constitution and the Requirements for Constitutional Amendments

The Constitutional Court has sustained that "the Constitution is an organic whole and the sense of its norms has to be determined so that between them the proper equivalence and harmony may exist, excluding any interpretation that leads to invalidate or deprive of efficiency any of its precepts."[12] Therefore, it is necessary to analyze constitutional norms that would be unable to sustain the assertion that

[11] In the Chilean Constitution the Spanish name of this appeal is "recurso de inaplicabilidad". This judicial review is equivalent to a hypothesis of concrete control of constitutionality.

[12] Constitutional Court, September 28 1985, Role 33. See: February 24, Role 43; May 14, 1991, Role 126 and June 26, 2.001, Role 325.

international treaties on human rights have the same legal effect as the Constitution. In a judgment number 346 (8 April 2002) on the constitutionality of the Rome Treaty (founding the International Criminal Court), the Chilean Constitutional Court stated that international treaties on human rights are not at a superior or at the same level as the Constitution (paragraph 62 of the judgment). In its opinion, Article 5 of the Constitution only emphasizes the need for the state and its instruments to respect not only constitutional rights, but also international treaties on human rights (paragraph 71). Thus, international treaties on human rights may not amend the Constitution. That is why if a treaty includes norms which contradict the Constitution, the only way to validate them is through a formal amendment of the Constitution, according to the constitutional procedures (paragraph 74). If that requirement were not so, it would mean that a norm approved through the quorum of a simple law could amend the Constitution without the requirements set by the Constitution itself.[13] Finally, if treaties on human rights were superior to the Constitution, the question arises of how to explain the competence granted by the Constitution to the Constitutional Court of controlling international treaties signed by the Government.

A good example of the treaties' subordination to the Constitution is the 1991 reform, which allowed the application of Article 4 of the San José de Costa Rica Treaty. Such a reform was necessary because originally the Constitution had forbidden granting pardon to persons condemned to death penalty in terrorist cases. The mentioned Article of the San José de Costa Rica Treaty recognizes the right to request pardon of every person condemned to such a penalty. Another example is the 2009 reform that was approved by the Congress because the Constitutional Court had decided that a constitutional amendment was the only way to enable the jurisdiction of the International Criminal Court to judge crimes committed in Chile.

4.4.4 The Hierarchical Superiority of Treaties on Human Rights with Regard to National Law

According to Silva Bascuñan, international treaties on human rights are in a superior level than the laws, because of their subject-matter, but formally they are in the same level as the laws (Bascuñan 1997, 124–125). This means that "if treaties and laws are on the same hierarchical level, in a case which requires a choice of either of them, the treaty will prevail over the national law" (Ibid.). This opinion is endorsed by what is stated in Article 5 of the Chilean Constitution, according to which "the

[13] To amend the Constitution, special quorum is necessary, variously depending on the chapter of the Constitution. In order to amend Chapters I, III, VIII, XI, XII and XV, it is necessary that the three fifth of senators and deputies approve. If the amendment affects any other chapter, it is necessary that the two thirds of the senators and deputies approve (Article 127). In order to approve an international treaty only a simple majority of the senators and deputies is required, unless the treaty contains norms that require a special quorum (Article 54).

sovereignty is limited by the respect for the essential rights emanating from human nature, recognized in the Constitution and international human rights treaties ratified by Chile that are in force".

4.4.5 The Chilean Constitution and the American Treaty on Human Rights

One of the most important treaties on human rights signed and ratified by Chile is the American Treaty on Human Rights (San José de Costa Rica Treaty).[14] This Treaty contains a large list of rights and liberties, guaranteed by two important instruments: the Commission and the Court. Article 44 of the Treaty says that anyone may report to the Commission the violations of human rights committed by the States; however, national remedies should first be exhausted. The Commission acts as a mediator between the plaintiff and the state (Article 48.1.f). The procedure may end with a friendly solution (Article 49). Should this not be the case, the Commission will produce a report which may contain proposals and recommendations considered useful to resolve the problem (Article 50). Starting from the production of this report, there is a 3-month period during which the Commission may report the case to the Court or prepare a report with its opinion and the conclusions on the matter (Article 51). In this report, the Commission makes recommendations and establishes a period within which the state shall take measures to solve the problem (Article 51). At the end of this period, the Commission will decide whether the state has or has not taken the appropriate measures, and whether it publishes or not its report (Article 51).

The procedure before the Court begins after the end of the procedure before the Commission (Article 61.2). Only the states and the Commission may submit a case to the Court (Article 61.1). Likewise, the Court's jurisdiction shall be recognized by the states at the moment of depositing the instrument of ratification or adhesion, or at any time (Article 62.1). The recognition may be made unconditionally, or under condition of reciprocity, for a specific period or for specific cases (Article 62.2). Should the Court hold that there was a violation of a right, it will decree the protection of the person affected by the violation. If necessary, the Court will arrange to rectify the consequences of the measure or situation that constituted the breach of rights, and the payment of fair compensation to the victim (Article 63.1).[15] Article 67 provides that the Court decision is final and conclusive. But in case of any doubts about the extent of the decision, it is possible to request an interpretation of this, and the Court itself will determine the meaning and scope of its decision should there be any doubts.

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[14] Chile ratified the Treaty on August 14, 1990.

[15] During the procedure, in serious and urgent cases, in order to avoid irreparable damages to the persons, the Court may take provisional measures. In cases that are under procedure before the Commission, the Court could take the same measures if the Commission asks for it (Article 63.2).

4.4.6 The Relationship Between the San José de Costa Rica Court's Judgments and the Judgments of the Chilean Courts

4.4.6.1 The San José de Costa Rica Court's Judgments Have No Supremacy over Chilean Courts

One of the consequences of internationalization of rights and liberties is the creation of international jurisdictional agencies. Their existence is logical if one thinks that a norm's efficacy depends largely on its justness. But there are situations that may lead to a confrontation between national and supranational courts. This as a result of different interpretations that may be given to rights and liberties recognized and guaranteed by both national and supranational law. If supranational is understood as something hierarchically superior, then one is to understand that interpretation by a supranational court and decisions thereof are superior to his national counterpart. However, as has already been mentioned, the Constitutional Court holds that all international treaties are subject to the Constitution. That is why in judgment number 346, the Constitutional Court said that the Court of San José de Costa Rica may not amend the judgments of the Chilean Courts.

For the same reason, given certain assumptions, it seems reasonable to recognize the states' right to give predominance to their national law and to its application made by the national courts. Of course this may not serve as an excuse for the supranational right fulfillment by whatever motive. Thus, it appears that it is advantageous to have available international jurisdictions that make up for the lack of national courts or their negligent attitude in cases of systematic, massive and gross violations of human rights. Within this scope, it seems difficult to find excuses to defend such violations by a state, and it is therefore understandable that the attitude and decisions of the supranational courts may have a special binding value, without detriment to other attitudes which the international community may adopt.

Nevertheless, such criteria may be adjusted in the case of countries with constitutional and democratic systems. There are at least two reasons for this. The first is the basic assumption that in such countries the institutionalized policies of violations of human rights may not occur. Secondly, juridical guarantees are contemplated for such violations, both before the national and supranational courts. So, the competition of supranational courts and the binding force of their decisions in such democratic countries cannot be compared with such their activity in non-democratic countries where supranational courts act to make up for either absence or inactivity of national courts in cases of massive and institutionalized violations to human rights.

In this sense, the creation of supranational mechanisms to protect human rights cannot mean political communities' abdication to defend the very basic principles on which they are founded and which they will never be able to give up: for example, the community's attitude towards existing rights therein, basis for and protection thereof (Nuñez Poblete 2000, 86). In fact, this is not new in western juridical history.

For example, during the second half of the nineteenth century, the Wisconsin Supreme Court declared that the *Fugitive Slave Act 1850* (Federal law), infringed due process guaranteed in the Federal Constitution, by allowing Federal agents to detain citizens without a judicial order.

Something similar also occurred in the European Union where, as indicated by Stith, "no monopoly exists on the interpretation of a right" (Stith 2000, 17). This is ultimately because "the national juridical systems stay out of the control of the European Court of Justice when interpreting purely national law" (Ibid.). In Stith's words, this permits the existence of a juridical pluralism,[16] which could be called an interpretative pluralism. Such pluralism is apparently better than monopoly in these matters, since it agrees more with the idea of a constitution itself. This, among other things, implies that no one may set up as the ultimate source of lawfulness and law-making. Such a basis of juridical and interpretative pluralism has enabled German and Italian constitutional courts to make significant pronouncements as to the relationships between their constitutional systems and EU law.

Therefore, in the judgments of the German Federal Constitutional Court in *Solange* (BverfGE 271, 1974), "Maastricht" (89 BverfGE 155, 1993) and on Lisbon Treaty (BVerfG 2 BvE 2/08, 2009) some parameters are determined which demonstrate the existence of certain spheres of competence reserved to the state. The first judgment claims the Court's duty to protect fundamental rights of German citizens, which includes the possibility of reviewing the compatibility of an EU Regulation with the German Constitution. In turn, in the Maastricht judgment, the German Federal Constitutional Court held that European Union law had to adjust to the German Constitution; consequently, the Court is competent to control the effectiveness thereof. Such a situation is now reflected in Article 23(1) of the German Basic Law.[17] Finally, the recent judgment on the Lisbon Treaty confirms earlier jurisprudence of the German Federal Constitutional Court by pointing out that European integration implies an attribution of competences of the Union member states, and this shall respect the constitutional identity of each of them. Likewise, the German Constitutional Court reaffirmed that it has the authority and competence to control *ultra vires* acts of Community institutions and of the Union should they exceed the limits of their competences and should there be no timely remedy within proper Union procedure.

A situation similar to that of the German jurisprudence has emerged in Italy. The reasoning of the Italian Constitutional Court was almost identical to that of Germany.

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[16] Stith (2008, 401–447).

[17] "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."

Thus, in its judgment number 183 of 1973 it held that although Article 11 of the Italian Constitution allows some limitations to sovereignty, this may not be indicative of an "inadmissible power to violate the fundamental principles of our constitutional order or the human person's inalienable rights". The same criterion was subsequently confirmed by the Court in its judgment number 232 of 1989.

Therefore, it seems necessary to recognize that in every constitutional and democratic system there exists a range of non-transferable competences. Among other things, this may be translated to the possibility of not accepting decisions taken by supranational agents due to their having exceeded that core of basic principles and assumptions of the respective political community. Clearly, this option faces difficulties, for example, resulting from the Vienna Convention on the Law of Treaties, Articles 26 and 27 of which bind to abide by the treaties in good faith with no option of states' exemption from such an obligation invoking the provisions of their respective national laws.

However, Article 46 of the Vienna Convention points out a most important exception to the general rule of Article 27, namely, that a state may nonetheless excuse itself for not fulfilling a treaty if, should it comply therewith, an evident violation of "a fundamentally important norm of its internal law" would ensue. Moreover, Article 61 (1) of the Vienna Convention stipulates that "a party may allege the impossibility of fulfilling a Treaty as a cause for denouncing it or withdrawing from it should that impossibility result from the definitive disappearance or destruction of an object indispensable for fulfilling the treaty. Should the impossibility be transitory, it may only be alleged as a cause for interrupting the treaty application".

In turn, Article 62 of the same Treaty stipulates that the parties to a treaty may allege a change of the circumstances that were considered to justify its non-fulfillment thereof or withdrawal therefrom, whenever the circumstances constituted "an essential basis of the parties' consent for binding by the treaty", and said "change has the effect of substantially modifying the scope of obligations still to be fulfilled by virtue of the treaty". Even this same norm authorizes the states to interrupt the application of the treaty by virtue of the same grounds already mentioned.

4.4.6.2 The Enforcement of the San José Court's Judgments May Need to Reform the Internal Law

The San José Court may condemn a state due to the violation of human rights by its public entity. In such cases, the Court may order the state to take the necessary steps in order to respect the Treaty and the rights involved. The San José Court has condemned Chile for violations to the treaty rights made by judgments of Chilean Courts in four cases. Even though the Chilean Constitutional Court said that the Court of San José de Costa Rica may not amend the Chilean Courts' judgments (judgment number 346), the Chilean State has adopted some measures in order to comply with the Inter-American Court's decisions, including the amendment of the Constitution. Those measures included compensation to the victims, constitutional and legislative amendments, initiatives to reform judicial procedures and changes in jurisprudence.

In *Olmedo Bustos v. Chile* (The Last Temptation of Jesus Christ case),[18] the Court condemned the Chilean State for violation of the freedom of speech because the Supreme Court had forbidden public exhibition of the film on the grounds that it offended honor of Jesus. The right to honor is recognized by the Chilean Constitution (Article 19 number 4) and by the Treaty (Article 13). Both rights can be protected by the courts, even against mere threats, or, in other words, even before the concrete violation of these rights takes place. However, the Inter-American Court condemned Chile for violation of the freedom of speech. Specifically, the Court understood that the Supreme Court's injunction was a kind of censorship, forbidden by the Treaty. Likewise, the Court recommended adoption of measures in order to amend Article 19.12 of the Constitution and to eliminate censorship, namely, film classification procedure. On 25 August 2001, this Article was amended, according to the Court's recommendation.

In *Palamara Iribarne v. Chile*,[19] the Inter-American Court again condemned the Chilean State. In this case, a civil employee of the Chilean Navy had written a book entitled "Ethics and the Intelligence Services". The book was forbidden by the naval authorities because the author did not request an authorization, pursuant to internal regulations. For this reason it began a criminal procedure before a Military Court that confiscated the book and the electronic archives, and ordered the arrest of Mr. Palamara. Later on another criminal procedure began before a Military Court due to the fact that in three interviews Mr. Palamara had criticized judicial system and had alleged that the Navy had adopted several measures of pressure against him and his family. Such declarations were considered a military criminal infraction by naval authorities. Mr. Palamara was convicted for crimes of disobedience, breach of military duties and contempt. Mr. Palamara filed a complaint before the Inter-American Commission of Human Rights which sued the Chilean State before the Court for violation of freedom of speech (Article 13 of the Treaty) and the right to property (Article 21). But the Court decided to further consider possible infringements of freedom of speech (Article 13), personal freedom (Article 7), the right to property (Article 21), and the right to due process (Articles 8, 9 and 25). Finally, the Court declared that Chilean State had infringed all those Articles, and awarded Mr. Palamara compensation. Likewise, the Court ordered the Chilean State to allow publication of the book. It ordered restitution of the confiscated materials the publication of the judgment in the Official Gazette, nullification of convictions against Mr. Palamara, modification of the regulation of the crime of contempt and conformity of military criminal jurisdiction to the international standards. The Chilean State has compensated Mr. Palamara, and his book has been published, but until today the modifications to the crime of contempt and to the military criminal jurisdiction ordered by the Court are pending.

In *Claude Reyes y otros v. Chile*,[20] the Inter-American Commission on Human Rights sued Chile for violation of freedom of speech (Article 13 of the Treaty), the

[18] February 5, 2001.

[19] November 22, 2005.

[20] September 19, 2006.

right to judicial protection (Article 25), with regard to Articles 1.1 (due respect of rights) and 2 (commitment to adopt internal norms). This case was based on the Chilean State's refusal to provide all the information requested by a group of persons about a forestry company and its forestry project on the Chilean Patagonia. The Commission alleged that the State's attitude had no justification in the Chilean legislation, and that the State did not grant a judicial remedy to challenge a violation of the right of access to information, and had not assured this right and judicial protection; there were no mechanisms in place to ensure a right of access to public information. The Court upheld the claim, and decided that the State had to provide the information to the victims and adopt the necessary measures to ensure a right of access to information, and had to compensate the victims. In 2005, the Chilean Constitution was amended in order to add the principle of publicity of actions and resolutions of the state (Article 8). Court's revision of the reform coincided with the proceedings before the Commission. Later on, on August 20, 2008 Law number 20,285 on access to public information, was enacted

Finally, in *Almonacid Arellano and others v. Chile*,[21] the Commission sued the Chilean State for violation of Articles 8 (fair trial) and 25 (judicial protection) of the Convention concerning obligations stemming from Article 1.1 (obligation to respect rights) and Article 2 (duty to adopt domestic law provisions) of the Convention. The facts related to the illegal execution of Mr. Luis Alfredo Almonacid Arellano during the military government and the application of the Decree Law 2.191 (amnesty law), adopted in 1978. The Court decided that the State had violated Articles 8 and 25 of the Convention, and breached the obligations of Articles 1.1 and 2. The Court said that amnesty for crimes against humanity was incompatible with the Convention. Therefore, the Court ordered the State to adopt the necessary measures to investigate and punish the authors of the illegal execution of Mr. Almonacid. In recent years, the Chilean Courts have successfully investigated the violations of human rights that occurred during the period covered by the amnesty.

4.5 Conclusion

The implementation of the Convention has brought some important consequences for Chilean law. The Chilean Constitutional Court has stated that international treaties on human rights are neither at a higher nor at the same level as the Constitution. If a treaty contains norms contrary to the Constitution, the only way to validate them is by means of a formal amendment of the Constitution. This was the situation in *Olmedo Bustos v. Chile*, in which the incompatibility between the Constitution and the Convention led to the amendment of the constitutional status of the freedom of speech. In a certain sense, the same thing occurred in *Claude Reyes y otros v. Chile* when at the time of proceeding before the Commission the Constitution was

[21] Septiembre 26, 2006.

amended. In case of conflict between the Convention and the law, as in *Palamara Iribarne v. Chile*, it is necessary to adapt the law to the Convention's standard. Finally, as a result of the conflict between the amnesty law and the need to prosecute crimes against humanity, the Chilean courts have begun the prosecution of these crimes.

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Chapter 5
The Universal Nature of Human Rights: The Brazilian Stance Within Latin America's Human Rights Scenario

Marcelo Figueiredo

5.1 Universalism of Confluence *versus* Universalism of Parallel Lines

In his book "After Virtue", Alasdair MacIntyre, the famous Scottish-American philosopher, criticizes the modernity of moral philosophy, and accuses it of being unable to provide grounds for an ethic that is separated from religion and metaphysics, and to agree, in practical terms, on the rules that enable justice to be accomplished (MacIntyre 2007, 1–78). As he approaches human rights, he states that it would be strange if these rights belonged to human beings by virtue of their human condition, in view of the absence of a means for their expression in classic and medieval Hebrew, Greek, Latin or Arabic languages before the 1400s, and in Japanese before the middle of the nineteenth century. In any case, although it is nearly a truism to affirm that the rights should not necessarily be made up of the same contents everywhere – for obvious reasons that involve both custom and the historical, social and anthropological reality of each people or region – it is also true to say that structuring a society without *human rights* does appear to be unthinkable (Ibid., 69–78).

By the 1930s, the world had become desolate, and this desolation would only worsen by 1945. Both Nazism and other forms of fascism ruled and acted against humanity, through the exercise of racist, xenophobic and imperialist policies, and by dividing people and peoples into those who ought to live and those who ought to be exterminated. They tried to exterminate, through industrial means, whole peoples, and led 60 million human beings to death during the war they waged. It makes sense to speak of a deep crisis in human rights at that time, with both the extension,

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intensity and atrocity with which violations took place, and the consolidation of an attitude that denied validity to the claims for human rights to all human beings.

Some examples from the day-to-day reality of our contemporary world may help us illustrate the need for international protection of human rights, taken from a perspective of open universalism. It is precisely because of the existence of an international definition of women's rights that it is also possible to repudiate the castration of women as an inhumane act, notwithstanding the argument that it is a traditional custom in some countries. On the same line of thought, unless proved otherwise, it seems unreasonable to punish with death the persons who infringe the law, or even take children to fight as soldiers in wars, regardless of the alleged justification of punishing such behaviour with death.[1]

The fact that a given language and the community speaking it have the right to exist, does not allow the members of that community to prohibit other members from learning another language. Doing so may ensure their development, as occurred in the attempts by radical Catalans to prohibit the teaching of Castilian in schools, and also in the case in Flamish Belgium in relation to the French language. A further example is the decision made by the Supreme Court of Chile on September 10, 1998, directing that legal proceedings be incepted following the death and disappearance of inmate Pedro Enrique Poblet Córdova during the Chilean military regime, and was only possible thanks to the *Geneva Conventions* signed by Chile and invoked by the above mentioned Court to supersede the internal statutes (amnesty) granted to the Chilean dictator.

This is why human rights are currently considered to be non-assignable, unable to be waived and *universal*.

In fact, human rights are today a transcultural moral instance and permit different civilizations to coexist. Human rights concern a person's value, dignity and freedom.

It certainly appears that these values do exist (or should exist) regardless of the shape they take, the specific circumstances of this or that jurisdiction, the changing feelings or differences in the concept of justice that may exist here and there. For that matter, that is the essence of the so-called international law of human rights affirmed by Dunshee de Abranches, in a pioneer work (Abranches 1964, 149). He states that such rights are "substantive and procedural rules of international Law that are intended to protect the individual irrespective of his or her nationality, including those individuals devoid of citizenship, and regardless of the jurisdiction in which they find the means of fighting against abuses and distortions of power exercised by any state; and to provide the corresponding compensation, whenever it is not possible to prevent harm".

The universal feature of human rights and dignity is something one accomplishes, to which one converges (universalism of confluence), and not from which one departs, and which operates through shared generalities between the different cultural procedures, considering the incompleteness of each culture, based on dialogue or debate processes, where prejudice and exclusions are eliminated.

[1]According to Habermas, for a norm to be valid, the consequences and side-effects that may be expected from its general application to satisfy the private interests of each person involved, must be such that all affected persons may freely accept them. See Habermas (1990, 120).

Such universalism of confluence contrasts with the traditional universalism of departure, or *a priori* universalism (required from all cultures); and it also contrasts with the universalism of parallel lines, which seeks to impose a sole manner in which one sees the world, but based on the specific features of each culture that would be self-sufficient and not open to other cultures, thus remaining limited to its own "localism".

The parallel lines universalism, according to Joaquín Herrera Flores, resists the *a priori* universalism, based on the premise of "the radical difference, which, ultimately, ends up defending the same as that which the abstract view of the world defends: the separation of us and them, the contempt for the other (…), the contamination of the status of willing to put oneself in the place of the other. From said universalism of departure we reach the universalism of parallel-lines, of atoms that only meet as they clash".[2]

The debate involving universalism and particularism is significantly important when it comes to human rights. The fierce polemic lies in whether one characterizes human rights as universal, because, if so considered, they may be defined as rights owned by everyone, every human being without exception, regardless of the cultural context to which one belongs. Lately, philosophical schools of thought have emerged to question the grounds of human rights and there is still the multiculturalism issue. How, within one single society of multiple groups that are culturally diverse, is one supposed to "impose" a given speech and a given practice of human rights? Should the Western standard prevail? Why? Some positions lie between Rawls' liberalism and Walzer's communitarism (Walzer 1983, 68–83), such as that of Wolfgang Kiersting.

Flávia Piovesan, with respect to universalism versus cultural relativism, states: "the debate between cultural universalists and relativists retrieves the dilemma involving the human rights' grounds: why do we have rights? Can norms on human rights be universal or are they relative?"[3] For the universalists, human rights derive from human dignity, they are inherent in human condition. In this sense, one defends the irreducible minimum ethical – even if one may discuss the scope of such "minimum ethical", and the rights therein contained. For the relativists, the sense of rights is strictly related to the political, economic, cultural, social and moral system prevailing in a given society. Each culture has its own conception of fundamental rights, which is connected with the specific cultural and historical circumstances of each society. There is no universal moral, since the history of the world is the history of a plurality of cultures, each of which produces its own values.

According to the relativists' critical view, the universalists invoke a hegemonical view of the Western Eurocentric culture, thus exercising a cultural cannibalism. The universalists, in turn, say that the relativists, in the name of culture, seek to cover serious violations of human rights. Furthermore, they add, the cultures are not homogeneous, nor do they make up a coherent unity. Rather, they are complex, variable, multiple, fluid and not static. They are human creations, and not destiny.

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[2] Herrera Flores (2008, 152), author's translation.

[3] Piovesan (2011, 207), author's translation.

The author also reminds us of the doctrine of the Portuguese sociologist Boaventura de Souza Santos, in defense of a multicultural conception of human rights, inspired in the dialogue between the cultures, to forge an emancipatory multiculturalism. According to Boaventura, "human rights must be conceived again as being multicultural. Multiculturalism, as I understand it, is a prerequisite for a balanced and mutually empowering relationship between global competence and local legitimacy, which constitutes the qualities of the human-rights counter-hegemonic policy of our days."[4]

Along the same line, Piovesan recalls Bhikhu Paarekh, who defends a pluralist universalism, not an ethnocentric one, based on intercultural dialogue: "[t]he purpose of an intercultural dialogue is to reach a catalogue of values with which all the participants agree.

The concern should not consist in discovering values, since they have no objective origin, but rather in seeking consensus around them… (…). Values depend upon a decision collectively made. Since they cannot be rationally demonstrated, they must be the objective of a rationally defensible consensus (…). It is possible and necessary to develop a catalogue of non-ethnocentric universal values, through an open intercultural dialogue where the participants decide what values are to be respected. (…) This position could be classified as a pluralist universalism".

Finally, Piovesan argues "[o]ne also believes that opening the dialogue among cultures, by respecting diversity and recognizing the other as a human being entitled to rights and dignity, is a precondition for introducing a human-rights culture, inspired by the observance of the 'irreducible minimum ethical', accomplished thanks to a universalism of confluence. In order to build this human-rights culture, one must change from the Idea of 'Clash of civilizations' into the Idea of 'dialogue among civilizations'".[5]

5.2 Founts of Protection of Human Rights in Latin America

It would be interesting to start this topic by providing an overview of what has recently occurred in Iberic America or Latin America[6] in the context of this matter. One may affirm that at first, the matter concerning the relationships between international treaties and the internal constitutional jurisdiction of Latin-American countries was settled under the rules of national judicial review, by virtue of which many jurisdictions in Latin America, especially those of a federal nature, were inspired by the North-American model, which established that those treaties ratified and approved by the Federal Senate are incorporated into domestic law to become part of its supreme law. In this respect, case law under the Supreme Court of the

[4] Piovesan (2011, 212), author's translation.

[5] Piovesan (2011, 214), author's translation. For more, see Kersting (2003), Walzer (1983).

[6] For a view of the Mexican reality, see Ramírez (2006). For an international perspective, see Goldman et al. (2001).

United States has granted to international treaties the character of federal ordinary rules and has examined, in several cases, the conformity of local precepts to the international provisions, and, on the other hand, it has overruled transnational norms deemed to be in violation of the Federal Constitution. This is the criterion prevailing in case law at Federal Courts in Mexico and Argentina, in that the Constitutions of both countries have incorporated, almost literally, the provision of Article 6 of the Constitution of the United States in their Articles 133 and 31 respectively, according to which the international treaties duly ratified and approved by the competent legislature have the nature of internal ordinary legislation and prevail over the local provisions, and may not contradict the Federal Constitution rules.

Note, however, that international law has recently become more dominant. According to the Mexican jurist Héctor Fix Zamudio: "[w]e may point out that Articles 3 of the Constitution of Ecuador (1978), and 4 of the Constitution of Panama (1972–1983) state that these countries recognize and accept the rules and principles of international law; as well as Articles 18 of the Constitution of Honduras (1982), and 144 of the Constitution of El Salvador (1983), which establishes that, in the event of conflict between an international treaty and an internal ordinary law, the treaty shall prevail".[7]

The subject matter presents a more vigorous evolution acknowledging the prevalence of international law, even if only partial, in the field of human rights, considering that Article 46 of the Constitution of Guatemala (1985) establishes that the treaties and conventions accepted and ratified by said country shall prevail over domestic law in the field of human rights. The same applies to the Constitution of Paraguay in Article 137, which states: "[t]his Constitution is the supreme law of the Republic. This Constitution, the international treaties, conventions and agreements approved and ratified, the laws of the Congress and other provisions hierarchically inferior, sanctioned as a consequence thereof, are an integral part of the national law" and Article 141: "[t]he international treaties validly entered into, approved by the Congress, and whose instruments have been duly deposited, become part of the internal jurisdiction according to the hierarchy determined by Article 137".[8]

The Constitution of Argentina (as amended in 1994) also provides, in Article 75, § 22 that treaties are hierarchically superior to laws. However, more emphasis had been given in Article 105 of the Constitution of Peru (1979), since on the same matter it established that the precepts contained in the treaties on human rights have constitutional hierarchy and cannot be modified, except under a procedure providing for the amendment to the Constitution.

It is also worth pointing out the provision of Article 5 of the Constitution of Chile (1980, as amended through a plebiscite on June 30, 1989): "the exercise of sovereign power recognizes, as a restriction, the respect of fundamental rights inherent in human nature. The State agencies shall respect and promote said rights, which are guaranteed by this Constitution, as well as by the international treaties ratified by Chile that are in effect."[9]

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[7] Zamudio (2009, 73).

[8] See also Rodríguez-Pinzon, Martin and Quintana (1999).

[9] Constitution of Chile, author's translation.

Finally, the prevalence of international conventional law, especially in the field of fundamental rights, can be found under Article 93 of the recent Latin-American Constitution – the Colombian Constitution (June 7, 1991) according to which: "[t]he international treaties and conventions ratified by Congress that recognize human rights and prohibit their limitation at times of state of siege shall prevail internally. The rights and duties established by this Constitution shall be interpreted in accordance with the international treaties on human rights ratified by Colombia."[10]

In a way, similar to the European model of the protection of human rights, there exist in the American continent a system of international protection through the activity of the Inter-American Commission and the Court of Human Rights which will be examined below.

Even in the absence of an express text (as to the recognition of international jurisdictions for the protection of human rights) in the majority of Latin-American Constitutions, one attests an increasing number of countries in our region which have not only become signatories to the American Convention but which have also expressly recognized the competence of the Inter-American Court to hear and adjudicate violations of human rights. Moreover, Mercosur also acknowledges the need for promoting and protecting human rights and their intimate connection to democracy as an essential condition for both effectiveness and evolution of the integration among its countries (Brazil, Argentina, Uruguay and Paraguay). Along this same line is Brazilian Executive Order 7,225 (July 1, 2010),[11] which enacts the Protocol of Asunción on the Mercosur's Commitment to Promoting and Protecting Human Rights, signed on June 20, 2005.

Article 305 of the Constitution of Peru (1979), for instance, expressly recognizes the superior value of the constitutional jurisdiction, under which "once the internal jurisdiction is exhausted, anyone who feels to have been harmed in their constitutional rights may resort to the international courts and bodies constituted under those treaties whereof Peru is an integral part."[12]

The Brazilian Constitution of 1988 has, as far as fundamental rights (individual and collective rights – class actions) are concerned, one of the most advanced chapters in the world. Its Article 5 provides an extensive list of rights and duties of Brazilian citizens and foreigners:

> 5. Everyone is equal before the law, without distinction of any nature, wherefore all Brazilians and foreigners residing in the Country are ensured the inviolability of their right to life, freedom, equality, safety and property, upon observance of the terms as follows (…).[13]
>
> Paragraph 1. The rules outlining fundamental rights and guarantees are immediately enforceable.

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[10] Constitution of Colombia, author's translation.

[11] In the Preamble, one can see that, through Legislative Order 592, dated August 27, 2009, the Brazilian Congress approved the Protocol of Asunción on the Mercosur's commitment to promoting and protecting human rights; that the Accord became effective in Brazil, in the external legal ambit, on April 3rd 2010.

[12] Constitution of Peru, author's translation.

[13] Seventy-eight items et. seq.

> Paragraph 2. The rights and guarantees established in this Constitution exclude no other rights resulting from the system and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil takes part.
>
> Paragraph 3. The international treaties and conventions on human rights that are approved by each House of the National Congress in two sessions, by three-fifths of the votes of the respective members, are equivalent to constitutional amendments.
>
> Paragraph 4. Brazil is subject to the jurisdiction of the International Criminal Court to which it has expressly adhered.

Brazilian internationalists Antônio Cançado Trindade (2008, 495 ff.) and Flávia Piovesan (2011, 65–166) acknowledge the constitutional hierarchical position of the international treaties on human rights. They assert that the rights provided by international treaties, as well as the other individual rights and guarantees established and recognized by the Constitution, are deemed to be fundamental and irreversible provisions – which cannot be abolished by means of amendments to the Constitution, as per Article 60, Paragraph 4 of the Brazilian Constitution. According to Flávia Piovesan, while international treaties for the protection of human rights have constitutional hierarchical position, other international treaties are located hierarchically below the Constitution (they are infra-constitutional). Such an infra-constitutional position of all other international treaties derives from Article 102, III, b, of the Brazilian Constitution of 1988, which grants to the Federal Supreme Court the competence to adjudicate, through extraordinary appeal, "the cases decided on a sole jurisdiction or as a last resort whenever the decision of any such appeal declares the unconstitutional nature of a treaty or federal law."[14]

However, the author argues that, while the other treaties are infra-constitutional, they hold "*supra-legal*" strength. *This* position would comply with the principle of good faith that prevails in international law (*pacta sunt servanda*) and which is reflected by Article 27 of the Vienna Convention on the Law of Treaties, under which the state is not to invoke provisions of its internal law as justification for not complying with the treaty. These arguments would support the conclusion according to which Brazilian law has opted for a mixed system to govern treaties. Such a mixed system means a combination of different legal systems: one system to be applied to treaties on human rights, and another system to be applied to traditional treaties. While the international treaties on human rights – as per the abovementioned Article 5, Paragraph 2 – are hierarchically leveled as constitutional, the other international treaties are infra-constitutional – albeit supra-legal. Antônio Cançado Trindade, in turn, grants supra-legal strength to the conventions on human rights, in order to confer direct enforcement to their norms – even, if necessary, against an ordinary law – whenever, without infringing the Constitution, they supplement it by specifying or expanding the rights and guarantees contained therein. Such understanding confirms the infra-constitutional but supra-legal position of international treaties on human rights, thus distinguishing them from traditional treaties. He therefore disagrees with the majority thesis embraced by the Federal Supreme

[14] Brazilian Constitution, author's translation.

Court on the parity of treaties and federal laws which shall be analyzed below (Cançado 2008, 495 ff.).

Before the reform of the judicial branch by means of Constitutional Amendment number 45/2004, the Federal Supreme Court, on the ground of its competence as the guardian of the Constitution, established, under Article 102, its understanding that constitutional norms should prevail over the treaties already incorporated into national jurisdiction. Thus, it established no distinction between international treaties on human rights and other treaties, concerning different matters. All of them were subject to the Constitution and, therefore, to judicial review. They would enter domestic jurisdiction at a hierarchical position identical to that of the federal laws, and could be revoked by an equal, future norm.

Recently though, the Federal Supreme Court, in Habeas-Corpus number 96772 – São Paulo (August 21, 2009) decided by unanimous vote that judges and courts shall, in the exercise of their interpretive activities, especially within the scope of international treaties on human rights, observe the basic legal hermeneutics (as provided for in Article 29 of the American Convention on Human Rights) which consists in affording priority to the norm that proves most favorable to the human being through an order that grants the individual the broadest legal protection.

In the case at issue, the Reporting Justice J. Celso de Mello held that international conventions on human rights do have constitutional hierarchy. The case concerned a discussion on whether or not the civil arrest of the depositary that unjustifiably refuses to return the deposited thing to the depositor should remain effective, in view of the execution, by Brazil, of the San José da Costa Rica Pact. It was held that the legal norms governing the arrest of the depositary that unjustifiably refuses to return the deposited thing to the depositor were partly abrogated.

On the other hand, in Habeas-Corpus 81319-Goiás (April 24, 2002) whose Reporting Justice was also J. Celso de Mello, the Court, by a majority vote, followed the Reporting Justice's understanding and stated: "it is undeniable that international treaties and conventions cannot infringe the governing authority of the Constitution of the Republic, nor do they have regulatory strength to limit the legal effectiveness of constitutional clauses and precepts enshrined in the Constitution" (Direct Suit for Unconstitutional Act number 1.480/DF, Reporting Justice J. Celso de Mello, en Banc). One finds it highly desirable, however, and "de jure constituendo", that in the same manner as comparative constitutional law (e.g. the Constitutions of Argentina, Paraguay, the Russian Federation, the Netherlands and Peru), the Brazilian National Congress grants constitutional hierarchy to the treaties on human rights executed by Brazilian State.

In turn, in Habeas-Corpus 88420-Paraná, adjudicated on April 17, 2007, the Reporting Justice being J. Ricardo Lewandowski, the Panel unanimously held that "the guarantee provided by the Inter-American Convention on Human Rights, which was ratified by Brazil in 1992 after the enactment of the Brazilian Code of Civil Procedure, and after the incorporation to the Brazilian jurisdiction of any rule under an international treaty, does have the power to modify Brazilian laws that have been introduced before". Accordingly, the habeas-corpus order was granted.

It should be mentioned briefly, that one can affirm that, upon a conflict between domestic and international sources of law, the current position of Brazilian law (under the constitutional case law and the best scholarly writing) is that:

(a) International treaties, in general, are incorporated into internal law on the same level as ordinary laws. If no hierarchical relation between the treaty and the law exists, they are both subject to the general rule according to which the norm that comes after shall prevail over that which comes before. The derogation of a treaty by the law does not exclude the possible international liability of the State, if the latter makes no use of the proper institutional means for putting an end to a treaty denouncement.
(b) Treaties executed pursuant to the norms of the Constitution and which are incompatible with it from either the formal (extrinsic) standpoint or material (intrinsic) standpoint, are valid and are subject to being declared unconstitutional *incidenter tantum* by any competent judicial body subject to review by the Federal Supreme Court, through extraordinary appeal. The treaty that is in force when a new constitution is made effective, regardless of this being the result of an original or derived constitutional power, shall be void if incompatible with the new constitution.

Such a matter, however, as seen above, suffered the impact of Article 5, Paragraph 3, which deals with human rights, as a result of Constitutional Amendment45 which brought several modifications.

Apparently, these modifications have, at least for now, not been sufficiently embraced by the Federal Supreme Court, which advances *timidly* in this matter, as it recognizes not the constitutional nature, *but only the supra-legal nature of the treaties on human rights*, in those cases where they are not subject to the stricter procedure stipulated under Article 5, Paragraph 3, of the Constitution (as mentioned hereinabove).

Brazil is a signatory to the following international documents which make up the regional system for the protection of human rights, or the Inter-American system of human rights:

(a) American Convention on Human Rights (1969) – San José da Costa Rica Pact;
(b) Additional Protocol to the American Convention on Human Rights – concerning Economic, Social and Cultural Rights (1988) – San Salvador Protocol;
(c) Inter-American Convention for Preventing and Punishing Torture (1985);
(d) Inter-American Convention for Preventing, Punishing and Eradicating Violence Against Women (1994) – Belém do Pará Convention;
(e) Inter-American Convention on the Forced Disappearance of People;
(f) Inter-American Convention on the Elimination of All Forms of Discrimination against Disabled Persons (1999);
(g) The Regulation of the Inter-American Commission on Human Rights;
(h) The Regulation of the Inter-American Court of Human Rights.

5.3 The Crisis of the Inter-American System for the Protection of Human Rights

Beyond a shadow of a doubt, a paramount issue in the promotion of human rights is the manner in which social and economic inequalities should be tackled. Throughout the world, especially in the so-called "developing" countries, inequality is growing worse. It is said that one out of five people in the world lives on less than a dollar a day. Clearly, the lack of funds amounts to a lack of education, health, housing, drinking water, etc. The lack of such basic conditions leads to a situation of disparity between those who have and those who do not have access to such essential services and the inferiority of the latter.

Both in discourse and in practice, human rights should face these differences in order to mitigate them, fighting violence, injustice and social inequality. As Cecília Macdowell Santos accurately points out, the 1990s was a decade of ratification of several international and regional norms on human rights (Macdowell Santos 2007, 27).

Former Brazilian President Fernando Henrique Cardoso (PSDB Party), elected for two terms of office (1995–1998 and 1999–2002), has welcomed the acknowledgement of international rules on human rights. In 1995, Brazil ratified the Inter-American Convention on Preventing, Punishing and Eliminating Violence against Women, the so-called Convention of "Belém do Pará", adopted by the Organization of American States (OAS) in 1994. However, despite many communications sent by the Inter-American Commission on Human Rights (IACHR), Cardozo's administration ignored the Maria da Penha case until the end of the second term of office.

In addition, in comparison to other Latin-American countries, it took Brazil much longer to recognize the regional norms on human rights established by the American Convention on Human Rights. While a significant number of OAS member states ratified the Convention in the 1980s, Brazil waited until 1992 to do so. Brazil is also one of the last OAS member states to accept the jurisdiction of the Inter-American Court for Human Rights. Only in 1998 did it recognize the Court's jurisdiction.[15]

[15] MacDowell Santos (2007). In his view, based on the constitutional principle that determines the preference for human rights, and aiming at promoting a culture driven towards human rights, Fernando Henrique Cardoso introduced, in 1996, the National Program for Human Rights (Executive Order 1,904/96), formally recognizing the human rights of "women, blacks, homosexuals, native people, the elders, the disabled, refugees, HIV-positive individuals, children and adolescents, policemen, prisoners, wealthy and poor people". In 1998, Cardoso created the National Secretary for Human Rights to implement this program, acknowledging that Brazil "was not a racial democracy". Cardoso also signed Law 9,140/95, known as the Law of Disappeared Persons, acknowledging the liability of the State for the disappearance of 136 people for political reasons. President Luis Inácio Lula da Silva, also elected to serve two terms of office (2003–2006 and 2007 to date), has not acted otherwise as regards the fight for the memory of dictatorship times. However, Lula's administration has created some institutional support for the promotion of human rights. For example, following his being inaugurated as President in 2003, he granted the National Secretary of Human Rights the status of Government Department. He created the Special Secretary of Policies for Women

Since Brazil belongs to the American continent, it is part of the international system for the protection of human rights, which is constituted by the Inter-American Commission[16] and the Inter-American Court of Human Rights. The Inter-American Commission on Human Rights was established by the member states of the Organization of American States (OAS) in 1960, many years before the approval of the Inter-American Convention on Human Rights, with the purpose of promoting respect for the rights of human beings recognized by the American Declaration of 1948.

The Inter-American Commission has been conducting an arduous work of receiving individual claims and investigating collective violations, which, unfortunately, were frequent during the military dictatorship in Latin America (until the 1980s), a decade, until the re-democratization process took place with the new Constitutions.

Under the American Convention for Human Rights, which was executed in San José da Costa Rica in November 1969, the Inter-American Court of Human Rights and the Inter-American Commission were created. The Commission slowly expanded its functions from a simple promotion to a true protection of human rights.

The foundations of the so-called Inter-American system for the protection of human rights are the Charter of the Organization of American States (OAS) or Bogota Charter (1948); the American Declaration of Human Rights and Duties (1948), which deals with the rights contained in the Letter of the OAS; the American

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and the Special Secretary of Policies for the Promotion of Racial Equality, and strengthened both of them by granting them the status of Government Departments. Despite these secretaries, the new advanced enactments, and the acknowledgment of international rules on human rights, serious violations of human rights remain being committed in Brazil. These violations are committed by the police, death squads and other groups and include the systematic practice of torture; slave labor; discrimination on the basis of race, ethnic origin, gender, sexual orientation, age and disabled status; the impunity toward the perpetrators of violence against social movements fighting for land reforms and for the rights of the native peoples, including criminalization of these fights.

[16] The Commission has the main task of promoting the observance and the defense of human rights, in the exercise of its term of office. Among its duties, the Commission: (a) receives, analyzes and investigates private petitions alleging violations of human rights, under Articles 44–51 of the Convention; (b) observes the general effectiveness of human rights in member-States; at its convenience, it publishes special information on the status of a specific State; (c) visits the countries to deepen the general observation of the situation and/or to investigate a specific matter. In general, these visits lead to the examination of a given denouncement that is published and submitted to the General Meeting; (d) stimulates the conscience of human rights in American countries. Among other things, it conducts and publishes studies about specific subject matters. For example, about acts intended to ensure greater independence to the judicial power; unlawful activities of armed groups; the situation of the human rights of minors, women, native peoples; (e) holds and takes part in conferences and meetings with government representatives, scholars, groups of parliamentarians, besides spreading and analyzing issues involving the Inter-American system of human rights; (f) makes recommendations to OAS member-States on the adaptation and implementation of measures intended to contribute with promoting and guaranteeing human rights; (g) ask the States to file injunctions and specific measures to avoid serious and irreparable damages to human rights in urgent cases, being also authorized to request "provisional measures" from Governments in cases of urgent danger.

Convention on Human Rights, also known as the San José da Costa Rica Pact (1969); and the Additional Protocol to the San José da Costa Rica Pact or the American Convention on Economic, Social and Cultural Rights, also called the San Salvador Protocol (1988).

The adoption of the San José de Costa Rica Pact in 1969, made effective at the regional level in 1978 and in Brazil in 1992, represented the strengthening of the Inter-American regional international system: the Inter-American Commission on Human Rights (which is part of both of the OAS structure, by virtue of its Letter, and the San José da Costa Rica Pact), and the Inter-American Court of Human Rights (created by the San José da Costa Rica Pact or the American Convention on Human Rights, and exclusively bound by it).

It is worth mentioning the application by Latin America of the important economic, social and cultural rights within the context of the international law of human rights. That is to say, do they exist and are they enforceable in such regional system?

Setting aside the polemics on the matter,[17] it was on November 17, 1988 that the so-called *San Salvador Protocol* was adopted during the meeting of the 18th ordinary period of sessions of the OAS's General Meeting. Finally, on November 16, 1999, 11 years after its adoption, the said Protocol became effective, in accordance with Article 21, thanks to the filing of the eleventh instrument of ratification. This significant instrument fills a historical gap left by the American Convention on Human Rights as regards the economic, social and cultural rights, which is known to be developed and applied progressively and effectively in Latin America.

Alongside the global normative system, regional systems aim at protecting human rights in Europe, America and Africa. Thus, the simultaneous existence of the UN's global system and the regional system is consolidated, in that the regional systems consist of the Inter-American, the European and the African systems for the protection of human rights.[18]

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[17] Which may be verified in the article by Robles (2008, 533).

[18] Heyns et al. (2006, 161 ff.) stated: "Although initial questions have been raised against the implementation of regional systems for human rights, especially by the United Nations with its emphasis in the universality, the benefits resulting from the fact that one can count on these systems are currently broadly accepted. Countries of a certain region frequently have a shared interest in protecting human rights in that part of the world, in addition to the advantage brought by proximity so as to reciprocally influence their behavior and ensure agreement to common standards, which the global system does not offer. Regional systems also provide the possibility that regional values are taken into consideration upon definition of human rights norms – obviously, at the risk of, if this is taken much farther, adversely affecting the idea of the universal nature of human rights. The existence of regional systems of human rights allows for adopting compliance mechanisms that are best suited to local conditions than those offered by the global, universal protection system. A primarily judicial approach of compliance may be suitable, for instance, in a region such as Europe, while an approach that affords room also for non-judicial mechanisms, such as commissions and pair reviews, may be more advisable for a region such as Africa. The global system is not that flexible."

According to Flávia Piovesan, "the global and regional systems should not represent a dichotomy, but rather a complement. Inspired by the values and principles of the Universal Declaration, they make up the instrumental universe for the protection of human rights at the international level. From such a view, the several systems for the protection of human rights interact for the benefit of the protected individuals. By adopting the principle of the primacy of human beings, these systems complement one another, and are added to the national protection system in order to provide the greatest possible effectiveness to the protection and promotion of fundamental rights. This, for that matter, is the logics and the set of principles making up the law of human rights".[19]

One should emphasize that the Vienna Declaration of Human Rights of 1993 reiterates the conception of the Declaration of 1948, stating in Paragraph 5 that "[a]ll human rights are universal, interdependent and inter-related. The international community must treat human rights globally and in a just and equitable manner, on an equal basis and with the same emphasis."[20]

Finally, Flávia Piovesan brings the teaching of Henry Steiner: "today there are no strong conflicts of interpretation between the regional systems and the United Nations system. In theory, the conflicts should be avoided by the adoption of the following rules: (1) the parameters of the Universal Declaration and of any other treaty of the United Nations accepted by a given country must be respected; (2) the parameters of human rights contained in the general principles of international law should also be observed; and (3) whenever the parameters conflict, the most favorable for the individual parameter should prevail" (Piovesan 2009, 460 ff.).

When analyzing major cases against the Brazilian State submitted to the Inter-American Commission on Human Rights, one may observe that before 2005, only three cases were forwarded to the Inter-American Court against the Brazilian State.[21] Over the last 10 years, Brazil has been the target of 507 denouncements and 108 actions to international courts.[22] Flávia Piovesan informs that, in December 1998, Brazil acknowledged the competent jurisdiction of the Inter-American Court, which significantly broadened and strengthened the levels of protection of internationally

[19] Piovesan (2009, 460 ff.), author's translation.

[20] However, one must bear in mind the diversity of the Western and Eastern, thus plural, conceptions of human rights, as we observed before. There must not be one sole truth on these values and on all matters. See the previous discussion on the "irreducible minimum ethical" and the necessary multiculturalism. We believe that the spread of a culture of human rights enables the growth of a responsible multiculturalism. See also Waldron (2000).

[21] For more details on the Inter-American Court case law, see Figueiredo (2008, 87–133).

[22] According to a report published by newspaper "O Estado de São Paulo" on August 10, 2009, 108 petitions are processed before the OAS against the Country in cases involving torture, murder, failures in the prison system and crimes against childhood and adolescence. Out of a total of 507 reports, 29 were received by the Inter-American Commission for analysis. The cases presented to Court are not recent since the petitioner must exhaust all existing remedies in the Brazilian Justice system so that the plea is accepted (with a few exceptions).

guaranteed human rights. She states that “in view of the recent acknowledgment of this international court´s jurisdiction, one finds that very few cases have been submitted to it so far. In fact, before May 2009, only five cases were filed with the Inter-American Court against the Brazilian State, out of which two are litigations and three involve provisional measures”.[23]

Regarding international litigation in Latin America, there is lack of effectiveness and enforcement of social, economic and cultural rights, and violations thereof, which reflects socially complicated situations that lead to judicial actions and serious social conflicts. Many of them are not settled internally and sometimes reach an international level. Ultimately, it is the frequent disrespect for the constitutional norms or programs in countries that have a detailed constitution, or a constitution with a far-reaching administrative scope, such as the Brazilian constitution, that leads to social conflicts. The lack of rights providing for a dignified life, housing, health, education, sanitation, safety, social security causes discriminated or neglected groups to resort to the judiciary, which may not always be ready to settle these claims. Even where judiciary is ready and prepared to solve them, at the national level it might not be able to settle as many claims as, perhaps, the executive could do by means of its public policies as it has the operational conditions to effectively provide for such rights in practice. If these problems are not solved within the national scope, they may reach, as they sometimes do, the international sphere of human rights protection.

It is also true that the democratization process within Latin America has helped strengthening the Organization for American States, the OAS, and the human rights system. The globalization of human rights and the *transnationalization of social movements* have also contributed to the expansion of transnational judicial activism. As well observed by Cecília Mac Dowell Santos, as a consequence of these processes, the Inter-American Commission on Human Rights (ICHR) has become more reliable among human-rights NGOs, and has forced OAS member states to recognize and comply with human rights norms (Santos 2007, 37).

On the other hand, José Eduardo Faria reminds that “(…) an important survey conducted by the Brazilian Geography and Statistics Institute signals what may occur in this respect: out of all Brazilians who would be involved in civil, criminal and labor matters between October 1983 and September 1988, 67% opted for solving them out of court. When asked to explain the reasons for such option, they alleged that (a) they do not trust police and justice agencies; (b) they fear revenge from the other parties involved; (c) they do know their rights; (d) they find evidence to be insufficient; and (e) they have counted on the intermediation of third parties. In view of such a percentage rate and the alleged reasons, if the Judiciary fails to rouse social, political and economic reality of the country, and fails to learn how to deal with conflicts among groups, communities and other individual or class groups underlying them, sooner than one thinks it may become an unimportant institution, or even an institution that is ‘disposable’ by society. The degree of ‘disposability’

[23] Piovesan (2010, 311), author’s translation.

will correspond, in this case, to the degree of weakness of the rule of law, so arduously conquered".[24]

Andreas Feldmann Pietch points out that the Inter-American system for the protection of human rights (ISHR) gives clear signs of crisis (Pietch 2006, 41 ff.). Such crisis is felt through at least two knots: on the one hand, the fragility on the enforcement of its judgments upon the States taking part in the system; and, on the other hand, what it calls a "system fatigue", which is the result of a complex and unfortunate combination of increasing expectations that are translated into an exponential rise in the workload and in the lack of suitable resources to successfully accomplish the mission of the Inter-American system for the protection of human rights. The author states, "the decisions rendered by the Court, or its recommendations, are not complied with, or are partly complied with (…). The States do not meet their obligations and very often excuse themselves from complying with them by arguing that there are no suitable laws or quorum in Congress to correct obsolete and improper laws through new instruments in line with the international law of human rights".[25]

The above-mentioned author further points out:

> (…) As a general rule, as far as the Inter-American system is concerned, one should warn about the clear absence of a culture of compliance on the part of most member-states.[26]
>
> (…) In order to ensure the observance of human rights and, more precisely, of the decisions rendered by the ISHR agencies, one must conduct reforms in the three branches of the State, especially the Judiciary. These reforms are subject to a greater observance of the decisions rendered by the ISHR by the State agents, judges, attorneys, diplomatic body, etc.[27]
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> (…) Another practice that leads to promoting the observance of the judgments and decisions rendered by the ISHR has to do with the promotion and diffusion, by the system, of citizenship, at least to key actors such as civil servants, congressmen and members of political parties. This could take place through the qualification of several entities, especially the Inter-American Institute of Human Rights (IIHR).[28]
>
> (…) The international community may also contribute to the task of strengthening the commitment of the States of the region with the ISHR. The creation of national institutions of human rights (today they exceed 100 entities) may promote the implementation and the respect for international norms within the domestic ambit.[29]

Finally, we should note, as does Flávia Piovesan, that a balance of the Inter-American system allows us to draw five conclusions:

> The first one is that the weaknesses and insufficiencies of the system reveal, above all, the weaknesses inherent in the protection of human rights within the internal ambit of States.
>
> The second conclusion points to the legacy of the system, which has been characterized especially by answering to a serious rate of conflict concerning civil rights. (…) One does

[24] Faria (2010, 112), author's translation.

[25] Pietch (2006, 41 ff.), author's translation.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

> not conceive, in the Court's case law universe, a diversified list of matters as is the case in the European system. Even if, within the democratization process, massive violations of human rights are not seen, this rate of conflict points to the endemic persistence of violence in the region.
>
> The third conclusion concerns those who access the system. One verifies that, within the Inter-American Court's jurisdiction to settle conflicts, the cases have been generally filed by the Inter-American Commission, and a considerable number of them came from denouncements submitted by NGOs. These cases have been then submitted by the Commission, afterwards, to the jurisdiction of the Inter-American Court.[30]
>
> The fourth conclusion concerns the impact of the decisions of the Inter-American Court, which has proved significant, as a result both of the increasingly credibility of the Court in the region and of the monitoring and supervising capacity of the civil society as regards the State's compliance with the decisions rendered. The Inter-American system, unlike the European system, does not count on the support of the consistent and solid cooperation network among States in affirming human rights; nor does it count on the high degree of respect of human rights in the internal ambit of the States.
>
> Unlike the European system – which entrusts the competence to supervise the compliance with the decisions rendered by the European Court to the Justices Committee –, in the Inter-American system it is the Court itself that has created a mechanism to assess the observance of its decisions. Unlike the European Convention, the American Convention establishes no set of systems to supervise the judgments rendered by the Court, but only determines that the Court must submit an annual report to the OAS'S General Meeting.
>
> The OAS's political agencies have not rendered effective support yet to the Commission and to the Court. It would be interesting if one could strengthen the sanction capacity of the Inter-American system in light of the experience of the European system.
>
> (…)
>
> One should further point out the successful experience of the Inter-American Court as regards its advisory competence – which does not face the limitations of the advisory competence of the European Court – through the consolidation of important interpretative parameters involving the scope of the American Convention rights, with considerable impact on the legal orders of the States of that region, as to their harmonization in light of the minimum protective parameters.
>
> The fifth conclusion refers to the challenges of Inter-American system, assembled in four factors: a) the broadening of venues where civil society participates in the Inter-American system, by providing individuals, groups of individuals and NGOs with direct access to Interamerican Court; b) the strengthening of the sanction capacity of the system, in the event of non-compliance with its decisions; c) the strengthening of the effectiveness and enforcement ("*justiciabilidade*") of economic, social and cultural rights; d) the increase in the budget apportionment for the Inter-American system, with additional financial and logistic resources, to strengthen its enforceability; e) a greater commitment by the States to the protection of human rights, considering how the level of commitment contributes to the strengthening of the system.

To conclude, one may say that the Brazilian legal system adopts a mixed judicial review: the North-American method ("*controle difuso*") and the European method ("*controle concentrado*"), tending towards the strengthening of the latter. Thus, the Federal Supreme Court prevails regarding constitutional matters.

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[30] Piovesan (2006, 139 ff.). The author's book is dated 2006. The reality has changed (for the better), as motioned before.

In Brazil, since the majority of human rights are concentrated in the Constitution, a significant number of conflicts on that matter are held by the Court of Justice. And yes, its decisions may be enforceable, because Article 103 A of the Brazilian Constitution (added by the Constitutional Amendment no. 45 of December 8, 2004) states: "Federal Supreme Court may, ex officio or upon demand, by means of a decision made by two-thirds of its members, following repeated decisions on constitutional matter, approve a Supreme Court binding precedent which, upon its publication in the official press, shall produce binding effects on other bodies of Judiciary and public administration, at federal, state and municipal levels, as well as perform the review or cancelling thereof, pursuant to the law" (Brazilian Constitution, Article 103 A).

Finally, it is worth mentioning some Brazilian cases in order to indicate how the Inter-American system has impacted on Brazilian law. Human rights NGOs play a fundamental role in the protection of human rights, since they point to the protection of human rights in an international system in order to impact national laws and policies. According to Cecília Macdowell Santos, the NGOs have the potential to re-politicize the law and re-legalize politics (Macdowell Santos 2007, 39). Still, in her view, it is estimated that human-rights NGOs are responsible for 90% of cases submitted to the ICHR (Ibid.). "Since the eighties, majority of cases against Brazil submitted to the ICHR were filed by international NGOs in association with local NGOs, victims and their families and/or players of social movement. NGOs make use of different strategies when they act within the ambit of the OAS and when they act with the United Nations (UN). Transnational judicial activism bears a qualitative nature, whereas the NGOs' approach bears a quantitative nature.

These NGOs resort to the ICHR not only to find solutions to specific cases, but also to create precedents that will impact Brazilian politics, legislation and society. (…). In addition to using the ICHR as a political resource to promote social change, NGOs also make use of it to reconstruct the international norms on human rights. The structuring of the denouncement as a violation of political and social rights is more easily accepted by international judicial and quasi-judicial agencies. (…). While most violations of human rights are reconstructed as violations of civil rights, the claims go beyond the victims' redress. Petitioners typically request the Brazilian State to take preventive actions and create new legislation or public policies on a specific subject matter."[31]

5.3.1 José Pereira Case

In 1989, José Pereira, 17 years old, was seriously injured as he tried to escape from Espírito Santo Farm, in the State of Pará. He suffered wounds to his hand and his right eye. Another land worker was killed. The young man had been attracted by false promises of work. In fact, hard labor was in place, without freedom and under

[31] Santos (2007, 41). Also, see Santos for a more detailed understanding of Maria da Penha case (domestic violence), which led to the enactment of Law 11,340/2006; and Simone Diniz case (discrimination on the basis of race as a violation of human rights versus the denial of racism).

inhuman and illegal conditions. Such was the case of José Pereira and other 60 land workers on that farm.

A petition was filed by the Pastoral Commission for Land and another commission before the Inter-American Commission of Human Rights, against the Federative Republic of Brazil, in 1994.

In September 2003, an amicable agreement was executed by the parties and the Brazilian State. Apparently, it was the first agreement of this kind in Brazil within the Inter-American system for the protection of human rights. At that time, Brazil acknowledged its international liability for the violation of human rights.

The agreement was homologated by the Inter-American Commission of Human Rights which is in charge to supervise its full compliance by Brazil.

5.3.2 Corumbiara Case

In the city of Corumbiara, State of Rondônia, military policemen, at the request of landowners, attempted to enforce a judicial decision restating their possession of the land. It must be noted that there were repeated denouncements by the policemen of violations of human rights in this region. Upon attempting to enforce the judicial order that determined that the landless rural workers clearly invaded the farms, the workers were killed and many people were injured. There were reports of executions, torture and humiliation committed against the rural workers.

Several entities denounced the slaughter against the Brazilian State. In its defense, the State alleged lack of exhaustion of the internal appeals and provided information on the processing and findings thereof, which were disregarded by the Commission.

In 2004,a final report on the case was published, in which the Commission found the Brazilian State to be liable for violating Article 4 (right to live), 5 (personal integrity), 8 (judicial guarantees) and 25 (judicial protection) of the Inter-American Convention. The Commission understood that Brazil infringed its obligation to respect and guarantee the rights provided for in the American Convention, and failed to prevent or prohibit torture. It also recommended that Brazil conducted a thorough, impartial and effective investigation of the facts by non-military agencies; adequately compensated the victims and their families as well as took provisional remedies to prevent similar cases from happening. It further suggested the amendment of military laws and review of the jurisdiction of the military police to investigate violations of human rights committed by military policemen.

5.3.3 Urso Branco Case

The case presents the reality of the Brazilian prison system and describes the threats and killing of 37 inmates by other inmates between January and June 2002. In 2002, the ICHR submitted to the Inter-American Court of Human Rights a request of

provisional measures against the Brazilian State on behalf of a group of inmates kept at the Urso Branco Penitentiary, in the State of Rondônia. The request was granted by the Court, which ordered the adoption of provisional remedies, determining that Brazilian State should guarantee due protection of the inmates' lives in the penitentiary.

5.3.4 Gilson Nogueira Carvalho and Damião Ximenes Lopes Cases

Finally, as Flávia Piovesan states, before May 2009, only five cases have been submitted to the Inter-American Court against Brazilian State, two of which being litigations and three of which concerning provisional remedies.[32]"Referring to the said two litigation cases, we find: a) the *Gilson Nogueira Carvalho* case, regarding the denouncement of murder of a human rights defender by an extermination group in the State of Rio Grande do Norte, submitted by the Inter-American Commission to the Court on January 19, 2005 (Case 12058); and b) the *Damião Ximenes Lopes* case, submitted by the Inter-American Commission to the Court on October 13, 2004 (Case 12237). One should note that, with respect to the *Gilson Nogueira de Carvalho* case, decision entered on November 28, 2006, the Inter-American Court dismissed the case in view of insufficient proof against the Brazilian State, which was said to have violated judicial rights and guarantees and judicial protection, provided for by Articles 8 and 25 of the American Convention of Human Rights (…)

In *Damião Ximenes Lopes vs. Brazil*[33] (Decision entered on July 4, 2006) the Court pointed out that the decision constitutes *per se* a form of compensation. The court, however, decided against the State in order to: a) guarantee, within reasonable time,

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[32] Piovesan (2010, 312, 317 ff.), author's translation.

[33] The Court entered the first decision holding Brazil liable, on July 4, 2006, by virtue of ill-treatment inflicted to a victim bearing mental disorder, at a psychiatric clinic in the State of Ceará. The decision of the Court held Brazil liable for the violation of the rights to live, to physical integrity and to judicial protection, since the victim, as a result of the violence sustained, dead 3 days following his entering the clinic. In the context of violence against patients, and before Mr. Damião Ximenes Lopes's death, at least two deaths occurred at Casa de Repouso Guararapes (Guararapes Rest Home), which were said to have involved hits upon the head with hard, heavy objects and that the patients entered the Rest Home in good health, and ended up dying during their stay. Ms. Raimunda Ferreira de Sousa died at Guararapes Rest Home in October 1987 and Mr. Geraldo Alves da Silva also died there in February 1991. The denouncements of ill-treatment and wrongful acts committed against patients, such as an accusation of rape and another, that a nurse assistant would have broken the arm of a patient, were not investigated by the administration of the Rest Home, which was never visited by its administrator, who did not maintain any contacts with physicians or nurses, not even with the families of the patients. On May 17, 2010, the Inter-American Court of Human Rights issues a Resolution on the Ximenes Lopes *vs. Brasil* case as a "Decision Compliance Supervision", where it affirms that it keeps supervising the July 4, 2006 decision's points pending compliance on the merits, compensation and costs.

that the internal proceedings aimed at investigating and sanctioning the persons responsible for the facts in the case, produce relevant effects; b) publish, within six months, in the Federal Register and another newspaper widely sold in Brazil, in a sole text, Chapter VII, that deals with the facts proved and mentioned in the decision entered by the Court; c) continue developing a program aimed at educating and qualifying all physicians, psychiatrists and psychologists personnel, as well as nurses and assistants personnel, including all persons involved in the provision of mental health services, especially on the principles that must govern the treatment of persons bearing mental disability, in accordance with the prevailing international standards on the matter and those mentioned in the decision; d) pay in cash, to the families of the victims, within a year, on account of compensation for material and non-material damages, the amounts determined by the decision, and e) pay in cash, within a year, on account of costs all the expenses generated in the internal ambit and in the international proceedings before the Inter-American system for the protection of human rights. The Court also stressed that it will supervise the full compliance with the decision and that the State shall, within a year, submit to the Court a report on the measures adopted for compliance thereof".[34]

One should observe that the decision of the Court was published in the Federal Register on February 12, 2007, and that payment of compensation was made under Executive Order no. 6,185 of August 13, 2007, and that the Brazilian State paid compensation equivalent to approximately 280,000 Brazilian reals to Damião Ximenes Lopes's (the victim's) family.

5.4 Conclusion

Both the discourse and the practice of human rights must be practical, responsible and accessible to an increasingly large number of persons around the world. Intervention and participation of civil society in promoting and defending human rights may be strategic and focused on changing paradigm and on pressuring government policies, so that it becomes more consistent with human rights' progressive discourse.

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[34] Piovesan (2010, 312, 317 ff.), author's translation.

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Chapter 6
Cultural Relativism vs. Universalism: The South Pacific Reality

Jennifer Corrin

6.1 Introduction

In many countries of the world, international human rights texts explicitly or implicitly purport to be universal and to have binding effect. However, whilst many South Pacific countries are signatories to human rights conventions, in reality this has not resulted in tangible change. Issues remain, particularly in relation to poverty, governmental institutions and the rights of women, children and minorities. In some parts of the Pacific, culture and customary law have been relied on to justify the undermining of key human rights protections, particularly anti-discrimination norms.

This chapter looks at the question of whether human rights are universal and binding in the context of the South Pacific, and more particularly with reference to Solomon Islands.

6.2 International Law in Solomon Islands

The major international human rights texts are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on Torture, and the Convention on the Rights of the Child.

Internationally, the Pacific has the lowest rate of any region in terms of ratification of human rights instruments. From 1892 to 1978, Solomon Islands was a

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British Protectorate. During that time, the United Kingdom government acceded to a number of international human rights instruments on its behalf. After independence, Solomon Islands succeeded independently to the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination in 1982. The country acceded independently to the Convention on the Elimination of All Forms of Discrimination Against Women in 2002 and the Convention on the Rights of the Child in 1995.

Solomon Islands is not a signatory to the Convention on Torture. Nor, somewhat surprisingly, has it succeeded to the obligations contained in the International Covenant on Civil and Political Rights. Some commentators have expressed concern about the lack of commitment to ratifying and implementing international human rights treaties within the region.

6.2.1 Binding Effect

The texts are of explicit binding effect on those countries that have ratified them. In respect of negative rights to provide certain freedoms, the obligations are strict. Positive obligations on States to provide the resources for certain rights to be recognised are treated less strictly, the obligation being only to take steps towards progressively realising these goals. Additionally, the international human rights texts allow for derogation from the rights set forth in those instruments in certain circumstances. In particular, provision is made for derogation in times of public emergency (ICCPR, art 4). Further, the degree to which States undertake to pursue the fulfilment of the rights varies. A number of States have also expressed reservations to various articles in these instruments. For example, in respect of the International Covenant on Economic, Social and Cultural Rights, Solomon Islands has maintained the reservations entered by the United Kingdom on original signature insofar as they are applicable. The result is that Solomon Islands retains reservations under the Covenant in respect of the provision of equal pay to men and women, the application of the Covenant to customary marriages and the obligation to provide compulsory primary education.

6.2.2 Universality

Universalism has been described as “the idea that human rights transcend national, historical and cultural boundaries and to which all players in an international arena should subscribe” (Farran 2009, 103). The international human rights texts purport to be binding on signatories with respect to all persons within the geographic territory of the signatory State. They are universal in the sense that the same rights are guaranteed to all within and between the State signatories.

The basic international instruments do not recognise any variation in the degree of protection offered based on cultural variances. Indeed, the idea that human rights

are universal was affirmed in the Vienna Declaration on Human Rights which noted that, while the differing history and backgrounds of countries needed to be taken into account, human rights were to be protected irrespective of differing political, economic and cultural systems.

6.3 Interpretation by International Institutions

International human rights obligations are regarded as universal and binding by international institutions such as the General Assembly, the International Court of Justice and the Human Rights Council. However, there are few interpretations of human rights obligations by the international human rights bodies that explicitly relate to Solomon Islands. The interpretations that do exist tend to come from bodies noting particular concerns in relation to treaties to which Solomon Islands is a party.

In 2007, a report from the Special Rapporteur on torture, containing summaries of credible allegations of torture, cruel, degrading or inhuman treatment, listed one allegation in Solomon Islands and noted the government response (Nowak 2007). An 18 year old male was sentenced to life in prison for a murder he committed when he was 14 years old. The government reported that the defendant's appeal against the sentence had been allowed, and the case remitted for resentencing.

In 2002, a report from the High Commissioner for Human Rights noted the concerns of the Committee on the Elimination of Racial Discrimination in respect of reports of displacement, hostage-taking, torture, rape, looting and the burning of homes in Solomon Islands in the context of political and ethnic unrest (Sub-Commission on the Promotion and Protection of Human Rights 2002).

In 2001, the Committee on the Rights of the Child considered the report of Solomon Islands in relation to its implementation of the Convention (Committee on the Rights of the Child 2002a). A list of issues for consideration was developed (Committee on the Rights of the Child 2002b). Similarly, a report was submitted to the Committee on Economic, Social and Cultural Rights in 2001 and a list of issues for consideration developed. The initial report of Solomon Islands was considered by the Committee on the Elimination of Racial Discrimination in 1983.

Apart from these instances, Solomon Islands does not appear to have come under consideration by the international human rights bodies. It has, for example, yet to come before the Universal Periodic Review Mechanism of the Human Rights Council; it is due to be considered in the eleventh session in 2011.

6.4 Enforcement of Human Rights Obligations

The mechanisms provided in the international texts for the enforcement of the rights they contain are limited. Most human rights treaty systems have a reporting procedure (Olowu 2006, 155, 176). However, Solomon Islands, like most South Pacific

countries, is well overdue to report (Olowu 2006, 155, 178). This may be explained, in part at least, by the burden that international reporting imposes on a State which is still developing, has other basic priorities (Corrin 2008, 8–9) and has suffered from civil unrest (Fraenkel 2004).

International institutions do encourage countries to comply with their periodic reporting obligations, in order to monitor compliance and by making substantive recommendations for reform. For example, in 2002, the Committee on the Elimination of Racial Discrimination noted that Solomon Islands had not submitted a report to the Committee since its initial report in 1983. While accepting the challenges facing Solomon Islands, the Committee said:

> In line with its previous recommendations, the Committee strongly urges the Government of Solomon Islands to avail itself of the technical assistance offered under the advisory services and technical assistance programme of the Office of the United Nations High Commissioner for Human Rights, with the aim of drawing up and submitting as soon as possible a report drafted in accordance with the reporting guidelines.

There had been previous communications to the same effect from the Committee on the Elimination of Racial Discrimination.

The Committee on Economic, Social and Cultural Rights considered the initial report from Solomon Islands when it was submitted in 2002. It made a number of recommendations for the improvement of compliance with the Covenant and encouraged Solomon Islands to send State representatives to undertake dialogue with the Committee. Likewise, as noted above, in 2001, the Committee on the Rights of the Child developed a list of issues for consideration in response to the report of Solomon Islands (Committee on the Rights of the Child 2002b).

6.5 Margins of Appreciation in International Texts

The international texts give States room to manoeuvre in relation to particular human rights, whether through provision for derogation in particular circumstances or through an obligation of progressive realisation. More generally, the language of rights is couched in terms which permit a culturally relative interpretation and takes into account regional and national cultural and political specificities.

The idea of a "margin of appreciation" has been used by the European Court of Human Rights to give States some discretion in the implementation of their human rights obligations. The term does not appear in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') but stems from limitations on the exercise of Convention rights, which indicate that interference by the State may be justified in certain circumstances (Butler 2008, 687, 695–696). This idea has particular relevance in the South Pacific, where the margin of appreciation could be used to justify taking into account the culture, traditions and history of a Pacific State when determining whether a limitation on a certain right is justified (Butler 2008, 687, 706).

6.6 Normative and Empirical Universality

In Solomon Islands, as in many other small South Pacific Island States, there is a significant gap between the normative and empirical positions on universality. Whilst Solomon Islands is signatory to a number of international conventions, there is no express political commitment to human rights. Nor is there any serious debate amongst the country's political leaders about this. Caution has been expressed about the value of international instruments. For example, the usefulness of the Convention on the Elimination of All Forms of Discrimination Against Women and the Beijing Platform of Action have been questioned. It has been said that women have been "flooded with international instruments" and that they required modification to fit the circumstances of Solomon Islands. Scholars have also endorsed this view. Additionally, there is strong support for a relative approach to human rights in the South Pacific, which would accommodate the different cultural contexts in which rights operate. Cultural relativism can act as a challenge to the universality of human rights (Corrin 2009, 31, 54).

Generally, Solomon Islands' courts have acknowledged the country's commitment to human rights as expressed in international conventions. They have also confirmed the binding nature of the rights chapter in the Constitution. However, this is another area where the empirical position departs from the normative. In a number of judgments, the courts have failed to promote or even to enforce human rights. These cases are discussed below. Writing extra-judicially, Muria CJ has observed that modern regimes in the domestic sphere are categorised as "foreign" by ordinary islanders (Muria 1996, 7).

Human rights protections do not play a significant role in the lives of the majority of the population in Solomon Islands. Also, there is a "disconnect" between the formal dispute settlement system and local realities (Corrin and Brown 1998, 1334, 1351; Corrin 2009, 55–56). Protection is limited, both by restricted access to remedies and evidential problems (Corrin Care and Zorn 2005, 144, 159–160), particularly for women. Further, even where a formal judgment upholding human rights may be a Pyrrhic victory if the applicant is ostracised by the local community for seeking relief outside the traditional system (Corrin Care 2006 51, 79).

6.7 The National Legal Order

6.7.1 Introduction

Solomon Islands, like other common law States in the Pacific, has a "dualist system" in which international treaty law does not become part of domestic law unless specifically incorporated by legislation. To date, there is no legislation in Solomon Islands which specifically introduces the international texts into the internal order. There is no other legislation dealing specifically with human rights.

There are some individual statutes which protect certain rights but these are outside the scope of this chapter.

Whilst international law has not been encapsulated in domestic legislation, Solomon Islands' Constitution contains a Bill of Rights (Constitution Chap II) and provides a mechanism for the enforcement of those rights (Constitution s 18). It should also be noted that in common law countries, like Solomon Islands, protection is also provided by the common law. Solomon Islands also has an Ombudsman who plays an indirect role in human rights protection through review of government action. These three modes of protection require further elaboration.

6.7.2 Constitutional Provision

Whilst Solomon Islands has not incorporated international conventions into domestic law, Chapter II of the Constitution, entitled 'Protection of Fundamental Rights and Freedoms of the Individual', contains an extensive list of human rights protections. The Constitution provides that each person is entitled to these rights and freedoms, subject only to respect for the rights and freedoms of others and for the public interest (Constitution, s 3).

In particular, the Constitution protects:

- The right to life (s 4);
- The right to personal liberty (s 5);
- The right to be free from slavery and forced labour (s 6);
- The right to be free from inhuman and degrading treatment (s 7);
- The right to property (s 8);
- The right to privacy (s 9);
- The right to due process of law (s 10);
- The right to freedom of conscience (s 11);
- The right to freedom of expression (s 12);
- The right to freedom of association and assembly (s 13);
- The right to freedom of movement (s 14);
- The right to freedom from discrimination (s 15).

These provisions are modelled on the Universal Declaration of Human Rights Fundamental Freedoms (1950), containing specific rights and freedoms and detailed exceptions.

The High Court of Solomon Islands has original jurisdiction to hear an application by any person who alleges infringement, whether actual or potential, of their constitutional rights (Constitution, s 18(1) and (2)). A subordinate court may also refer any question arising before it as to the contravention of the rights provisions (Constitution, s 18(3)).

As the Constitution, which contains the human rights provisions, is the supreme law, it is clear that the State as a whole is bound by those provisions. However, the Constitution may be amended by legislation. Changes to Chapter II, protecting

fundamental rights and freedoms, require a majority of three-quarters of the legislature.

The draft of a new federal constitution is currently being discussed in Solomon Islands. This constitution differs in a number of key respects from the existing one. The human rights protections are far more extensive, encompassing both civil and political and economic, social and cultural rights and specific protections for women and other persons; it is made clear that the human rights provisions bind not only government acts but also those of individuals in certain circumstances; and, while custom continues to be recognised as a source of law to the extent that it is not inconsistent with the Constitution or other statutes, the exemptions customary law previously enjoyed in respect of human rights have been removed. A Constitutional Court and Human Rights Commission are to be created.

6.7.3 Courts and Common Law Rights

The hierarchy of the courts in Solomon Islands follows the typical three tier model of inferior court, superior court, and appeal court. The superior court is called the High Court. It has original jurisdiction to determine any question as to the interpretation or application of this Constitution (Constitution, ss 83 and 84(2)). More specifically, it has jurisdiction to determine applications for breach of the rights protected by chapter II (Constitution, s 18(2)). The appeal court is called the Court of Appeal and it has jurisdiction to hear appeals as of right from the High Court (Court of Appeal Act, Cap 6, s 11).

Courts in Solomon Islands have been slow to develop their own jurisprudence. Their approach to constitutionally enshrined human rights has been inconsistent.

With regard to common law rights, given the breadth of constitutional protection, there is very little need to resort to these. Solomon Islands follows the English common law and, in this manner, where necessary, the courts may protect rights. In some cases, this protection has been indirect, through an approach to statutory interpretation to the effect that Parliament is presumed not to intend to invade fundamental rights, freedoms and immunities. The courts have also accepted that various common law rights qualify for protection as rights, freedoms or immunities. These include:

- The right of access to the courts;
- Legal professional privilege;
- Privilege against self-incrimination;
- Immunity from the extension of the scope of a penal statute by a court;
- The right to procedural fairness when affected by the exercise of public power;
- Freedom from extension of governmental immunity by a court;
- Immunity from interference with vested property rights;
- Immunity from interference with equality of religion;
- The right to access legal counsel when accused of a serious crime;
- Protection from false imprisonment (habeas corpus).

6.7.4 The Ombudsman

Solomon Islands has an Ombudsman who plays an indirect role in human rights protection through review of government action. The public and independent office of the Ombudsman is established by the Constitution (Constitution s 96). Further provisions relating to the office and its powers are made by legislation (Ombudsman (Further Provisions) Act Cap 88). The role of the Ombudsman is to enquire into the conduct of the public service and other public bodies, assist in the improvement of practice and procedure and ensure the elimination of arbitrary and unfair decisions (Constitution s 97). Any person who has suffered injustice as a result of government action may make a complaint to the Ombudsman, who may investigate (Ombudsman (Further Provisions) Act Cap 88, ss 5–6). Where, after investigation, the Ombudsman is of the view that the action under consideration was contrary to law, based wholly or partly on a mistake of fact or law, unreasonably delayed or otherwise unjust or manifestly unreasonable, recommendations may be made to the department or authority concerned.

6.8 Enforcement of Rights at the National Level

A threshold question which arises in relation to enforcement of human rights in Solomon Islands is whether the constitutional provisions are enforceable against individuals. The Constitution as it presently stands makes no express reference to the parties bound by the rights chapter. Theory provides a spectrum between two opposing approaches to the potential applicability of human rights norms: the "vertical approach", in which rights protections apply only to violations by the State or State authorities, and the "horizontal approach", in which human rights protections extend to violations by individuals (Corrin 2009, 31). The Constitution is silent as to which of these approaches is to prevail. With human rights having their foundation in a desire to protect the individual from the might of the State, it might be assumed that the vertical approach would be prevalent. However, throughout the South Pacific region, it seems that the opposite is the case, with Solomon Islands jurisprudence demonstrating the only real discussion of the issue (Corrin 2009, 53). Some members of the judiciary have favoured the "horizontal approach". Others have been of the view that the rights contained in the Constitution are "principally" concerned with the relationship between citizen and State. This tendency to support the vertical approach has gained further support and was favoured in *Ulufa'alu v Attorney-General* [2005] 1 LRC 698 the latest Court of Appeal decision to consider this matter. However, the comments in that case are strictly obiter, as the case was decided on other grounds. Further, the Court of Appeal was anxious not be taken as laying down a general inflexible rule that fundamental rights were only applicable vertically. They noted that this was a developing area and considered that the nature

of the particular right relied on and the surrounding context would have to be examined in each case, stating:

> It is necessary to consider the precise rights sought to be relied on and the context in which they are relied on. This Court does not think that it can be said as an absolute principle 'always horizontal' or 'never horizontal' ([2005] 1 LRC 698 [32]).

In any event, it should be noted that the Constitution provides that a Court may decline to grant constitutional relief if other means of redress are available (Constitution 1978, s 18(2)).

As has been noted above, a significant proportion of the Solomon Islands population has little interaction with State institutions, with the majority of dispute settlement occurring outside of the formal context through customary processes. It has therefore been proposed that, rather than adopting either a horizontal or vertical approach to human rights enforcement, a "lateral approach" should be used in the Pacific region (Corrin 2009, 67–68). This approach would recognise the pluralistic nature of Solomon Islands by making human rights protections enforceable against not only the State but also traditional leaders (Corrin 2009, 67).

The draft of the new constitution for Solomon Islands, referred to above, provides for the rights provisions it contains to apply not only to the government but also to 'all other persons and bodies'. However, this is limited "to the extent that it is applicable taking into account the nature of the right and the nature of the duty imposed by the right". The extent of this limitation is unclear.

Legislation in Solomon Islands may be reviewed for compatibility with the human rights provisions of the Constitution. This power depends on an interested party seeking judgment on whether the legislation is constitutional. The Court may decline to exercise jurisdiction if satisfied that there are alternative means of redress available (Constitution, s 18(2)).

The High Court of Solomon Islands may "make such orders, issue such writs and give such directions" as it considers appropriate "for the purpose of enforcing or securing the enforcement of any of the provisions" (Constitution, s 18(1)). These powers have been interpreted broadly and used as a basis for declaring an Act void and severing words from a statute to make it conform to the Constitution. Interestingly, any person aggrieved by the violation of their fundamental rights may apply to the High Court for an award of compensation to be made against the person or authority violating the relevant constitutional protection (Constitution, s 17; Nonggorr 1993, 278).

Although certain human rights are constitutionally entrenched in Solomon Islands and are therefore superior to other laws, this does not mean that they will always prevail (Corrin 2007, 143, 151). There are several reasons for this. Firstly, these rights are subject to exemptions. In particular, the right to freedom from discrimination is specifically made subject to the application of customary law. The section exempts laws which provide "for the application of customary law" from the protection of non-discrimination. There is case law to the effect that this provision exempts all customary law from the requirement of non-discrimination. However, it

has been argued that this is reading the provision too broadly and that the constitutional exemption should really only protect laws "designed specifically to govern the application of customary law", rather than all customary rules which might have discriminatory effect (Corrin Care 2006, 51, 74). The existence of this exemption has often resulted in customary practices adversely affecting women in particular. This is because the customary system is largely patriarchal and status-based, and capable of operating to the detriment of women.

Secondly, human rights are subject to more general provisos. The Constitution provides for laws to contravene certain human rights protections set out in the Constitution in a time of public emergency (Constitution, s 16(7)). A period of public emergency is defined to mean either a time of war or a time during which a declaration of public emergency has been made (Constitution, s 16(1)). Laws passed during that time will be valid even if inconsistent with the fundamental freedoms contained in the Constitution, provided they are reasonably justified in the circumstances for the purpose of addressing the situation arising or existing.

In addition, the Constitution provides that custom is a source of law and its importance is emphasised by the Preamble. Although the Constitution is the superior source of law, the fact that custom is explicitly recognised can influence the courts in determining the existence of an inconsistency between custom and human rights (Corrin 2007, 143, 151). For example, in *Pusi v Leni*, a case concerning an alleged violation of the constitutional freedom of movement resulting from the application of customary law, doubt was cast on the superior force of the human rights provisions in the Constitution. Muria CJ considered that the Constitution clearly embraced "the worthiness, the value and effect of customary law" and noted:

> The Constitution itself recognises customary law as part of the law of Solomon Islands and its authority therefore cannot be disregarded. It has evolved from time immemorial and its wisdom has stood the test of time. It is a fallacy to view a constitutional principle or a statutory principle as better than those principles contained in customary law. In my view, one is no better than the other is. It is the circumstances in which the principles are applied that vary and one cannot be readily substituted for the other.

6.9 National Interpretation of Rights

6.9.1 Domestic Interpretation of Constitutionally Enshrined Rights

Constitutionally enshrined rights have been interpreted by Solomon Islands courts in a number of cases.. These decisions are in accord with the Privy Council's broad approach to the interpretation of constitutionally enshrined rights. Others are not.

Particular problems have arisen where human rights conflict with customary law. In these cases, the courts appear to take a narrow view of the application of human rights. Where the texts are referred to, they appear to be interpreted narrowly.

The most striking example of this is that the human rights provisions are not always taken as universally binding. This is demonstrated by cases where customary law has prevailed.

One example of this is *Pusi v Leni*, which has already been referred to above. In this case, the applicant claimed that he had been banned from entering a particular village due to insulting behaviour towards the village elders. He claimed that this was a violation of his constitutional rights, inter alia, to freedom of movement. Muria CJ found on the facts that there was no such ban and that the applicant was reluctant to go into the village not because of a ban but because he had not atoned for his breach of custom. As noted above, Muria CJ made some important obiter dicta comments regarding the place of custom in the constitutional hierarchy.

Two other examples where the court has managed to avoid declaring customary law unconstitutional occurred in relation to the right to freedom from discrimination. As noted above, this right is subject to a constitutional exemption in favour of laws providing for the application of customary law. The first case is *Tanavalu v Tanavalu*, where a widow was claiming rights over the property of her deceased husband. The Court accepted the evidence that, under customary law, the deceased's father was entitled to take over the deceased's estate, to the exclusion of the widow. The widow argued that, if that was the case, the rules of customary law were discriminatory. However, the court refused to treat this as unconstitutional on the grounds of sexual discrimination. Whilst it was accepted that discriminatory 'law' was unconstitutional, the court held that the word 'law' in this context did not include customary law. The judge's basis for this finding was that the words, "no law shall", in the relevant section, were referring to a law to be made in the future. As customary law already existed at the time of the adoption of the Constitution, it was not such a law. According to this decision, no customary law, no matter how discriminatory, would offend the anti-discrimination provision. The court went on to say that even if this had not been the case, the Constitution exempts from the anti-discrimination provision any laws making provision "for the application of customary law". This is a wide interpretation as it is arguable that the shield is only for a law designed specifically to govern the application of customary law. The decision was upheld by the Court of Appeal.

The second case involving discrimination where the court declined to declare customary law unconstitutional despite its discriminatory effect was *Minister for Provincial Government v Guadalcanal Provincial Assembly*. In that case, the Court of Appeal was called on to consider whether the Provincial Government Act 1996 was unconstitutional. This Act introduced a system whereby Provincial Assembly members were indirectly elected from Areas Assembly members. As Area Assemblies consisted of 50% elected members and 50% non-elected chiefs and elders, who were all male, females were effectively denied equal opportunity. The Court concluded that as the Constitution mandated parliament to "consider the role of traditional chiefs in the provinces" (s 114(2)(b)), it had been recognised that "traditional chiefs" should play a role in government at provincial level. The discrimination that would remain until the role of "traditional chiefs" under the Constitution was re-evaluated had therefore been accepted in the Constitution itself.

Ironically, due to pressure from existing Provincial members, the Provincial Government Act 1996 was repealed and replaced by the Provincial Government Act 1997, which reintroduced direct elections of Provincial Assembly members.

This approach can be contrasted with the Court of Appeal's decision in *Loumia v DPP* [1985–6] SILR 158, where the right to life was in question rather than freedom from discrimination. In that case, the accused had been convicted of murder under the Penal Code (Cap 26). He argued that his actions were justified as he had acted in the belief that he had a legal obligation under customary law to retaliate against a person responsible for the death of his close relative (Penal Code Cap 26 s 204(c)). The Court of Appeal held, that even if the duty to kill was part of the customary law of Solomon Islands, such law was contrary to right to life (Constitution s 4), and therefore unconstitutional.

In other cases involving the application of the rights chapter in the Constitution, where customary law has not been used as a defence, the Courts have, generally, interpreted rights liberally. In some cases they have made reference to the analogous provision in the international text as an additional ground for upholding the right in question.

6.9.1.1 The Right to Life

The right to life was considered in *Regina v Su'u*, where the court was called on to consider whether the accused were entitled to a legislative amnesty under the Amnesty Act 2000 (SI) in respect of murder charges. Mwanesalua J held that killing was a violation of the right to life protected by the Constitution, which "adopted" Article 3 of the Universal Declaration of Human Rights. As the killing violated human rights, it was held that the amnesty provisions did not apply.

6.9.1.2 The Right to Be Free from Inhuman and Degrading Treatment

In *R v Rose* the court had to decide whether corporal punishment in a school environment amounted to inhuman and degrading punishment, which was prohibited by the Constitution (s 7). Ward CJ determined that, while such punishment could be inhumane, this was not always the case. It was a matter of degree and depended on the way in which the punishment was carried out. In this case the punishment was unreasonable and the right to protection was upheld.

6.9.1.3 The Right to Due Process of Law and Personal Liberty

In *Regina v Mae*, on a bail application, it was held that a delay of 15 months between charge and trial was inconsistent with the right to be tried within a reasonable time. Similarly, in *Kimisi v DPP* [1990] SILR 82 a delay of over 2 years was considered prejudicial to a fair trial.

Manedetea v Kulagoe [1984] SILR 20 considered the requirement that courts be independent and impartial, holding that it required that courts not be perceived by a reasonable bystander to be biased.

In *Kenilorea v AG* [1984] SILR 179 the Court held that retrospective legislation purporting to direct the Court as to the manner of dealing with litigation currently pending before it infringed judicial independence. Orders had been made under price control legislation that had never been passed, and an application was made to declare the Orders invalid. The parliament attempted to pass legislation that retrospectively validated the orders.

In *DPP v Sanau* [1987] SILR 1, a provision of the Criminal Code allowing for summary dismissal was held to be void as it contravened the requirement that trials be held in public.

In *K v Regina*, consideration was given to the Constitutional requirement that an accused be brought to trial within a reasonable time or consideration be given to bail (Constitution s 5(3)(b)). The Court referred to Amnesty International's Fair Trials Manual, and took account of the relevant considerations of the Human Rights Committee and regional human rights bodies referred to in the Manual. A similar approach was taken in *Seko v Regina*.

6.9.1.4 The Right to Freedom of Conscience

In *Lobo v Limanilove*, Kabui J considered the proper balancing of interests between religious groups attempting to worship in the same area. Insofar as one religious group was attempting to halt another carrying out religious activities in a certain area, that conduct was held to be unconstitutional.

6.9.1.5 The Right to Freedom of Association and Assembly

Folotalu v Attorney-General considered the right to freedom of association in the context of the requirement of a deposit from a candidate wishing to stand for election. The applicant contended that the deposit hindered him in his right to freely associate in forming or joining a political party. It was held that the deposit was so high as to infringe this right and was not justifiable.

6.9.1.6 The Right to Freedom of Movement

Solomon Islands courts have upheld the right to freedom of movement where the government has acted without legal authority to prevent an individual from leaving the country. For example, in *Jamakana v AG* [1983] SILR 127, a resident of Solomon Islands was illegally banned from leaving the country by the Minister for Immigration. Although the constitutional protection defined freedom of movement as meaning 'the right to move freely throughout Solomon Islands, the right to reside in any part of Solomon Islands, the right to enter Solomon Islands and immunity

from expulsion from Solomon Islands' (s 14(1)), this was interpreted broadly to include the right to depart from Solomon Islands and the ban was held to be unconstitutional. Compensation, which was awarded on the same basis as damages for tort, was awarded against both the government and the Minister personally. Similarly, in *Tong v AG* [1985–6] SILR 112, where immigration authorities withheld a citizen's passport without legal authorisation, this was held to restrict his freedom of movement and compensation was awarded.

A less liberal approach can be observed in the following cases:

6.9.1.7 The Right to Property

In *Fugui v Solmac Construction Company Limited* [1982] SILR 100, the applicants claimed customary rights of ownership over certain land which had been subject to logging by a company. The Court held that, on the facts of the case, a right to crop coconuts amounted to "property" within the meaning of the Constitution. However, the constitutional right of protection from deprivation of property (s 8) was limited to acquisition by right of statute or statutory regulation. The appropriate remedy for unlawful acquisition by private individuals was a normal claim in damages.

6.9.1.8 The Right to Privacy

Solomons Mutual Insurance Ltd v Controller of Insurance concerned an application to quash certain search and seizure warrants on the basis, inter alia, that they were not compliant with the Criminal Procedure Code and alternatively, that there had been a breach of the applicant's right to privacy under the Constitution. Palmer J had difficulty determining the correct respondents to the Constitutional action and preferred to decide the case on the basis of breach of the Code. His Honour also noted that once a person has been charged and brought before the courts, it was inappropriate for the police to obtain further information relating to the matter by way of search warrant.

6.9.1.9 The Rights to Due Process of Law and Personal Liberty

Gerea v Director of Public Prosecutions [1984] SILR 161 considered the Constitutional protection of a fair hearing by an independent and impartial court as it related to a mandatory penalty of life imprisonment for murder. It was submitted that requiring a court to impose a mandatory life sentence intruded upon the independence of that judicial body. The Court concluded that while the nature of a "hearing" extended to the sentencing process, the independence of a court was not infringed by it being required to impose a certain sentence for a particular offence. The courts were sufficiently:

> independent within the meaning of s 10(1) if in the exercise of that function they are subject neither to control nor pressure by any outside body. The requirement of s.10(1) is in our

> opinion fully met if, as is the case in Solomon Islands, they are subject to no direction by the legislature or the executive government as to the disposition of a particular case and to no form of pressure from outside bodies in the performance of their judicial functions.

Taurii v Kerehote [1985] SILR 80 involved a justice with an alleged interest in the outcome of the case he was hearing. The applicant, by not objecting when invited, was considered to have waived his right to do so.

Qalo v Qaloboe concerned the question of whether the parties to an appeal could provide the funds necessary to allow a hearing to take place when those funds were otherwise not forthcoming. The Court concluded that such a step would interfere with the governmental role of appropriating funds established by the Constitution. The fact that the Constitution provided for the establishment of courts by law and for the fundamental right to be tried within a reasonable time did not mean that there was an enforceable duty on the government to continue to fund the courts.

6.9.1.10 The Right to Freedom of Expression

In *DPP v Solomon Islands Broadcasting Corporation* [1985–1986] SILR 101, the respondent was charged with criminal contempt for having broadcast a statement by a Member of Parliament criticising the judiciary. The respondent argued that a finding of contempt would limit the right to broadcast, and as such would infringe the freedom of expression guaranteed by the Constitution (s 12). The Court held that a finding of contempt would not infringe this freedom as it fell within the ambit of the proviso exempting anything "done under the authority of any law … for the purpose of … maintaining the authority and independence of the courts" (s 12 (2)).

In *Digicel (Solomon Islands) Ltd v Attorney-General* the applicant applied to quash the grant of a telecommunications licence to a third party on the grounds that it infringed the applicant's freedom of expression by creating a monopoly on telecommunications services. The Court considered that, given the circumstances surrounding the grant of the licence, and provision for review within the licence itself, it could not be said that the grant was unjustifiable.

6.9.1.11 The Right to Freedom of Association and Assembly

Tri-Ed Association v SICHE [1985–6] SILR 173 concerned a law restricting the ability of academics to associate with others in certain trade unions. The Constitution allowed for restrictions to be placed on public officers as long as they were reasonably justifiable in a democratic society. It was held that it had not been demonstrated that the restriction was not justifiable and the constitutional case was not made out.

Feratalia v Attorney-General concerned both freedom of expression and association in the context of refusal to permit a protest to be held. While accepting that the refusal was a restriction on those freedoms, the High Court held that it was one that was reasonably justifiable given the prevailing circumstances at the time. It was therefore a legitimate restriction.

6.9.1.12 The Right to Freedom from Discrimination

Folotalu v Attorney-General, discussed above, also considered the right to freedom from discrimination. The applicant contended that in being obliged to pay a deposit in order to stand as an electoral candidate, he was being discriminated against as an individual living in a rural area, compared to those living in urban centres. It was held that no discrimination had been established.

R v Bowie [1988–9] SILR 113 concerned a charge of gross indecency. The relevant provision of the Penal Code applied only to males. This was alleged to contravene the right to freedom from discrimination on the grounds of gender. The Court held that the law was inconsistent with the Constitution, but that the section could be saved by severing the word 'male'.

6.9.2 Domestic Use of International Texts as an Aid to Interpretation

As international human rights law is not incorporated into Solomon Islands law, there is little jurisprudence dealing directly with the international law. However, the courts of Solomon Islands do refer to the international texts and decisions reasonably frequently as an aid to interpretation of the fundamental rights provisions found in the Constitution. Case examples demonstrating this include the following:

Regina v Su'u
In this case, reference was made to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in determining the content of the right to life.

Loumia v DPP [1985–6] SILR 158
In this case, reference was made to the European Convention on Human Rights as the model for the rights and freedoms set out in the Constitution.

R v Rose
In this case, reference was made to the European Convention on Human Rights and associated case law as relevant to the interpretation of the protection against inhuman or degrading punishment.

Timo v Regina
This was a bail application. The Court referred to the Human Rights Committee's General Comment 8, which refers to principles of pre-trial detention and the presumption of innocence.

Seko v Regina
Reference was made to the jurisprudence of the Human Rights Committee and the regional human rights bodies.

K v Regina
In this bail application, the key international texts were cited. It was noted that these must be read subject to the Constitution and domestic legislation. Particular attention was given to the Convention on the Rights of the Child as the accused in question was a youth. The Court noted that much of the relevant requirements of the Convention, namely that a young person not be subjected to torture, or other cruel inhuman or degrading treatment, and that a young person not be deprived of their liberty arbitrarily, were reflected in the Constitution and other Acts.

Reference to these texts is not specifically required or referred to in the Constitution, but will depend on the approach of the court. This can be compared with other countries in the region., In Fiji, for example, the Constitution provides that the courts "must, if relevant, have regard to public international law applicable to the protection of [constitutionally enshrined] rights" (s 43). Fiji has thereby incorporated international norms into the domestic legal system. The Constitutions of both Papua New Guinea and Tuvalu allow reference to be made to the international conventions, declarations and recommendations, as well as to judicial decisions relating to human rights in determining whether an act is reasonably justifiable in a democratic society.

6.10 The Role of Regional Organizations

While there are a number of regional groups in the South Pacific of which Solomon Islands is a member, such as the Pacific Islands Forum and the Melanesian Spearhead group, there is no regional human rights organisation. Nor is there any regional protection system supporting the national system of human rights. It has been noted that the Asia-Pacific is the only region in the world without a regional human rights protection mechanism (Chiam 2009, 127, 128ff; Jalal 2009, 177, 187). In 1989, LAWASIA, the Law Association for Asia and the South Pacific, adopted a draft Pacific Charter of Human Rights. However, the draft did not receive support at a governmental level (Jalal 2009, 177, 181). LAWASIA is currently considering a revival of this initiative.

Although there is no regional human rights organisation or regional protection system, use is made of the universal instruments and decisions of international and regional bodies in interpreting protection provided on the national level. Also, there have been a number of United Nations-sponsored initiatives designed to examine the possibility of establishing a human rights mechanism for the Pacific (Chiam 2009, 127, 128ff; Jalal 2009, 177, 180). In 1996, the Commonwealth Secretariat organised a workshop on human rights education in the South Pacific. The attendees recommended that a Pacific Charter of Human Rights be adopted and that a South Pacific Centre for Human Rights be established. However, this was not taken further.

More recently, there has been some support for a Pacific regional human rights mechanism in the 'Pacific Plan', created under the auspices of the Pacific Islands

Forum, of which Solomon Islands is a member (Jalal 2009, 182, 185–186). Nonetheless, it remains the case at present that there is no Pacific human rights organisation for Solomon Islands to join.

6.11 The Relationship Between National and International Systems

As discussed above, international texts do not prevail over national laws as the former have not been incorporated into domestic law. Even if they had been incorporated into domestic legislation, they would be subject to the Constitution, which is the supreme source of law in Solomon Islands. The Constitution of Solomon Islands protects most of the key rights protected under the universal instruments. As noted above, the provisions are modelled on the Universal Declaration of Human Rights (1948) and the European Convention, containing specific rights and freedoms and detailed exceptions. The protections tend to emphasise civil and political rights rather than economic, social and cultural rights. In terms of modalities, the national system is arguably stronger than the international system, with provision made for the hearing of disputes and the granting of remedies in the event of contravention.

Theoretically, the human rights protections conferred by the Constitution have binding effect throughout the country and are superior to other national laws. However, there is a significant gulf between the form of rights protection in the South Pacific and realities, with constitutional protections not bringing about real cultural change (Corrin Care 2006, 51, 78). For the majority of the population therefore, the Constitution, and the protections it contains, play little, if any, role in daily life (Corrin 2009, 55–56). For most people, enforcement of human rights law in the formal court system is not a practical option; they are far more likely to encounter local dispute settlement, in which custom plays a key role and human rights are unfamiliar (Butler 2008, 687, 688).

As has been noted above, international decisions are sometimes cited in the interpretation of the Constitution of Solomon Islands. Reference is also often made, for interpretive purposes, to the case law of various other jurisdictions where similar issues have arisen for consideration.

The references to international texts and decisions, referred to above, would seem to suggest some degree of convergence between the national and universal level. However, in general this does not appear to be the case. In fact, the national jurisprudence perhaps demonstrates a preference for customary law over human rights, where the two come into conflict. Apart from this, decisions are largely on a case by case basis. Neither is there any uniform regional jurisprudence on human rights.

As discussed above, in theory, national human rights protections contained within the Constitution prevail over any inconsistent laws. They therefore have binding effect nationally. However, this effect is diminished by the scope of exceptions and by the narrow interpretation that is often preferred by the courts.

As there are no regional human rights instruments in the Pacific, it might be expected that national rights would only converge with the international human rights instruments. However, there is some convergence with the instruments of other regions, such as Europe, demonstrated by the occasional use of such instruments as aids to interpretation at the domestic level.

6.12 Conclusion

In Solomon Islands, as in many other small island States in the South Pacific, human rights are not widely regarded as universal or indispensible. For many people, particularly those living in rural areas, human rights, whether contained in international law or the Constitution, are a foreign concept. For the majority of the population, traditional values have more relevance. There is no strong convergence of human rights protection at international and national level, although there is some limited convergence evidenced by the courts' reference to international instruments as an additional basis for some of their decisions.

Whilst there may be an increasing tendency in some parts of the world to recognise human dignity as the supreme value and to place the individuals in the centre of social, economic, legal and political activities of State and international institutions, this assertion does not hold true for Solomon Islands. Whilst human dignity is recognised as an important right, the prevailing ethos in Solomon Islands and much of the Pacific is not concerned with the individual. The emphasis is on collective rather than individual rights (Thaman 1999; Corrin 1999, 251; Corrin 2009, 57). There is also an emphasis on duties rather than rights. Further, these collective rights and duties are not centered around the State, but stem from and are specific to traditional communities. While some have argued that the notion of collective rights is not foreign to international instruments, those instruments do tend to focus on the rights of the individual in accordance with liberal theory (Tamata). Despite the existence of human rights protections, Solomon Islands remains predominantly patriarchal and status-based (Corrin 2009, 57).

As discussed above, there is no regional protection mechanism in Solomon Islands. The influence of the international regime is limited by the fact that it has not been incorporated into domestic law. At the national level, although human rights are constitutionally enshrined, those rights are often divorced from the realities of everyday life. There is strong resistance to some aspects of human rights from sectors of Solomon Islands society where traditional leadership and customary law are still strong. Constitutional guarantees have not brought about tangible cultural change and the values underpinning traditions and culture are still widely accepted (Corrin 2006, 78). Where traditional values conflict with human rights, the former are likely to prevail, at least in the rural sector. In addition to tensions between cultural norms and human rights, abuses occurring during the ethnic conflict in Solomon Islands between 1998 and 2003 have been a serious challenge to human rights (Farran 2009, 4–5).

Bearing in mind the importance of retaining the valuable fabric of the complex social network, a gradual approach to bridging the gap between universal values and traditional norms may be more productive. A more nuanced approach to resolving conflicts between human rights and customary law is required. As suggested by the Australian Law Reform Commission ('ALRC'), in the context of recognition of Australian indigenous law, "The approach to be adopted must be flexible … and must pay particular regard to the practicalities of the situation". Such an approach might focus "less on which rights trump other rights according to either the cultural relativist or universalist position, but instead on an outcome that minimizes the extent to which each conflicting right must be compromised" (Charters 2003, 21).

Above all, there is a need for further research and discussion. Comparative work is both important and useful, but this should not confine the debate to existing models as opposed to searching for fresh ideas. Further, the process of change must involve Solomon Islanders at every level. In the past, there has been a failure to consult, and consultation which has taken place has usually proceeded from a preordained, imported agenda. The language of rights is an important ingredient in the search for common values and the formulation of principles that are resonant in the context of Solomon Islands.

Human rights education is also an essential element of any initiative for change. Many people in Solomon Islands remain ignorant of their rights (Corrin 2008). Apart from preventing access to remedies, this leads to suspicion and fear of change. Education, therefore, plays an important role in ensuring human rights protections have practical force (Corrin 2008, 17). There is also the question of adequate resourcing. Without adequate and sustained support, human rights initiatives are likely to be driven by an 'outputs' approach that has no lasting effect on embedded structures and attitudes.

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Chapter 7
Implementation of Universal Human Rights Standards in Japan: An Interface of National and International Law

ABE Kohki

7.1 Introduction

Among major UN human rights treaties, Japan is a State party to the following: the International Covenant on Economic, Social and Cultural Rights (ratified in 1979), the International Covenant on Civil and Political Rights (herein ICCPR, ratified in 1979), the Convention on the Elimination of Discrimination Against Women (CEDAW, ratified in 1985), the International Convention on the Elimination of All Forms of Racial Discrimination (acceded to in 1995), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (acceded to in 1999), the Convention on the Rights of the Child (ratified in 1994), its two Optional Protocols on involvement of children in armed conflict and on the sale of children, child prostitution and child pornography (ratified in 2004), and the International Convention for the Protection of All Persons from Enforced Disappearances (ratified in 2009).

In addition, Japan acceded to the Convention relating to the Status of Refugees and to the Protocol relating to the Status of Refugees in 1981. Japan is also a State party to the four Geneva Conventions of 1949, their two Additional Protocols of 1977 and the Statute of the International Criminal Court.

As at the end of July 2011, Japan has signed, but not yet ratified, the Convention on the Rights of Persons with Disabilities. The list of unsigned treaties includes: the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Japan has not accepted the competence of any of the human rights treaty bodies to receive and consider individual complaints. The current official reason for non-acceptance is the concern that such acceptance may give rise to problems with

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regard to judicial independence. The Human Rights Committee, the monitoring body of the ICCPR, has repeatedly recommended that the Government of Japan reconsider its position. In its most recent Concluding Observation addressed to Japan it recommended that "the State party should consider ratifying the Optional Protocol taking into account the Committee's consistent jurisprudence that it is not a fourth instance of appeal and that it is, in principle, precluded from reviewing the evaluation of facts and evidence or the application and interpretation of domestic legislation by national courts" (UN Doc. CCPR/C/JPN/CO/5, October 30, 2008, 8).

There is no regional mechanism for the promotion and protection of human rights in the area surrounding Japan. One may discern little, if any, political will to establish one in the foreseeable future.

7.2 The Constitution of Japan and International Human Rights Documents: A Comparative Analysis

7.2.1 Substantive Provisions

The Constitution of Japan, enacted in 1946, provides that "fundamental human rights are conferred upon the people of this and future generations as eternal and inviolate rights" and that "the people shall not be prevented from enjoying any of the fundamental rights" (Article 11). Article 97 of the Constitution stresses trans-temporal human endeavors in constructing human rights: "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability." Clearly, this is the narrative of human rights commonly shared throughout the globe.

Human rights are defined in considerable detail in Articles 10–40 of the Constitution. Although written by members of the occupying American power and translated into Japanese, the Constitution has continued to enjoy overwhelming support from citizens throughout its history. Ongoing debates about revision of the Constitution are centered on Article 9, an article embodying the principle of pacifism. No substantial challenges have ever been launched against human rights protection although the last decade saw a tendency among conservative citizens against the gender equality clauses in Article 24 of the Constitution.

Recent research by Professor Yokota, an internationally renowned human rights expert, compares Japan's Constitution and the Universal Declaration of Human Rights in order to clarify the legal significance of the Declaration in Japanese domestic contexts (Yokota 2009, 805–842). His analysis shows that while most of human rights norms are commonly provided for in both documents, some discrepancies exist. As suggested, the right to pursue happiness and academic freedom are enunciated only in the Constitution. The pursuit of happiness set forth in Article 13 of the Constitution helps effectively expand the human rights scope of the Constitution to meet the changing social circumstances. Newly emerging human

rights, such as the right to privacy and the right to environment, are construed to be implicitly embraced therein.

It may be added that the right to live in peace is not explicitly stipulated in the Declaration while the Constitution refers to it in its Preamble. The normativity and justiciability of that right have been approved by lower courts in cases in which the constitutionality of dispatching the Self-Defense Forces abroad was at issue (Sapporo District Court, Judgment, September 7, 1973; Nagoya High Court, Judgment, April 17, 2008; Okayama District Court, Judgment, February 24, 2009). The right to live in peace is an embodiment of the principle of pacifism, a fulcrum of the Constitution.[1]

Conversely, Professor Yokota's survey sheds light on the absence in the Constitution of a provision that protects motherhood and childhood. Article 25 (2) of the Declaration states in its second sentence that "[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection", a protection that is not currently extended to children in Japan. Presumption of innocence and the right to seek/enjoy asylum set forth in Article 11(1) and 14 of the Declaration respectively are two other guarantees that are not provided for in the Constitution.

A provision protecting the presumption of innocence is lacking not only in the Constitution but also in the Criminal Code and Criminal Procedures Law. However, the Due Process clause of the Constitution (Article 31), which provides that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law", is considered implicitly to guarantee the right to be presumed innocent. However, widespread criminal practice contradicts this interpretation.

The Constitution presupposes that human rights are inherent to individual persons. Collective rights are apparently unknown in the Constitutional context. Thus, the right to self-determination, commonly provided for in primary articles of the international covenants, does not find its counterpart in the Constitution. The right of persons belonging to minorities, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language (Article 27 of the ICCPR) is not stipulated in the Constitution either. In a case where the right of indigenous *Ainu* to enjoy their own culture was argued in relation to Article 27 of the ICCPR, however, one lower court has suggested that such a right may be inferred from the above-mentioned Article13 of the Constitution (Sapporo District Court, Judgment, March 27, 1997).

Unlike universal human rights documents, Japan's Constitution is interpreted to protect legal persons as well as natural persons. Thus, part of human rights protection,

[1] In its General Comment No.6 on the right to life (April 30, 1982), the Human Rights Committee considered that "States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life." Arguably, Article 6 of the ICCPR on the right to life is resonant with the right to live in peace in the Constitution of Japan.

such as the right to property, economic freedoms, the right to due process and the right to sue for redress, has been extended to corporate entities as Constitutional rights. The Supreme Court has even recognized that freedom of political activities attributes to legal persons (Supreme Court, Judgment, June 24, 1970), a view widely criticized by Japanese Constitutional scholarship.

7.2.2 Restrictions on Human Rights Protection

Japan's Constitution provides that human rights are guaranteed to the extent that they do not interfere with "public welfare". The concept of public welfare is quite nebulous and has been subject to much controversy. Human rights treaty bodies have repeatedly recommended that the application of public welfare should not exceed the scope of restrictions permitted in international documents. Thus, reiterating "its concern that the concept of 'public welfare' is vague and open-ended and may permit restrictions exceeding those permissible under the Covenant", the Human Rights Committee recommended that, "the State party should adopt legislation defining the concept of 'public welfare' and specifying that any restrictions placed on the rights guaranteed in the Covenant on grounds of 'public welfare' may not exceed those permissible under the Covenant" (UN Doc. CCPR/C/JPN/CO/5, October 30, 2008, 10).

Japan's Constitution does not provide for derogation in cases of emergency. The Constitutional silence has been considered, in light of the principle of pacifism, an indication that the Constitution admits of no suspension of human rights in cases of emergency. In June 2003, however, the Law concerning Measures to Ensure National Independence and Security in a Situation of Armed Attack was enacted. The law stipulates that in response to a situation of armed attack, the freedoms and rights of the people guaranteed under the Constitution must be respected; that if restrictions are placed on these rights, those restrictions must be limited to the minimum degree necessary to respond to the situation of armed attack in question and they must be implemented through fair and appropriate procedures; that in this case the provisions in article 14 (equality under the law), article 18 (freedom from bondage and involuntary servitude), article 19 (freedom of thought and conscience), and article 21 (freedom of assembly, association and speech, secrecy of communication) of the Constitution and other regulations concerning basic human rights shall be respected to the fullest extent possible.[2]

The Constitution of Japan confines the subject of human rights protection to "Kokumin" which literally means Japanese nationals. Although expressed as "the people" in the English version, the authentic text of the Constitution indicates otherwise. In one of the most disputed Constitutional cases, the Supreme Court

[2] See *Fifth periodic reports of States parties due in* 2002*,* UN Doc. CCPR/C/JPN/525 April 2007, 125, 126.

opined that “except for those which by nature of rights are considered applicable only to Japanese nationals, guarantees of fundamental human rights should be understood to be equally extended to aliens residing in Japan” (Supreme Court, Judgment, October 3, 1978). This apparently liberal interpretation was substantially compromised, however, when the Court decisively held in the same ruling that “it is appropriate to consider that fundamental human rights in the Constitution are only guaranteed to aliens within the framework of the resident status system.”

Following the lead of the Supreme Court, lower courts have subsequently delivered a line of decisions to the effect that the “immigration status”, as opposed to “being human”, determines the extent of human rights protection to aliens in Japan as mentioned below.

7.3 National Mechanisms for Human Rights Protection

Article 99 of the Constitution states that “[t]he Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.” Thus, constitutionally pronounced human rights have a binding effect and the obligation to protect human rights is clearly imposed on legislators.

In principle, the courts have the authority to determine the constitutionality of any law, order, regulation or official act related to specific cases. There is no Constitutional Court in Japan and the constitutionality of any law or official act is to be reviewed only in relation to specific cases by ordinary courts. However, at the time this report was written, the Supreme Court had delivered less than ten decisions declaring the unconstitutionality of statutes throughout its 60-year history.

All judges shall be independent in the exercise of their authority and shall be bound only by the Constitution and the laws (Article 76 (3) of the Constitution of Japan). The laws are interpreted to include binding international law.

Individuals claiming human rights violations may resort to courts. There are criminal procedures available to respond to infringements of human dignity. The *habeas corpus* protection is guaranteed by the Protection of Personal Liberty Act. Administrative litigations and civil lawsuits may also serve as redress for human rights violations. The decision of a court is to be executed as pronounced.

There are human rights organs of the executive, to which an individual may lodge a complaint, claiming violations of human rights. In charge of the organs are the Civil Bureau of the Ministry of Justice, the Regional Legal Affairs Bureau and the District Legal Affairs Bureau under the Civil Liberties Bureau. In addition, more than 14,000 civil liberties commissioners are appointed by the Minister of Justice and are engaged in activities to promote human rights in their localities. The annual number of cases handled by this mechanism is around 17,000–18,000. The breakdown of cases indicates that most of them are disputes between private persons.

The current institution obviously lacks independence from the government authorities. Thus, human rights treaty bodies have issued a series of recommendations

urging Japan to establish an independent national mechanism to address human rights issues. Thus, noting "with concern that the State party [Japan] has still not established an independent national human rights institution", the Human Rights Committee recommended in its most recent Concluding Observation addressed to Japan that "[t]he State party should establish an independent national human rights institution outside the Government, in accordance with the Paris Principles (General Assembly resolution 48/134,annex), with a broad mandate covering all international human rights standards accepted by the State party and with competence to consider and act on complaints of human rights violations by public authorities, and allocate adequate financial and human resources to the institution" (UN Doc. CEDAW/C/JPN/CO/6, August 7, 2009,17).

In December 1996, Japan enacted the Law of Promotion of Measures for Human Rights, which obliges the State to promote measures for human rights protection. In line with the statutory requirements, an impressive number of local governments have enacted their own ordinances for the promotion of human rights. Notably, the Universal Declaration of Human Rights is often invoked as a source of those ordinances. In 1999, the Fundamental Law on Gender Equality was enacted, which in turn prompted local governments to enact separate ordinances to implement gender equality in their localities. There should be no doubt that the CEDAW has served as a basis for the enactment of the Fundamental Law and the Ordinances. In some localities, there is a mechanism to handle individual complaints claiming gender discrimination in accordance with its ordinance.

As an alternative dispute resolution mechanism, the Japan Federation of Bar Associations has a well-established procedure to handle human rights complaints made by citizens. Although its decisions are not legally binding, its recommendations enjoy a morally persuasive status.

7.4 Judicial Attitudes

Article 98 (2) of the Constitution of Japan provides that "treaties concluded by Japan and established laws of nations shall be faithfully observed." By virtue of this provision, treaties concluded by Japan automatically acquire the force of law in Japan. As has been repeatedly recognized by Japanese courts, binding customary international law is also part of the law of the land. Reflective of the principle of international cooperation, another fulcrum of the Constitution, international law enjoys a higher status in the Japanese domestic legal order; the dominant view is that it prevails over national statutes and is only inferior to the Constitution.

Domestic courts occasionally invoke the Vienna Convention on the Law of Treaties in interpreting human rights treaties. Thus, the Osaka District Court stated in a judgment rendered on March 9, 2004: "[t]he Vienna Convention does not have retroactive effect, and therefore is not applicable to the [International] Covenant [on Civil and Political Rights], which came into force before the entry into force of the Vienna Convention. However, judging from the fact that the contents of the

Vienna Convention include customary international law that had existed before its entry into force, the Covenant shall be interpreted according to the Vienna Convention insofar as there are no special conditions that prevent such interpretations."

The above court affirmed the principles elucidated in the General Comments adopted by the Human Rights Committee in formulating its judgment. It opined that the General Comments "should be respected to a considerable extent in interpreting the Covenant as analogues to 'subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation' or 'supplementary means of interpretation'".

There are cases wherein courts have adopted a method of evaluative interpretation in stressing the importance of the object and purpose of a human rights treaty. In an epoch-making judgment which significantly widened the frontier of international human rights litigation in Japan, the Tokushima District Court invoked Article 14(1) of the ICCPR in light of a relevant ruling of the European Court of Human Rights as well as a non-binding UN document protecting the rights of the detainees (Tokushima District Court, Judgment, March 15, 1996). The judgment was refined and upheld in its material part by its superior court (Takamatsu High Court, Judgment, November 25, 1997).

That said, however, the majority of judicial decisions show indifference, if not antagonism to interpretation effectuated at the international level. Following the dominant attitude of the judiciary, a district court denied the legal significance of the General Comment on Article 17 of the ICCPR and held: "[i]nterpretation by the Human Rights Committee, though official, is different from the text of the Covenant and has not been ratified as a treaty. Accordingly, regardless of the interpretation [of the Committee in the General Comments], the claim of violation of the said Article may not be adopted" (Sapporo District Court, Judgment, May 15, 1997). There is no lack of decisions, such as the above-mentioned ones, which disregard the interpretation of human rights treaty bodies. This is particularly so with regard to cases on immigration and economic, social and cultural rights.

Japanese courts continue to reject the view, repeatedly expressed by international monitoring bodies, that human rights treaties are to be extended to non-citizens, regardless of their status. "The best interests of the child' and 'respect for family rights' are only considered within the framework of their resident status", so said the Tokyo District Court in a case wherein the deportation of a family including a child born in Japan was at issue (Tokyo District Court, Judgment, January17, 2008), a decision endorsed by the Tokyo High Court (Tokyo High Court, Judgment, May 29, 2008). The treaty interpretation by the monitoring body of the International Covenant on Economic, Social and Cultural Rights tends to be simply unheeded in Japanese judicial settings (Osaka High Court, Judgment, May 19, 2008).

Regarding decisions of the Supreme Court, reference to international human rights documents is, to say the least, rare. In a case where the prohibition of courtroom note-taking was challenged, the Supreme Court was apparently informed by Article 19 of the ICCPR and declared that the prohibition was unreasonable (Supreme Court, Judgment, March 8, 1989). Five judges, expressing their joint dissenting opinion in a case in which the right to inheritance of a person born out of wedlock

was at issue, directly invoked Article 26 of the ICCPR and Article 2 (1) of the Convention on the Rights of the Child in declaring the unconstitutionality of an apparently discriminatory provision of the Civil Code (Supreme Court, Judgment, July, 5, 1995). In the same judgment, two of the ten justices of the majority vote, while finding the differential treatment of children born out of wedlock constitutional, made reference to relevant articles of the ICCPR and the Convention on the Rights of the Child in encouraging the revision of the Civil Code.

In a rare display of judicial activism, the Supreme Court found part of the Nationality Act unconstitutional. In particular, the Court had recourse to the ICCPR and the Convention on the Rights of the Child (Supreme Court, Judgment, June 4, 2008). The Court, however, only referred to these treaties as implying the move worldwide to remedy the discriminatory treatment against illegitimate children. It should be recalled that treaties concluded by Japan are in fact part of domestic law and are superior to the Nationality Act.

Overall, international human rights documents and the treaty interpretation by human rights treaty bodies are not given due respect in Japanese domestic courts. Notably, there has been a widespread tendency in the Japanese judiciary to avoid the "autonomous interpretation" of treaty provisions and subsume them into the Constitutional interpretation. In a number of cases, the courts concluded that there was no violation of international human rights treaties simply because there was no violation of the Constitution. Typically, in a case wherein the fingerprinting system imposed on foreigners was challenged, the court abruptly held that "since [the fingerprinting system] is not repugnant to Article 14 of the Constitution, it is obviously not repugnant to Article 26 of the ICCPR" (Tokyo District Court, Judgment, August 29, 1984). A different court stated, without any substantial analysis of the ICCPR, that "[t]he principle of equality provided for in the Covenants is basically the same as in Article 14 of the Constitution, and what was previously determined [with regard to Article 14] can be applied as well" (Osaka District Court, Judgment, October 11, 1995).

More recent judgments are not that blunt, yet the basic attitude of the judiciary seems unchanged. In a criminal case wherein freedom of expression of a public employee was at issue, the court first determined the constitutionality of the indictment and then went on to interpret the relevant articles of the ICCPR, only to confirm the Constitutional interpretation. It was welcomed that the court apparently interpreted the ICCPR independently from the Constitution. However, by all appearances, the treaty interpretation was subjected to the Constitutional interpretation in order to come to the finding that the indictment was not in contravention of freedom of expression (Tokyo District Court, Judgment, July 20, 2006).

Curiously, there are a number of court decisions which simply put aside the question of treaty interpretation. The CEDAW is no exception. Its monitoring body, the Committee on the Elimination of Discrimination against Women, stated in its Concluding Observation after the consideration of Japan's sixth periodic report, "[t]he Committee is concerned that the Convention has not been given central importance as a binding human rights instrument and as a basis for the elimination of all forms of discrimination against women and the advancement of women

in the State party. In this connection, while noting that article 98, paragraph 2, of the Constitution stipulates that treaties that are ratified and promulgated have legal effect as part of the State party's internal law, the Committee is concerned that the provisions of the Convention are non-self-executing and are not directly applicable in court proceedings" (UN Doc. CEDAW/C/JPN/CO/6, August 7, 2009, 19). The Committee stressed that Japan should "increase its efforts to raise awareness about the Convention and the Committee's general recommendations among judges, prosecutors and lawyers so as to ensure that the spirit, objectives and provisions of the Convention are well known and used in judicial processes" (Ibid., 20).

The CEDAW Committee's concern was reminiscent of a similar statement made by another treaty body, the Human Rights Committee, which for its part recommended that "[Japan] should ensure that the application and interpretation of the Covenant form part of the professional training for judges, prosecutors and lawyers and that information about the Covenant is disseminated at all levels of the judiciary, including the lower courts" (UN Doc. CCPR/C/JPN/CO/5, October 30, 2008, 7).

7.5 Concluding Appraisal

It is generally agreed in the Japanese legal academy and profession that human dignity is a supreme value and that the individual should be placed in the center of activities of state and international institutions. Among international scholarships, the Vienna Declaration adopted in the Second World Conference of Human Rights in 1993 is often referred to as an eloquent testimony of the universal nature of human rights as well as the Universal Declaration of Human Rights. The officially pronounced position of the Japanese government is also constructed upon the presumption that human rights are universal, a position imprinted in none other than the Constitution.[3]

With regard to the implementation of human rights standards, as described above, there still appears to be a long way to go in making the faithful application of international human rights standards in domestic courts a dominant paradigm. Aside from judicial behavior, current situations in Japan are conspicuously stagnant in criminal and civil fields. For one thing, the death penalty is firmly entrenched in the Criminal Code and, contrary to what is expected of a State party to human rights treaties, the number of capital sentences and executions has increased in recent years, obviously urged by civic voices calling for harsh penalties for criminal offenders. While the number of executions was 2 in 2001, 2 in 2002, 1 in 2003, 2 in 2004 and 1 in 2005, it went up to 4 in 2006, 9 in 2007 and 15 in 2008. As of the end of

[3] Note that there is a strong criticism among progressive circles in Japan about the current global situations where the terminology of human rights is effectively co-opted by a certain political and economic forces to justify and enforce their interventionary policies.

2008, there were 100 convicts waiting to be brought to the gallows. The government stresses that the death penalty is supported by the public. However, the Human Rights Committee staunchly rejects this claim and recommends that Japan should "inform the public, as necessary, about the desirability of abolition" (UN Doc. CCPR/C/JPN/CO/5, October 30, 2008, 16).

The substitute detention system, under which suspects can be detained in police detention facilities for a period up to 23 days with limited access to a lawyer, and the selective use of electronic surveillance methods during interrogations to record confessions by the suspect are other issues of serious concern from the international human rights perspective.

In civil affairs, provisions of the Civil Code that discriminate on the basis of gender are yet to be revised. Unheeded is the concern expressed by the Committee on the Elimination of Discrimination Against Women that there are "discriminatory legal provisions in the Civil Code with respect to the minimum age for marriage [18 for men and 16 for women], the waiting period [of 6 months] required for women before they can remarry after divorce and the choice of surnames for married couples have yet to be repealed". The same Committee was also concerned that "children born out of wedlock continue to be discriminated against through the family registry system and in provision on inheritance" (UN Doc. CEDAW/C/JPN/CO/6, August 7, 2009, 17). Patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and in society persist in this country. It may be submitted that the persistence of gender biased perceptions in society is, at least partly, behind the government's attitude against taking legal responsibility for "comfort women" issues.

As exemplified above, the academic and official position approving the universal nature of human rights does not necessarily represent the entire picture in Japan. Since the state is no longer considered the primary abuser and is increasingly held responsible for a failure to prevent and remedy the behavior of private persons, it is critically important to ensure that the local population feel a sense of ownership of human rights and human rights documents, a condition that is yet to fully come into being in Japan. Education to sensitize the local populace to embrace "enlightened" human rights philosophy is not an effective guarantee of grassroots support of international documents. Rather, in pursuing the full potentialities of human rights, one should be courageous enough to contemplate that there might be alternative visions to the human rights paradigm in obtaining the real good. Such diametric approaches, as opposed to enlightenment ones, would help recognize the validity of human rights.

The fact that only state representatives and influential elite NGOs participate in legislating and implementing international standards seems to inculcate the impression, that human rights documents and machineries are foreign to the general populace. Effective procedures should be devised so that those at the grassroots level are given a voice in international human rights activities. Last but not least, for the sake of universal validity of human rights, the venues for international standard-setting and monitoring should not be geographically confined to particular cities in Europe and North America.

Annex: The Constitution of Japan (excerpts)

Chapter II. Renunciation of War

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Chapter III. Rights and Duties of the People

Article 10. The conditions necessary for being a Japanese national shall be determined by law.

Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Article 12. The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Article 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

Peers and peerage shall not be recognized.

No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Article 15. The people have the inalienable right to choose their public officials and to dismiss them.

All public officials are servants of the whole community and not of any group thereof.

Universal adult suffrage is guaranteed with regard to the election of public officials.

In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

Article 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters; no one shall be in any way discriminated against for sponsoring such a petition.

Article 17. Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through an illegal act of any public official.

Article 18. No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

Article 19. Freedom of thought and conscience shall not be violated.

Article 20. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

No person shall be compelled to take part in any religious act, celebration, rite or practice.

The State and its organs shall refrain from religious education or any other religious activity.

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 22. Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.

Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Article 23. Academic freedom is guaranteed.

Article 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Article 25. All people shall have the right to maintain the minimum standards of wholesome and cultured living.

In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Article 26. All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

Article 27.vAll people shall have the right and the obligation to work.

Standards for wages, hours, rest and other working conditions shall be fixed by law.

Children shall not be exploited.

Article 28. The right of workers to organize and to bargain and act collectively is guaranteed.

Article 29. The right to own or to hold property is inviolable.

Property rights shall be defined by law, in conformity with the public welfare.

Private property may be taken for public use upon just compensation therefor.

Article 30. The people shall be liable to taxation as provided by law.

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Article 32. No person shall be denied the right of access to the courts.

Article 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.

Article 34. No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.

Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.

At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Article 38. No person shall be compelled to testify against himself.

Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

No person shall be convicted or punished in cases where the only proof against him is his own confession.

Article 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

Article 40. Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

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Chapter 8
Human Rights as the Basis for a New Chinese Constitutionalism

Mo Jihong

8.1 The Significance of the Conception of Human Rights in the Constitution of China Through the Constitutional Amendments of 2004

8.1.1 Human Rights and the Rights of the Citizen in the Chinese Constitution

In China, before the 1990s the conception of human rights had been regarded as a concept of a bourgeoisie's right but not as a socialist notion. The main reason why such opinion prevailed is due to the theory of *class struggle*. In a socialist society, two mutually opposing groups exist: one is the people, the other is the enemy of the people.[1]The nature of the socialist regime is to use democracy in ruling over the people and dictatorship to rule over the enemy of the people. The task of socialist law is to grant rights to the people and deprive the enemy of any rights of the people. Thus, under socialist constitutional law, there are no universal rights applicable to everyone without distinction.[2] This is the reason why there was the concept of rights of the citizen but not of human rights in the text of all four constitutions of China after the founding of PRC (1954, 1975, 1978, 1982). When the current Constitution was drafted, the main orthodox ideology at that time prevailed over the other ideas, even in the field of protection of human rights. It was very difficult for the National People's Congress (NPC) to incorporate the universal

[1] 4 毛泽东著作泽东 [Mao Zedong Works Selection] 1475 (人民出版社 [People's Press] 2nd ed. 1991).

[2] *Id.*

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conception of human rights in the international field of human rights protection into constitutional text before 1991.[3]

Since the beginning of the 1990s, the Chinese government has been taking part in the international dialogue concerning the protection of human rights and has gradually gotten to know the current movement in the sphere of international protection of human rights. Having taken a prudent look at the concept and significance of human rights, human rights were accepted by the Chinese government and academic groups. One of the greatest successes in the field of protection of human rights in China is the signing of two important international covenants on human rights: the International Covenant on Civil and Political Rights (ICCPR)[4] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[5]At the same time, many issues related to the protection of human rights have been discussed both in the academy and in practice.[6]

The public began to appeal for the incorporation of the concept of human rights into the Constitution in order to increase the responsibility of the Government for the protection of human rights and to improve constitutional protections.[7]With the wave of support for the concept of human rights spreading, when the new amendments to the current Constitution were passed by the NPC on March 14, 2004, the concept of human rights was incorporated in the Constitution, with the Constitution providing: "The state respects and protects human rights."[8]

8.1.2 The Significance of the 2004 Constitutional Amendments to the Protection of Human Rights

It should be noted that the 2004 amendments play a very important role in protecting human rights, not only by clarifying the concept of human rights but also by extending the scope of the protection of human rights. This spirit of protecting human rights can be observed in the following points.

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[3] *Id.*

[4] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 1057. China signed this Covenant on Oct. 5, 1998 but has not yet ratified it.

[5] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. This Covenant was signed by China on Oct. 27, 1997 and ratified on February 28, 2001.

[6] *See* 本刊评论员，深入开展人权与法制的理论研究 [Deeply Engaging in Theoretical Research on Human Rights and Legality] (中国法学 [China Law Press] 1991).

[7] 陈光中，《公民权利和政治权利国际公约》批准与实施问题研究 [Chen Guangzhong, Research on Issues Regarding Ratification and Implementation of the International Covenant on Civil and Political Rights] (中国法制出版社 [China Legality Press] 2002). In this book, Professor Chen proposed a mechanism for ratifying and implementing the ICCPR, causing great concerns among both the NPC and the public.

[8] 宪法 [Constitution] (1982) Article 33.

First, there is an emphasis on the responsibility of the state in the field of protection of human rights where two concrete duties are imposed on it: to respect human rights and to protect human rights.[9] The first duty is negative and the latter is positive. These duties are consistent with the requirement stipulated in international human rights conventions.[10]

Second, protection is extended to private property rights through the amendment which provides a firm systematic basis for the socialist market economy. Before the amendments of 2004, although there were provisions regarding private property in the constitutional text,[11]there were no specific provisions confirming the right to private property. The reason for this lies partly in the prohibition on the development of private property and partly in the faults of the traditional theory of protection of human rights.[12] The nature of rights in the constitutional text was therefore not quite clear. In response, the 2004 amendments set up a comprehensive and systematic basis for the protection of the right to private property.[13]

Third, the concept of public emergency is brought into the constitutional text, replacing the system of martial law. Before the 2004 amendments, martial law was a basic constitutional system but was not consistent with what was required in practice. For the sake of formulating the power of the state in times of public emergency and establishing a constitutional system wherein the state can undertake urgent measures in times of public emergency, the system of martial law was replaced by the system of public emergency.[14] This was also done in order to adapt domestic mechanisms to the requirements of Article 4 of the ICCPR in times of public emergency, including the taking of measures constituting a derogation of state obligations under the ICCPR.

Therefore, the concept of human rights enriches the content of the constitutional protection of the rights of citizens in the current Constitution. It offers a good chance for the legislative agencies to pass laws and regulations to concretize the protection of human rights.

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[9] *Id.* Note that there are no constitutional provisions explicitly addressing the protection of human rights, apart from the general statement Article 33 that the state "respects human rights." However, there are allusions to the responsibility of state organs for guaranteeing fundamental rights under the 2004 amendments. For instance, Article 36 protects religious belief. The state's obligation to respect and protect the right to religious belief prohibits state organs, public organizations or individuals from compelling citizens to believe in, or not to believe in, any religion, and from discriminating against citizens who believe in, or do not believe in, any religion.

[10] *See* ICCPR, *supra* note 125, Article 2 (1) (providing that each State party to the ICCPR undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR).

[11] *See* 宪法 [Constitution] (1978) Article 9 (providing that the state protects the lawfully earned income, savings, housing and other consumer goods owned by citizens).

[12] *See, e.g., id.* Article 13 (discussing the right to inherit private property but not defining the right to private property).

[13] 宪法 [Constitution] (1982) Article 13.

[14] *Id.* Articles 67 § 20, Article 80, Article 89 § 16.

8.1.3 *The Significance of Human Rights in the Current Constitution*

The issue of protection of human rights is very contentious at present, and much pressure from the public and from the international society is creating a strong impetus to develop and perfect the protection of human rights. Nowadays, the right-owner of protection of human rights is caused much attention by the government and the public. It should be emphasized that the conception of human rights under the current Constitution will create a far-reaching influence in the founding of constitutionalism in the coming future in China.

The conception of human rights under the current Constitution is conducive to the dissemination of correct ideas on the protection of human rights as it surpasses traditional limitations. In particular, the universal conception of human rights benefits the understanding of human rights and improves its quality and level.[15]

The conception of human rights in the current Constitution helps perfecting the structure of constitutional rights by regarding human rights as the core of the constitutional protection. The holders of constitutional rights can be divided into several classes – the public, citizens, laborers, social organizations and so on. Different right-holders enjoy different constitutional rights based on the different responsibilities of the state towards them. Individual interests can be protected at different levels according to different situations, as long as it is in conformity with prevailing international standards.

The provisions on human rights in the current Constitution can offer a constitutional basis for the enactment of laws concerning the protection of human rights by the NPC and its Standing Committee. The important task at present for China's legislative agencies is the adoption of the Law on Protection of Human Rights. There are two options for China to promote the protection of human rights. The first is to rearrange the structural order of the provisions in the Constitution so that the fundamental rights of the citizens and human rights are enjoyed by all persons living in China. The second is to enact a special law which can concretize the constitutional provisions on the responsibility of the state in protecting human rights. The first method touches upon many doctrinal and procedural issues regarding the nature and character of human rights and would be very difficult for the NPC to accept it in the short term. The second option may be more easily adopted by the NPC, because a special law on the protection of human rights can create a new arrangement both in the substantive and procedural sense.

[15] For example, before 1991 there was no concept of human rights in the Constitution because the concept of human rights was regarded as legal term belonging to the bourgeoisie and not of the proletariat. Only the fundamental rights of the citizen were recognized under the Constitution. Since 2004, however, the concept of human rights has been incorporated in order to perfect the constitutional concept of human rights.

Considering the above-mentioned reasons, in 2007, the author organized a special group of experts to draft the Law on the Protection of Human Rights of China (PHR Law).[16] The group was supported by the Konrad Adenauer Stiftung Foundation. The group completed a draft law which was published by Law Press in China. The draft law prepared by the experts (the Expert Draft) is accompanied by the Study Report, which describes the importance of making the PHR Law. It also gives a point-by-point appraisal of the concrete provisions of the PHR Law, including the legislative purpose of every provision, the legal basis thereof, and the referential data in legislation.

The Expert Draft is an important body of work in the project of studying this issue that is still in the early stage of theoretical research. The study was undertaken together with an analysis of the current system of the protection of human rights in China. The Expert Draft was formulated on the basis of lengthy discussions on the Universal Declaration Human Rights,[17] the ICCPR, the ICESCR and other international human rights conventions. The provisions of the Expert Draft, therefore, basically cover all the institutional requirements for the protection of human rights and the most important fundamental rights. The provisions link the fundamental rights system prescribed in the current Constitution with laws. The Expert Draft also makes recommendations as to how China can effectively perform its obligations as a state party to the international human rights conventions that China has ratified.[18]

According to the Expert Draft, there is a systematic structure of human rights consisting of human rights that are enjoyed by all natural persons, fundamental rights enjoyed by all citizens and special rights enjoyed by special groups of citizens and other residents in China. An elected people's representative, for example, enjoys at least three kinds of constitutional rights: the basic human rights accorded to all arising from being a natural person, the fundamental rights accorded to citizens, and the prerogatives enjoyed by the representative in enforcing one's responsibilities. There appears to be a pyramid structure in the protection of human rights, with the fundamental and important rights at the bottom, and the most specific rights enjoyed by the person by virtue of his or her status being at the top. The state and the government ought to take different responsibilities in protecting different rights. The protection of the rights enjoyed by all natural persons should be effective regardless a person's race, nationality, gender, social background or education in order for a person to be entitled to such rights.

[16] *Human Rights Protection Law of the People's Republic of China*, drafted by Mo Jihong, translated into English Version by Mr. Bjorn Ahl, *See* http://www.iolaw.org.cn/showNews.asp?id=20165

[17] Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948).

[18] 莫纪宏，人权保障法与中国[Mo Jihong, The Law of Protection of Human Rights and The People's Republic of China] 368-90 (法律出版社 [Law Press] 2008) [hereinafter Mo, Protection of Human Rights in China].

On October 27, 1997, the ICESCR was signed by the Chinese government with ratification by the Standing Committee of the NPC in 2001. On October 5, 1998, the Chinese government signed the ICCPR, but has yet to ratify it. At the time of writing, China has signed 27 international human rights conventions.[19] Before the ratification of the ICCPR is undertaken, the government has to clarify the relationship between universal rights granted under international human rights conventions and rights

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[19] As of August 2008, China is signatory to the following human rights treaties and conventions: Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, signed by China on July 20, 1949 and ratified on Apr. 18, 1983; Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, ratified by China on Sept. 24, 1982; Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, ratified by China on Sept. 24, 1982; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, ratified by China on Dec. 29, 1981, International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, acceded to by China on Apr. 18, 1983; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, signed by China on Aug. 29, 1990 and ratified on Mar. 2, 1992; Convention concerning equal remuneration for men and women workers for work of equal value, May 28, 1953, 165 U.N.T.S. 305, ratified by China on Dec. 28, 1990; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, signed by China on Dec. 12, 1986 and ratified on Oct. 4, 1988; Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Aug. 12, 1949, 75 U.N.T.S. 32, signed by China on Nov. 2, 1950; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, Aug. 12, 1949, 75 U.N.T.S. 86, signed by China on Nov. 2, 1950; Geneva Convention relative to the protection of civilian persons in time of war, Aug. 12, 1949, 75 U.N.T.S. 288, signed by China on Nov. 2, 1950; Geneva Convention relative to the treatment of prisoners of war, Aug. 12, 1949, 75 U.N.T.S. 136, signed by China on Nov. 2, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 7, 1977, 1125 U.N.T.S. 3, ratified by China on Sept. 14, 1983; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, ratified by China on Sept. 14, 1983; Vocational Rehabilitation and Employment (Disabled Persons) Convention, June 20, 1983, 1401 U.N.T.S. 235, ratified by China on Feb. 2, 1988; Right of Association (Agriculture) Convention, Nov. 12, 1921, 38 UNTS 153, ratified by China on Apr. 27, 1934; International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, 993 U.N.T.S. 3, signed by China on Oct. 27, 1997 and ratified on Mar. 27, 2001; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, May 25, 2000, 2171 U.N.T.S. 227, signed by China on Sep. 6, 2000 and ratified on Dec. 3, 2002; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161, ratified by China on Aug. 8, 2002; Convention Fixing the Minimum Age for the Admission of Children to Industrial Employment, July 11, 1984, 40 U.N.T.S. 218, ratified by China on July 11, 1984; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, signed by China on July 17, 1980 and ratified on Nov. 4, 1980; Convention concerning Employment Policy, July 9, 1964, 569 U.N.T.S. 65, ratified by China on Dec. 17, 1997; Convention on Rights of the Child, May 25, 2002, 2173 U.N.T.S. 222, signed by China on Aug. 29, 1990 and ratified on Jan. 31, 1992; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 46 I.L.M. 443, signed by China on Mar. 30, 2007 and ratified on Aug. 1, 2008, the new statistics can be seen in the Blue Book of China's Human Rights,李君如主编(Edited by Li Junru)社会科学文献出版社(Social Sciences Archive Press [2011])445–446.

granted under the Constitution. That is, it has to clarify the difference between the protection of human rights arising from the Constitution and the protection of human rights arising from ordinary laws. This entails hard work and, as seen from the proposals above, there is a need to probe such intricate issues more deeply.[20]

8.2 The Development of the Protection of Human Rights in 2009

8.2.1 China Published National Human Rights Action Plan[21]

The National Human Rights Action Plan of China (2009–2010) as issued by the Information Office of the State Council underlines the goal of promoting human rights, in accordance with international law, including in particular judicial guarantees as well as economic, social rights and cultural rights (social security, health care, education, etc.).

8.2.1.1 Fulfillment of International Human Rights Obligations[22]

As pointed out in the National Human Rights Action Plan of China (2009–2010), China cherishes the important role played by international instruments on human rights in promoting and protecting human rights. So far, China has acceded to 27 international conventions on human rights. China will earnestly fulfill its obligations to those conventions, submit timely reports on implementing the conventions to the treaty bodies concerned, hold constructive dialogues with these treaty bodies, take into full consideration the proposals raised by them, and adopt the rational and feasible ones in the light of China's actual conditions.

Thus, China:

– Completed the second report on implementing the "International Covenant on Economic, Social and Cultural Rights," and submitted it to the treaty bodies concerned for consideration.

[20] *See* Mo, Protection of Human Rights in China, *supra* note 141, at 368–90, for a discussion of how China to perform its obligations under the ICCPR.

[21] Section 8.2.1 represents extracts from the National Human Rights Action Plan of China (2009–2010) as portrayed at: http://english.people.com.cn/90001/90776/90785/6635641.html, in Chinese, see: http://english.people.com.cn/90001/90776/90785/6635670-92.html

[22] Section 8.2.1.1 represents extracts from the National Human Rights Action Plan of China (2009–2010) available in full at: http://english.people.com.cn/90001/90776/90785/6635641.html, in Chinese, see: http://english.people.com.cn/90001/90776/90785/6635670-92.html

- Completed the seventh and eighth combined report on implementing the "Convention on the Elimination of All Forms of Discrimination Against Women," and submitted it to the Committee on the Elimination of Discrimination Against Women for consideration.
- Completed the third and fourth combined report on implementing the "Convention on the Rights of the Child," and submitted it to the Committee on the Rights of the Child for consideration.
- Completed the first report on implementing the "Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict," and submitted it to the Committee on the Rights of the Child for consideration.
- Completed the latest report on implementing the "Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography," included it in the third and fourth combined report on implementing the "Convention on the Rights of the Child," and submitted them together to the Committee on the Rights of the Child for consideration.
- Completed the first report on implementing the "Convention on the Rights of Persons with Disabilities," and submitted it to the Committee on the Rights of Persons with Disabilities for consideration.
- Participated in the deliberation meeting held by the Committee on the Elimination of Racial Discrimination on China's 10th, 11th, 12th and 13th combined report submitted in accordance with the "International Convention on the Elimination of All Forms of Racial Discrimination."
- China has signed the "International Covenant on Civil and Political Rights (ICCPR)," and will continue legislative, judicial and administrative reforms to make domestic laws better linked with this Covenant, and prepare the ground for approval of the ICCPR.
- Earnestly executed the "United Nations Anti-Corruption Convention," and worked hard to link the Convention to domestic laws.

8.2.1.2 Exchanges and Cooperation in the Field of International Human Rights[23]

The National Human Rights Action Plan of China (2009–2010) emphasizes that China is committed to holding exchanges and to cooperation in the field of international human rights and to promoting the healthy development of international human rights on the basis of equality and mutual respect.[24]

[23] Section 8.2.1.2 represents extracts from the National Human Rights Action Plan of China (2009–2010) available at: http://www.china.org.cn/china/2011-07/14/content_22989895_7.htm and http://www.china.org.cn/archive/2009-04/13/content_17595407_27.htm

[24] http://www.china.org.cn/china/2011-07/14/content_22989895_7.htm

- China takes an active part in the work of the United Nations Human Rights Council (HRC), and helps that body to solve human rights problems in a fair, objective and non-alternative way.
- China participated in the HRC's first Universal Periodic Review (UPR) for China, holding constructive dialogues with various sides and carrying out rational proposals.
- China continues to cooperate with the Special Procedures of the United Nations Human Rights Council, maintains correspondence with it, and is considering inviting a special rapporteur to visit China while taking into account the principle of balancing various human rights and China's reception abilities.
- China continues in technical cooperation with the United Nations Office of the High Commissioner for Human Rights.
- China continues to strengthen exchanges and cooperation with the Food and Agriculture Organization (FAO) of the United Nations, the UN Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), International Labor Organization (ILO) and other relevant international organizations.
- China continues to hold bilateral dialogues and exchanges on human rights with various countries concerned on the basis of equality and mutual respect.
- China continues to participate in human rights activities in the framework of the Asian-Pacific Region and Sub-region.[25]

In a word, continuing to make further and effective dialogue and cooperation with the international society in the field of protection of human rights is going deeper and deeper for China in the coming future according to the request of the National Human Rights Action Plan of China (2009–2010).

8.2.2 The White Paper on Progress in China's Human Rights in 2009[26]

On September 26, 2010, the Information Office of the State Council issued a white paper on Progress in China's Human Rights in 2009. The following are some figures and facts:

- In 2009, the Chinese government promulgated and implemented the National Human Rights Action Plan of China (2009–2010). This was the first national action plan in China with human rights as the theme.

[25] http://www.china.org.cn/archive/2009-04/13/content_17595407_27.htm

[26] Section 8.2.2 represents extracts from the National Human Rights Action Plan of China (2009-2010) available in full at: http://www.china.org.cn/china/2010-09/26/content_21007045.htm, http://www.chinadaily.com.cn/cndy/2010-09/27/content_11351005.htm and http://www.china.org.cn/china/2011-09/09/content_23384529.htm

- In 2009, the per capita net income of rural residents was 5,153 yuan (769.1 U.S. dollars), and the per capita disposable income of urban residents was 17,175 yuan, an increase of 8.5% and 9.8% respectively over the previous year.
- In 2009, China's input of money for poverty reduction programs in rural areas increased by three billion yuan over the previous year to 19.73 billion yuan.
- In 2009, the total health care expenditure in China reached 1.72 trillion yuan, making up 4.96% of China's GDP, and the per capita health care expenditure was 1,192 yuan.
- From January 2009 to March 2010, the National People's Congress (NPC) and its Standing Committee examined 25 laws and draft decisions concerning laws, and adopted 18 of them. They amended eight laws, including the Electoral Law and the Postal Law, and further guaranteed human rights through legislation.
- In China, there are over a million bulletin board services (BBS) and some 220 million bloggers. According to a sample survey, each day people post over three million messages via BBS, news commentary sites, blogs, etc., and over 66% of Chinese 'netizens' frequently place postings to discuss various topics, and to fully express their opinions and represent their interests.
- In 2009, the number of letters and visitors for appealing rights dropped by 2.7% over the previous year, a decrease for the fifth consecutive year.
- By the end of 2009, some 3,274 legal aid organizations and 58,031 legal aid service centers had been set up at the provincial, city and county levels nationwide, providing convenient access to legal aid services.
- In 2009, China appropriated 42 billion yuan for the increase of job opportunities, a rise of 66.7% over the previous year.
- In 2009, the number of people participating in basic medical insurance topped 1.2 billion, a national coverage rate of over 90%.
- By the end of 2009, some 99.7% of the school-age population had access to nine-year compulsory education, and 99.5% of counties in China had provided nine-year compulsory education.
- In 2009, China invested 1.24 billion yuan for the socioeconomic development of the areas inhabited by ethnic-minority people.
- By 2009, there were 3,474 homes for people with disabilities in China, where 110,000 disabled people were taken care of.[27]

In the document, the Information Office further pointed out that the year 2009 was the most difficult one for China's economic development since the beginning of the twenty-first century. In 2009, facing the great impact of the international financial crisis and grave and complicated economic situations, the Chinese government, sticking to the Scientific Outlook on Development characterized by putting people first, combined the countermeasures to the international financial crisis with the maintenance of a stable yet rapid economic development and the promotion of China's human rights. The government carried out a series of policies and measures to maintain economic growth, restructure the economy, promote reforms and

[27] http://www.china.org.cn/china/2010-09/26/content_21007045.htm

improve people's livelihood, thus effectively curbing the economic slowdown, becoming one of the few countries making a turnaround in the economy, and promoting new and notable progress in China's human rights.

In 2009, the Chinese government promulgated and implemented the National Human Rights Action Plan of China (2009–2010). This was the first national action plan in China with human rights as its theme. It is a programmatic document for directing and promoting the comprehensive development of China's human rights. The Action Plan applies the constitutional principle of respecting and protecting human rights to the various fields of politics, economy, culture and social construction, and the various links of legislation, law enforcement, judicature, governance and administration. The document expressly stipulates the objectives and concrete measures of the Chinese government in promoting and protecting human rights. Over the past year or so, the National Human Rights Action Plan of China (2009–2010) has been effectively implemented, the Chinese people's consciousness of human rights has been enhanced, and the overall cause of human rights has been promoted comprehensively.

China is a developing country with a population of 1.3 billion. Due to its inadequate and unbalanced development, there is still much room for improvement in its human rights conditions. The Chinese government is taking effective measures to promote the sound development and social harmony with a view to building a more just and harmonious society and ensuring that the people enjoy a more dignified and happier life.[28]

In accordance with the White Paper, China has long taken the initiative to hold exchanges and cooperate with other countries in the realm of human rights, endeavoring to promote the sound development of human rights on the international stage.

China is an active participant in the work of the UN's human rights agencies, and it plays a constructive role in encouraging countries around the world to handle human rights issues fairly, objectively and non-selectively.

In February 2009, China received the Universal Periodic Review (UPR) from the United Nations Human Rights Council for the first time. During the review, China, with a serious and highly-responsible attitude, gave a detailed account of its human rights situation, the challenges facing the country and what is needed to be done in the future, and conducted an open and frank dialogue with other countries. China's efforts and progress made in the sphere of human rights have been recognized by many countries, and in June 2009 the UN Human Rights Council verified and approved the report reviewing China's human rights situation. In 2009, a Chinese delegation attended the meetings of the Third Committee of the 64th Session of the UN General Assembly, and the 10th, 11th and 12th sessions of the UN Human Rights Council, and participated in the fourth, fifth and sixth UPR sessions of the UN Human Rights Council. Chinese experts attended the second and third sessions of the Advisory Committee of the UN Human Rights Council, and the fourth and fifth sessions of the Working Group on Communications of the UN Human Rights

[28] http://www.chinadaily.com.cn/cndy/2010-09/27/content_11351005.htm

Council. China played an active part in the Durban Review Conference held in April 2009. While working in the organizations and participating in the meetings mentioned above, China, as always, upheld the basic tenets and principles stipulated in the Charter of the United Nations, performed its duties conscientiously, and proactively participated in reviews and discussions of the human rights issues.

China attaches great importance to the significant role played by international human rights instruments in the promotion and protection of human rights, and has joined 25 international conventions on human rights, including the International Covenant on Economic, Social and Cultural Rights. Meanwhile, China is actively working for the approval of the International Covenant on Civil and Political Rights. The Chinese government has taken effective measures to guarantee the implementation of its obligations as stipulated by international human rights conventions it has joined. In 2009, China set about drawing up the second report of its implementation of the International Covenant on Economic, Social and Cultural Rights, the consolidated report of the third and fourth implementations of the Convention on the Rights of the Child, and the first report of its implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and the Convention on the Rights of Persons with Disabilities. In August 2009, China received a review of its 10th to 13th consolidated report of its implementation of the International Convention on the Elimination of All Forms of Racial Discrimination conducted by the UN's Committee on the Elimination of Racial Discrimination. The committee affirmed China's policies, measures and achievements made in developing the economy in areas inhabited by ethnic groups, enhancing the development of the smaller ethnic groups, raising people's living standard, promoting health care and education, and protecting the cultures of ethnic minorities groups.

The Chinese government has been actively involved in formulating international human rights instruments. In 2009, the Chinese government sent a delegation to attend the meeting of the working group to establish an optional protocol for a complaint mechanism to the Convention on the Rights of the Child. China actively recommended its experts to participate in the work of organizations supporting human rights treaties. In 2009, a Chinese expert was elected as deputy chairperson of the newly-organized UN Committee on the Rights of Persons with Disabilities and was reappointed a member of the UN Committee against Torture.

China has been taking the initiative to carry out international cooperation in the realm of human rights, attaching great importance to technical cooperation with the UN's Office of the High Commissioner for Human Rights (OHCHR). Since the signing of the Memorandum of Understanding on human rights cooperation between China and the OHCHR in 2000, both sides have carried out a series of cooperative programs on human rights on the principle of mutual respect. China resolutely supports the programs of the OHCHR and made another donation of $20,000 USD to it in 2009. China highly appreciates the important functions of the UN's Special Procedures of the Human Rights Council in the realm of international human rights, and maintains close cooperation with it. The Chinese government replies to all inquiries from the Special Procedures in a highly responsible manner and has invited the Special Rapporteur on the Right to Food for the Human Rights Council to visit

China. China will continue cooperation in follow-up work with the United Nations Children's Fund office in China on the review of China report conducted by the UN's Committee on the Rights of the Child. An international symposium on the Convention on the Rights of the Child and Its Implementation in China and a symposium on the Report of the Implementation of the Convention on the Rights of the Child were held in China in 2009.[29]

China upholds the principles of equality and mutual respect when carrying out bilateral dialogues and communication in the field of human rights with related countries. In 2009, China held human rights dialogues and consultations with the European Union, Great Britain, the Netherlands, Australia and Norway, and communicated with countries such as Russia and Laos. Through dialogue and communication with other countries, mutual understanding concerning human rights has been enhanced, gaps have been narrowed and consensuses have been reached.

The full realization of human rights is an important goal for China in its efforts to comprehensively build a moderately prosperous society as well as to build a harmonious society. Working closely with other countries, China will, as always, contribute its due share to ensure the continuous progress of China's human rights, as well as the healthy development of human rights in the rest of the world and the building of a harmonious world with lasting peace and common prosperity.[30]

In a word, in 2009, based on the White Paper, the Chinese government made significant progress by a variety of means with relation to the provision for, and protection of, human rights, so as to execute the Human Rights Action Plan. It should be said that human rights have been respected and protected in China according to the current Constitution, National Action Plan and other documents in the past years.

The new tendency in the field of protection of human rights can be seen in the Blue Book of China's Human Rights.[31] The Blue Book of China's Human Rights (2011), the annual report of China's Human Rights, was released by China Society for Human Rights Studies on September 9, 2011 in Beijing appreciating the significant progress in this field and pointing out that the struggle against poverty in rural areas and against discrimination in employment is of high importance.

Since 1978, China has signed 27 international treaties and adopted a great number of laws and normative acts in the field of human rights.

Of great importance is the National Program on the development of Chinese women (2011–2020)[32] which provides a large spectrum of objectives and measures in areas such as health, education and political participation. The National Human Rights Action Plan of China (2012–2015) is now in discussion. All this shows China's acceptance of the universal human rights and the intention thereof in the future.

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[29] http://www.chinadaily.com.cn/cndy/2010-09/27/content_11351005.htm

[30] Ibid.

[31] 李君如主编 (Edited by Li Junru), 人权蓝皮书,The Blue Book of China's Human Rights, 社会科学文献出版社 (Social Sciences Archive Press [2011]).

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Chapter 9
Who Is Afraid of Human Rights? A Taiwanese Perspective

Yean-Sen Teng

9.1 Methodological Issues

The idea of human rights is one of the factors inducing the emergence of the era of globalization (Steiner et al. 2008, 1385). The supremacy of sovereignty of States is, as a result, not as insurmountable as the Westphalian conception held true concerning the issues of human rights violations. Criticism of the human rights policies and issues of other States shouldn't be regarded as violating the principle of non-intervention under the Charter of the United Nations.[1] In that connection, the concept of external sovereignty will include and add the element of human rights in its evaluation (Peters 2009, 518–522). In fact, issues relating to human rights have been raised in too many fields in the international community, with or without involving the concept of global governance, including trade and human rights (Ruggie 2008, para. 4; Herz et al. 2008), environment and human rights,[2] and international economic law

[1] United Nations (2001), Chapter III, Serious breaches of obligations under peremptory norms of general international law. See also Nagan et al. (2003), especially in chapters 4 and 5.

[2] The world conference organized by the UN took place in Stockholm between June 5 and 16, 1972. It adopted a Declaration on the Human Environment, which formulated the principles that indeed guided actions during the following two decades. Several principles, among the 26 in the Stockholm Declaration, exercised a major role in the further development of international environmental law. The first principle affirms the fundamental human right to liberty, equality and adequate conditions of life in an environment that permits a life of dignity and well-being. It adds that man bears a solemn responsibility to protect and improve the environment for present and future generations. Twenty years later, in the Conference convened in Rio de Janeiro 1992, the Declaration on Environment and Development was adopted which is characterized by its anthropocentric approach and which is quite different from that of the Stockholm Declaration and from the World Charter for Nature. The Principle 1 proclaims that human beings are at the center of concerns for sustainable development and that they are entitled to a healthy and productive life in harmony with nature.

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and human rights (Office of the United Nations High Commissioner for Human Rights 2005; Office of the High Commissioner for Human Rights 2003; Srinivasan 1996), and they continue to extend and entangle with other fields under the expanding regimes of international law.

However, the difference between the idea and the contents of human rights has to be well maintained, though they are closely related. As the former may connote the ideal elements of the human rights norm, it is not concerned with any valid rules in its application. Rather, it is the latter that refers to the validity of human rights rules. Consequently, in the issue of the satisfying enjoyment of human rights in domestic legal regimes, the focal point naturally falls on the contents and standards of human rights.

Bearing that in mind, the methodological discussion of human rights can be classified into three approaches: universalism, relativism or localism, and radicalism. Universalism refers conceptually to the idea of human rights being universally valid and being applied in the global society with reference to a relevant concept of global governance to that effect. It calls for universal standards of human rights that are recognizable all over the world. In this regard, the normative contents and the elements of human rights, as demonstrated in international conventions, are to be adopted and applied universally. It rejects the possibilities of separate regimes of human rights that are to be applied differently if the adjective "human" is put before the word 'rights'. Seemingly, the idea of human rights being universally recognized in the world community can be evidenced in the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948. The idea of human rights was upheld and recognized to that effect by almost every State when the non-binding instrument was proclaimed. It has been hailed as an historic event of profound significance, as one of the greatest achievements of human civilization and has become the International Magna Carta of all mankind (Lauterpacht 1950, 394–397).

In fact, viewing the tradition of using some grand and familiar concepts, such as human rights, rule of law, security and peace, which serve as standards for human behavioral patterns, is not idiosyncratic in the context of preserving homogeneity of interests of a human community. From the perspective of the common concern of humanity, they are useful in identifying the principles for the whole community of humanity to live by. In that connection, therefore, they are seldom or hard to challenge in regard to the objectives they are to pursue. One of the reasons may be that those grand concepts "exist at such a high level of abstraction" as to "fail to indicate concrete preference for action" (Koskenniemi 2010, 32). Accurately speaking, in his own words, Koskenniemi explains, "As soon as such words are defined more closely, disagreement emerges" (Koskenniemi 2010, 32). Epistemologically, in fact, concepts are used as ways of apprehending the things, concrete or abstract, we tend to understand. They are closely related to the nature of the things we perceive (Raz 2009, 18–26). In that regard, we take the concepts as premises for rational articulation. Methodologically, without regard to the contents or elements of those abstract concepts, we are indulging in a formalistic approach towards the unchallenged

concept or idea of human rights. Following from that, the concept of human rights is of a universalistic nature which is emphasized by its formal acceptance and the significance of formal validity; it is, thus, universal in application. Consequently, human rights *per se* serve as thresholds for judging legitimacy as pure reason, in sharp contrast to legitimacy in practical reason where the standards of human rights are to serve as à la carte. The concept of human rights as pure reason is, therefore, especially apt for articulating some universal standards in terms of basic needs or common good[3] from the viewpoint of the common concern of humanity which may be cognizable from the perspective of moral naturalism.

Human rights, conceptually, are the rights to which everyone is entitled simply by being human; hence, they are universal by definition. The construction of human rights under this method, therefore, is focused on value setting, rather than on standards setting, and thus seeks to avoid any disagreements which may occur should human rights be context-dependent and a matter of practical reason. In other words, one may draw a clear line between the universalist and the relativist based on the conceptual engagement with the subject-matter that is used to discuss human rights. The universalist's insight on human rights focuses on the abstract idea of a value identification. The relativist, however, looks into the concrete contents of human rights; the subject-matter is thus context-dependent, it refers to the standards needed in different situations. That said, epistemologically, anyone who adopts the formalism approach towards international human rights law might be deemed a universalist, properly so-called.

By way of contrast, relativism or localism connotes that human rights cannot be universal due to the reality of different social backgrounds and cultural context. In other words, the Western idea of political liberalism should not be taken for granted to be the common concern and value pattern of different communities in the world (Donnelly 2003, 107–123; Hatch 1983, 8). When viewed from the distinctive idea of human rights, the contents and standards of human rights surely vary for practical possibilities. Methodologically, the approach to the theory of human rights can be termed as realism or pragmatism. Such an approach is reluctant to take on the predetermined presumptions in the understanding of human rights as a value and standards. Therefore, it prefers the idea of human rights as practical reason to that of pure reason. One thing to be noted is that, without abandoning the concept of human rights,[4] though the relativists believe that the concept of human rights is context-dependent, it still functions as a certain value to human society. However, instead of believing in a metaphysical articulation of human rights, it urges that it should be elaborated and articulated in terms of national laws and be applied in the

[3] Just to name a few of the scholars in this group, e.g. Gardbaum (2008), Petersmann (2008), Pogge (2002), Donnelly (2003), Vincent (2001), Nussbaum (1999), Sen (1982).

[4] Realists may be skeptical but they are definitely not radical or critically nihilistic. *Cf*. McCoubrey and White (1999, 203).

form of traditional and societal arrangements, rather than in abstract standards as understood in universalism.

In radicalism, the concept of human rights is, however, but a tool or banner and can only be used as the common denominator to urge for any change to the status quo. Apparently, human rights are nothing but a pennon for some identical-interest group of persons to march off claims *sui generis*. Naturally, those claims are radical or idiosyncratic to the normal pattern of behaviors and traditional way of life. Obviously, radicalism has connections and similarities with relativism regarding the concept of human rights as *a posteriori*. Therefore, in its extreme, human rights connote no special or distinctive value in their nature and contents; they are indistinguishable from ordinary rights. In that connection, the claim originating from radicalism includes, but is not limited to, those rights *sui generis*, namely the right to die, i.e. by means of euthanasia, same sex rights to family life, the right to discriminate, right to work as a slave,[5] right to trade body[6] or organs, freedom to use one's body, e.g. for prostitution.

Accordingly, the different approach or discourse of human rights may change the appearance and content of human rights as well. Human rights are recognized, therefore, as a protean-faced concept. The absence of a proper theory of human rights is of course a factor in that connection. Recalling that the dignity of human beings appeared in the first Article of the Universal Declaration of Human might serve as the core value to that effect, the concept of dignity as applied in the constitutional interpretation in domestic legal systems is varied and carries with it different contents (McCrudden 2008, 655–724). Bearing that in mind, human rights perhaps agree in words but not in reality because we are still not fully equipped to answer the question, "What are human rights?" Accordingly, the analysis of the above theories of human rights is, of course, not evaluative, rather it is descriptive as a reflection of the situation in the world community.[7]

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[5] Migrant workers sometimes "voluntarily" waiving their rights in order to seek a job in the workplace may give the impression of claiming the right to be treated discriminately.

[6] One Grand Justice in her separate opinion in Constitutional Interpretation No. 666 argued in favour of the right to trade human body. Based on the premises that sexual freedom is part of personal liberty, sex as an object, e.g. a commodity, for transaction, is not to be deemed as having the equivalent effect of trading of human persons because the body used for transaction as a sex object is still under the control of the human person's free will. The argument, it seems, wrongly ignored that sexual transaction in a form of contract, even though invalid on the ground of public morality, presupposes that a buyer uses and controls a human body. Thus, a person may refuse, out of his/her free will, to offer sex to the buyer but such an act would constitute a breach of a contract. Consequently, to separate the human body from the human person for the purpose of a sexual transaction is not a valid argument for defending personal liberty and human dignity. Available at http://jirs.judicial.gov.tw/ENG/CETransfer.asp?goto=c&datatype=c02&code=666

[7] It is too early to tell the percentage of each approach in Taiwan without a proper survey in that regard, however, the distinctive approaches are roughly composed of the following members: the academics are inclined to adopt universalism, the politician prefers relativism or localism, and the NGO's or human rights advocates favor radicalism.

9.2 Contents or Concept

9.2.1 International Level

As mentioned above, the idea of human rights fails to be universal when practical reason prevails over pure reason. In this connection, with reference to the validity of human rights norms in international law, the subject-matter to be elaborated in human rights discourse will be the different contents and standard of human rights, rather than the abstract theory of human rights that is of no concern to that effect. If it were true, then it is not illogical for one who adopts the universalist's viewpoint on human rights to maybe have a relativist's attitude towards the contents of human rights. However, from the viewpoint of both customary and conventional international human rights law, human rights of different contents do not lose their validity. Following from that, the concept of human rights as a legal norm in international law, when positively valid, should oblige all states to respect, to protect and to punish those who infringe upon the rights.

However, the content, even the core of human rights, if recognized as practical reason and subject to cultural context and social arrangements, is possible, or even necessary, to be constructed and interpreted variably in different legal systems. Take the European Court of Human Rights as an example. It has been the model and most developed regime for the protection of human rights in the world, however, we must acknowledge that the contents of certain rights are not necessarily appreciated and applied in the same way. This is the case when the Court in the proceeding introduces the doctrine of "margin of appreciation". As Macdonald clearly explains, "[t]he doctrine of margin of appreciation illustrates the general approach of the European Court of Human Rights to the delicate task of balancing the sovereignty of Contracting Parties with their obligations under the Convention" (Macdonald 1993, 83). Apparently, the extent and scope allowed for the application of the doctrine of margin of appreciation by Contracting Parties is subject to the availability of the European standards. Where the latter are clearly defined, the doctrine's scope definition becomes less or unnecessary. In this connection, human rights with different standards are comprehensible or necessary in a certain sense. This could be the reason why the Asian value and the justifications thereof emerge.[8]

In addition to the above-mentioned features of reality concerning the application of human rights norms to a particular case, there are some other factors that have the

[8] I have always challenged the use of the Asian value in the discourse on human rights for Asian peoples. It is an excuse for the authoritative Governments to escape from some human rights obligations, especially those of civil and political rights. It seems that the peoples of the Asian community deserve an inferior treatment and enjoyment of human rights as compared to those of the Western one. In fact, other than the political reasons in that connection, the Asian value might be misunderstood as Asian standards when the purpose and object are to discourse human rights as context-dependent and thus should be varied in accordance with cultural background and legal traditions.

effect of pulling the common concern of humanity in reference to the universal idea of human rights backwards. First, the genuine concept of human rights can never be possible in the notion of humanity. When viewed from the development of a great magnitude of human rights protection of the right-holders (women, migrant workers, children, disabled persons and the indigenous peoples) and upon the objects of such protection (the right to strike, the right to family life, the right to health) within the framework of the United Nations, some wonder whether these rights are genuine human rights in nature (Rawls 2002, 65–66; Griffin 2008, 48–51). If the concept of human rights cannot illustrate clearly the nature of the rights, it will eventually lose its validity in its application and apprehension (Raz 2009, 18–24).

Second, the derogation of certain human rights in some circumstances will lose the universality of human rights. The relative normativity of human rights will eventually bring the rights into conflict and consequently, the rights will thus be identical with ordinary legal or positive rights (Beck 2008, 312–347). In addition, the absence of the necessary institutional rules which would enable a human rights' norm to penetrate into national laws, induces the apprehension of the universal concept of human rights through the lens of municipal legal standards, and paints it as only relatively valid with reference to diverse domestic standards. Therefore, the limits to fundamental rights' universalism can seemingly be summarized as follows: (1) without a proper theory and foundation of human rights, it leaves the States to make their own preferential and rational choice in implementing the obligations of human rights. In this connection, functionalism and pragmatism are the most convenient way to manipulate the concept of human rights, especially in the hands of those in power. (2) The nature of the normativity of international human rights law is not that of a superior and transnational one, but rather of conventional and inter-States only, which is the inherent deficit in international law or international human rights law.

To remedy the deficit, recalling the absence of an adequate international mechanism for applying human rights internationally and universally, a new concept of global public law or administrative law might be workable as a regulatory platform in order for some normative dimensions of the common concern of humanity to be recognizable therein. This could be a rational choice. Bearing that in mind, the aim and purpose of the protection and realization of human rights can then be deliberated universally and practically on the contents of human rights. Following from that, it may be necessary to construct a transnational human rights system to replace the traditional regime of inter-States human rights law so that the nature of international human rights norms can be independent from the interference of the will of the States.

9.2.2 Regional Level

The idea of human rights is universal. This is a common consciousness of all peoples. Therefore, the enjoyment of human rights for anyone is, without the slightest doubt, a necessity. However, the truth is that not everyone everywhere has the same protection of human rights, not to mention the full enjoyment of human rights.

The problems are even serious in Asian communities. Some relevant factors may be identified as follows: the first and most serious problem is the ignorance of the concept of human rights. Take Taiwan as an example. After the end of martial law on 15 July 1987, even though the democratic developments have indeed made some impressive progress, as viewed from the viewpoints of Western style and criteria, the human rights, however, have neither been taken seriously in policy-making, nor in the debate of public interests. In education, a proper course of human rights is seldom offered in the curriculum of all levels of education. Higher education, universities and colleges, are especially ignorant of human rights education, and worst of all, most law schools normally do not teach human rights law.[9]

Due to the ignorance concerning the idea of human rights, the second problem follows. The enjoyment of human rights is believed to be a gift from the ruling government. It is the clemency of the ruler or the ruling class to let his people enjoy human rights. In that connection, to wish to live a better life is much the same as fishing in a pond: one needs luck and good techniques. Third, the concept of human rights, if anything, is to serve as a powerful medicine to cure the weakness, failure or rogue of the government. Since human rights are for medication purposes, they should naturally be varied according to the type of sickness. This is a protean-faced concept of human rights thus playing for different purposes. If we are optimistic, human rights are the tools for the purpose of corrective justice.

Because of the lack of adequate theory and sufficient knowledge of human rights in Asian communities, the concept of human rights is just an empty norm. The truth is that not only the Asian peoples suffer the deficit of human rights protection, but also most human communities face the same problems. The main reason for that is that the normative contents of human rights are varied and evolutionary in nature. If the contents vary in accordance with the spatial conditions, it would be absurd and impossible to hold a universal standard for the enjoyment of human rights.

Academically, the human rights regime in Asia is less developed in comparison with other regimes, such as the European and the American ones. This may be seen in two aspects. First, it lacks some institutional frameworks for working on the human rights issues as well as on the regional and global topics. Second, it has not developed the required institutional rules to further the implementation of human rights obligations, even though the substantive norms are not much different from that of developed countries. From the perspective of pathology, the major deficiency of the Asian human rights regime may be related to the three determinants: authoritative power of governments, serious deficit of democratic capacity and knowledge among the populations, and predominant collective interests over individual interest.

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[9] Some law professors may sometimes respond to the urge for the necessity of human rights protection by holding the opinion that since the constitutional law has provided the protection of fundamental rights and freedoms of people, what are human rights for? More often than not, human rights are not thought of as proper rights in the domestic legal system and not justiciable in terms of the traditional theory of legal rights. That explains why there are just a few law schools teaching international human rights law or related courses in their curriculum.

Human rights have no chance to be realized whenever rule of law is nowhere in sight, and human rights cannot develop in an undemocratic land. Accordingly, the situation in the Asian human rights regimes cannot possibly improve without assimilating some positive determinants or ideas into the society. Ironically, human rights are discoursed as collective interests from the perspective of Asian values. The people have not fully participated in the formulation of collective interests and common good in the Asian community; these were determined by the will of those in power.

9.2.3 National Level: A Taiwanese Perspective

Nowadays, all states of constitutionalism, without exception, have a chapter of fundamental rights in their constitutions. Taiwan is no exception. In the second Chapter of the Constitution, the fundamental rights and duties of the people are stipulated, in which some basic freedoms are provided, namely, the right to be free from arbitrary detention, the right to a fair trial, the right to public participation, freedom of expression, of movement, of assembly and association, of belief and religion, academic freedom, the right to work, the right to education, etc. Obviously, most of these freedoms are civil and political rights in nature and are called the first generation of human rights. The second generation of human rights, such as the right to work, the right to social security and cultural rights, are classified as a sort of social welfare under the Chapter "Fundamental National Policy". Consequently, the issue of the justiciability of those rights is prevailing in the discussion on the implementation of the international Covenant on Economic, Social and Cultural Rights after its approval by the Legislative Yuan last year.

Examining the text of the Constitution in Taiwan, we cannot conclude that the realization and enjoyment of those freedoms and fundamental rights are equivalent to that of the international human rights norm. In fact, we will never have any opportunity to find out whether the implementation of constitutional law in Taiwan is to the full satisfaction of the protection of international human rights law. There may be two reasons behind this: normative and institutional. In the normative aspect, since the contents of human rights are not static but evolutionary, any comparison between the texts *per se* will not be an adequate method to that effect. As for the institutional aspect, Taiwan has not had the *locus standi* as a State in the international community to ratify the international human rights conventions under the supervision of the United Nations.[10] Hence, there is no chance of submitting a communication

[10] See Optional Protocol to the International Covenant on Civil and Political Rights, 1966. Article 1, "A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol."

by its people to the treaty bodies for revisions concerning the way and methods of implementing the international human rights conventions in Taiwan. In short, no international supervision from the treaty body, namely, the Human Rights Committee, is available in this case.

That said, however, constitutional interpretation plays a significant role in the promotion of the idea and the protection of human rights in Taiwan. The significance of its contribution to that effect is distinctive and decisive, especially after the end of martial law in Taiwan on 15 of July 1987.[11]

Interestingly enough, the function of constitutional interpretation performed by the Convention of Grand Justice of the Judicial Yuan never ceased during those years. During that period of the so-called "White Terror", national security was naturally given much more weight than the enjoyment of the fundamental rights and freedoms of people, not to mention that of human rights.[12] It was not until 1976, the fourth Session of the Convention of Grand Justice, that some concrete cases concerning the issue of people's rights, rather than an abstract interpretation of constitutional law, were initiated and decided. The applications for remedies in those cases initiated by the affected parties were concerned with the unconstitutionality of the ordinary legislation or administrative regulations, which violated their constitutional rights or freedoms. The rates of unconstitutionality have gradually increased from 4%, 31%, 38% to 47% as of 15 September 2008 (Lee 2010, 458).

The rights and freedoms or the categories of them that were invoked for constitutional interpretation were mostly concerned with civil liberties and political rights. They include gender equality, the right to liberty, freedom of movement and residence, freedom of expression and publication, academic freedom, the right to communication, freedom of assembly and association, the right to work, the right to a fair trial, property rights, the right to decent living, and the right to privacy. Among those decisions, the right to liberty brought about tremendous results for democratic development in the recent history of Taiwan. The reason for that is obvious: during the period of White Terror which lasted nearly 38 years, the unjust laws and administrative regulations seriously violated personal freedoms.

One of the landmark decisions concerning personal freedom is Interpretation No. 251 on January 19, 1990. The conclusion of the Interpretation reached at the

[11] On 20 May 1950, the Nationalist Government issued a Martial Ordinance in Taiwan, after that it was under the regime of martial law for nearly 38 years.

[12] Some scholars of public law in Taiwan are of the opinion that the application for constitutional interpretation is equivalent to that of human rights interpretation on the ground that the constitutional rights are conceptually no different from human rights. See Lee (2010, 457). In my opinion, however, it is better not to confuse human rights interpretation with the constitutional interpretation of people's rights. The decisive point for making such a difference between them is the norm upon which the rights are recognized. Human rights are recognized and identified in terms of international human rights law, viz., international custom and conventions, in that connection, the normative contents and standards are universal. As for the interpretation of the constitutionality of fundamental rights stipulated in each States' constitutional law, it is obviously not universalized, but in truth localized.

Convention of Grand Justice of the Judicial Yuan held that, "[t]he detention and forced labor ordered by the police under the Act Governing the Punishment of Police Offences are in nature punishment of physical freedom. It would be desirable to revise the law expeditiously, whereby these punishments will be decided by the courts in accordance with legal procedure, so as to conform to Article 8, Paragraph 1, of the Constitution. In that connection, Article 28 of the Act providing the punishment of 'sending perpetrator to a specific place for rehabilitation or for learning living skills' has the same effect of imposing restrictions on physical freedom; therefore, it does not conform to the Constitution by the same token. Following from that, the existing procedure regarding the punishment of detention and forced labor under the said Act will be null and void after July 1, 1991. All relevant laws also have to be revised by that date" (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 251 1990).

With this Interpretation in force, the police State of Taiwan has gradually shifted to a legal State in its appearance. The Act at issue was revised and replaced by The Maintenance of Social Order Act.

In Interpretation No. 392 on 22 December 1995, the significant issue concerning who has the authority to detain a suspect was finally clarified. Under the previous provisions of the Code of Criminal Procedure, which empower prosecutors to detain suspects without an order from a judge, or to take any other measures in conjunction with a detention, were interpreted as being incongruous with the spirit of the aforementioned Article 8, Paragraph 2, of the Constitution (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 392 1995). The Convention of Grand Justice in that Interpretation moreover strengthened the protection of personal freedom. It was of the opinion that, "[t]he provision in the Habeas Corpus Act prescribing, 'When a person is arrested or detained unlawfully by any organ other than a court, said person, or any other person, may petition the District Court or High Court of the arresting place to issue a writ directing the detaining authority to surrender the detainee to court for trial' was unconstitutional on the ground that unlawful arrest or detention as a condition for petitioning the writ was incompatible with Article 8, Paragraph 2, of the Constitution" (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 392 1995, para. 2).[13]

Almost 10 years later, on 28 January 2005, the Convention of Grand Justice in their Interpretation No. 588 declared another important decision concerning personal freedom. An obligor may be put under custody for his or her failure to fulfill the obligation of monetary payment under public law in accordance with the different situations provided in the Administrative Execution Act. It held that the Act *per se* is not incompatible with the Constitutional law. However, several situations as provided

[13] Before the Interpretation was made, the prosecutor is deemed as the judge in a broad sense. Consequently, the prosecutor has a much wider power than the judge does to detain the suspects. That such a strange situation existed in Taiwan may be caused by the fact that both the prosecutor and judge are recruited by passing the same examination after they have graduated from a law school. They are trained altogether in the same institute organized by the Ministry of Justice. After the successful training of nearly 2 years, each candidate makes their own choice to be a judge or the other, a prosecutor. Interestingly, with this interpretation in hand, however, the system in accruing the candidates for them has not changed.

in the Subparagraphs (iv), (v) and (vi) of the Paragraph II in Article 17-I were held as unconstitutional, as not proportionate to the purpose and going beyond the boundary of necessity to put the obligor under custody (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 588 2005, para. 2).[14] With this Interpretation, the protection of personal freedoms has moved a step further based on the doctrine of due process of law from a substantive point of view.

Other than the issue of personal freedoms, the Convention of Grand Justice has made another significant contribution to the right to privacy in their Interpretation No. 603 on 28 September 2005. The application for constitutional interpretation in this case dealt with whether some provisions of the Household Registration Act making the issue of an identity card conditioned on the taking and keeping of applicant's fingerprints are unconstitutional or not. The Interpretation held that the relevant provisions of the said Act were unconstitutional on the grounds that the fingerprints were important information of a person, who himself shall have control of such fingerprinting information, and should be protected under the right of information privacy. The Convention of Grand Justice further made the idea clearer and declared, "[r]efusal to issue an Republic of China (R. O. C.) identity card to one who fails to be fingerprinted according to the aforesaid provisions is no different from conditioning the issue of an identity card upon compulsory fingerprinting for the purpose of record keeping. The failure of the Household Registration Act to specify the purpose thereof is already inconsistent with the constitutional intent to protect the people's right of information privacy" (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 603 2005, para. 2).

The right to privacy is not, in fact, an enumerated right in the Constitution of the R. O. C. and was first elaborated by the Convention of Grand Justice in their Interpretation No. 585 on 15 December 2004. The idea of the right was further elaborated in the above-mentioned Interpretation No. 603. The Convention of Grand Justice held, "[t]o preserve human dignity and to respect free development of personality is the core value of the constitutional structure of free democracy… [i]t should… be considered as an indispensable fundamental right and thus protected under Article 22 of the Constitution for the purpose of preserving human dignity, individuality and moral integrity, as well as preventing invasions of personal privacy and maintaining self-control of personal information. As far as the right of information privacy is concerned… it is intended to guarantee that the people have the right to decide whether to disclose their personal information or not, and, if so, to what extent, at what time, in what manner and to which people such information will be disclosed. It is also designed to guarantee that the people have the right to know and control how their personal information will be used, as well as the right to correct any inaccurate entries contained in their information" (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 603 2005, para. 1).

Before the Interpretation was issued, there was a heated debate in the community in Taiwan on the genuine purpose for collecting the fingerprints, and to what extent

[14] The situations are such as "where the obligor refuses to state to the execution personnel when they are investigating the subject matter of execution"; "where the obligor refuses to report or made a false report after he or she is ordered to report the status of the estate"; and "where the obligor refuses to appear without legitimate reason after legal notice".

public order or national security should prevail over personal privacy.[15] It is obvious and understandable that the distinctive personal information can easily be used as a threat to any person and as a useful weapon to control its people when the democracy and rule of law are still young and developing in a State. In fact, it is always necessary to pay more attention to personal freedoms when the government intends to be more democratic. To derogate personal freedom for the reason of public order could be just an excuse for an incapable government to do something wrong.

Other than those Interpretations that have had positive effects on the promotion of the enjoyment of human rights in Taiwan all these years, there is one Interpretation which is exceptionally adverse to that effect. In the Interpretation No. 618 on 3 November 2006 that concerned the issue of whether the requirement for emigrants from Mainland Area to hold a household registration in the Taiwan Area for at least 10 years is unconstitutional. The relevant provision in this case was the first half of Article 21 of the Act Governing Relations between Peoples of the Taiwan Area and Mainland Area, which provides that, "[n]o person from the Mainland Area who has been permitted to enter into the Taiwan Area may register as a candidate for any public office, serve in any military, governmental or educational organization or state enterprise, or organize any political party unless he or she has had a household registration in the Taiwan Area for at least ten years."

The application was initiated by the High Administrative Court of Taipei based on the idea of equal protection before the law. In its application, the Court especially referred to the International Convention on the Elimination of All Forms of Racial Discrimination, which the Republic of China, in fact, signed and ratified on 31 March 1966 and 10 December 1970, respectively. However, the Convention of Grand Justice, in making their Interpretation, not only ignored the Convention, but also made a contrary decision based on the reason of national interests. The Interpretation first referred to Article 10 of the Amendments to the Constitution as promulgated on May 1, 1991 (as amended and renumbered as Article 11 on July 21, 1997) which provides that the rights and obligations between the peoples of the Chinese mainland area and those of the free area, Taiwan, and the disposition of other related affairs may be specified by *sui generis* law. In that connection, the Act Governing Relations between People of the Taiwan Area and Mainland Area as promulgated on July 31, 1992, is the *sui generis* law to that effect.

The Convention of Grand Justice were of the opinion,"[g]iven the fact that a person who came from the Mainland Area but has had a household registration in the Taiwan Area for less than ten years may not be as familiar with the constitutional structure of a free democracy as the Taiwanese people, it is not unreasonable to give discriminatory treatment to such a person and not to the Taiwanese people of the Taiwan Area with respect to the qualifications to serve as a governmental employee, which is not in conflict with the principle of equality as embodied in Article 7 of the Constitution, nor contrary to the intent of Article 10 of the

[15] Those who opposed the measure of fingerprints, not surprisingly, were mostly once the victims of the White Terror. The one who led the opposing argument was the then Vice-President of the R. O. C.

Amendments to the Constitution… based on the concerns that those who originally came from the Mainland Area have a different view as to the constitutional structure of a free democracy and may need some time to adapt to and settle into the society of Taiwan" (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 618 2006, para. 2).

The Convention of Grand Justice even went further to justify the institutional discrimination by declaring that it also may take a while for the Taiwanese people to place their trust in a person who came from the Mainland Area if and when he or she may serve as a public functionary. If the review is to be conducted on a case-by-case basis, it would be difficult to examine an individual's subjective intentions and character, as well as his or her level of identification with the preservation of the constitutional structure of a free democracy. Besides, it would also needlessly increase the administrative costs to a prohibitive level with hardly any hope of accuracy or fairness. Consequently, the Convention of Grand Justice held the 10-year period, as specified by the provision at issue, is nonetheless a necessary and reasonable means, in that regard, and that no violation of the principle of proportionality under Article 23 of the Constitution could be inferred from that.

This Interpretation stirred a tide of strong criticism from human rights activists and academics as well. Needless to say, this is a retreat from the idea of human rights.

Along with the development of democracy in Taiwan, the realization of enjoyment of fundamental rights and freedoms has become more and more possible and positive in Taiwan. Legislation expressly containing provisions or implicitly having the effect of restricting the enjoyment of fundamental rights and freedoms have gradually been repealed or amended by means of the constitutional interpretation. The freedom of expression is another good example. In the Assembly and Parade Act, Article 4 prohibits certain activities or situations when any one is exercising his right to assembly and parade, i.e. to advocate communism or secession of territory. In that regard, the competent authority may deny an application for an assembly or a parade or declare its unlawfulness and arrest the leader and the accomplice. In Interpretation No. 445 on 23 January 1998, the Convention of Grand Justice declared, "[t]he said provision, which allows the competent authority to censor the contents of a political speech prior to the approval of an assembly or a parade, is inconsistent with the intention of protecting the freedom of expression under the Constitution… thus shall become null and void from the date of this Interpretation" (The Judicial Yuan of the Republic of China, J. Y. Interpretation No. 445 1998, para. 2). Freedom of expression is finally established in the community in Taiwan. Before the Interpretation was declared, the political ideology of the Democratic Progressive Party (DDP), which aims to declare the independence of Taiwan, was illegal with reference to the said provision. Interestingly, 2 years later, after the Interpretation, the DDP won the Presidential election and took the power to reign over Taiwan.

Thereafter, the democratic development in Taiwan has been moving faster and more radical changes have been witnessed. In that connection, the idea of human rights is gradually awakening naturally among the educated population. In 2000, for the first time the political regime was transferred to the hands of those who have

fought long against the regime of the Kuomington (Nationalist) Party (KMT). In his inaugural speech when taking the office of President of the Republic of China, Taiwan, the then President Chen Shui-bian declared his ambition "to build a State of human rights". Unfortunately, after 8 years in power, the DDP government did not make the dream come true, seemingly due to the mistrust of the opposition Party, the KMT. Some important bills relating to the promotion of human rights, for example, the National Human Institution Act died in the Legislative Yuan. The abolition of the death penalty was another failure. In 2008, the new government of the KMT did not ignore the tide of human rights in the era of globalization. Eventually, the Two Covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights were passed by the Legislature on 31 March 2009. In order to further the internalization of the rights stipulated in the Two Covenants, the Legislature additionally enacted an Implementation Law of the Two Covenants. Eventually, however, the Secretary-General of the UN turned down the letter of international ratification of the Two Covenants deposited to him by the President.

Theoretically, the Two Covenants were not formally internalized into our domestic legal system in terms of our constitutional law. This was the reason why the Legislative Yuan enacted the Implementing Law to internalize the norms stipulated in the Two Covenants as constituting an integral part of our domestic law. In accordance with the constitutional law in Taiwan, international conventions are to constitute an integral part of municipal law once they are approved by the Legislative Yuan and ratified by the President (Ministry of Justice of the Republic of China 2009, Decision of the President).[16]

Although somewhat misunderstanding from the point of view of the theories of monism and dualism in international law, the enactment of the required Implementation Law of the Two Covenants is a landmark legislation in Taiwan. Since Taiwan or the Republic of China has not been recognized as a State in the international community by most of the States, consequently, it lacks the capacity required in international law to participate in international affairs, which includes the conclusion of and access to international human rights conventions and their related institutions. The enactment of the Implementation Law to make the Two Covenants operative in practice is definitely a good sign of the Government's belief in the value of human rights.

However, it would be too early to predict the efficacy of the protection of human rights in Taiwan after internalizing the most important Covenants of the UN. Some events that stirred up furious debate recently in Taiwan merit some attention and comments here. Namely, the resumption of executions of death row inmates on April 30, 2010, the first time the death penalty has been carried out in the country since December 2005, has triggered a heated debate on whether or not capital punishment should exist in a country that advocates human rights protection. The resumption of the *de facto* moratorium on the death penalty pending abolition

[16] Based on the State practice where a State adopts the dualistic approach to the relations of national law and international law, a new Act needs to be enacted in order to internalize the ratified treaty. Accordingly, Taiwan adopts a monist approach in the internalization of international treaties.

has incurred a strong distrust upon the Government's determination in dealing with human rights issues.

In response to human rights advocacy on the abolition of the death penalty, the government, whether the executive or the judiciary, was of the opinion that the execution of the death penalty was not incompatible with the right to life stipulated in Article 6 of the International Covenant on Civil and Political Rights. Literally, it may be true. However, the Government was seemingly not that interested in the objectives and purposes of the Covenant. The excuses for the resumption of the death penalty relied on by the Government were mainly twofold: rule by law (not rule of law) and public opinion.

Regarding the requirement of the doctrine of rule of law, the Government, the executive, the judiciary and even the President, is confident in relying on the relevant law concerning the execution of those sentenced to death. In accordance with the Guidelines for Reviewing the Execution of Death Sentencing Case,[17] the procedural rights afforded to the convicted are whether they have exhausted the remedies of retrial or extraordinary appeal in courts. If yes, the Ministry of Justice (MOJ), the Republic of China shall issue a Writ of Execution to the Supreme Prosecutor Office. Based on the regulation of the Guidelines, the Ministry concluded that the execution of those sentenced to death was legitimate and required under the doctrine of rule by law.

As to the poll, indeed, more than 70% of the populations in Taiwan favor the existence of the death penalty for the purpose of maintaining the internal order. This message also constitutes the legitimate grounds for the resumption of the *de facto* moratorium on the death penalty in Taiwan.[18] In fact, the MOJ has put in some efforts to abolish capital punishment gradually, as reported by a local newspaper recently, in response to the row about the end of the *de facto* moratorium on the death penalty. A panel mandated by the Ministry of studying the feasibility of the abolition reached a conclusion that suggested replacing the death penalty with "a special life sentence" that requested the inmates subjected to the punishment not be eligible for parole. The panel also recommended revising laws to adopt more specific standards in the review of parole applications by prison inmates serving a life sentence, such as categorically requiring that the convicts should stay in jail for at least 25 years but no more than 40 years.[19] Ministry statistics show that on average,

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[17] The author's translation. An administrative regulation adopted by the Ministry of Justice in 1999, amended in 2005.

[18] Premier Wu Den-yih was of the opinion that Taiwan was upholding the "rule of law" when it executed the four death row convicts. Wu's remarks came a day after the European Union's foreign policy chief condemned the executions in a rare statement. Baroness Catherine Ashton urged Taiwan to resume its *de facto* moratorium on the death penalty. In several polls more than 70%, even 80% of people do not want the death penalty abolished. The law also provides for the death penalty. We are thankful for the opinions of European representatives but it is impossible to change. Our basic approach is administration according to the law, says Premier Wu Den-yih. Available at http://englishnews.ftv.com.tw/Read.aspx?sno=53FC7FF84FF7CBA968DE116F3732A099

[19] Talk of the day-Replacing the death penalty with life sentence. Focus Taiwan New Channel, Oct, 16, 2010. Available at http://focustaiwan.tw/ShowNews/WebNews_Detail.aspx?ID=201010160005&Type=aTOD

inmates serving life imprisonment sentences in Taiwan stay in jail for 12.8 years before they are set free on parole, shorter than in neighboring countries like Japan, in which the average period of permanent imprisonment is 20 years. The Ministry believes a stricter parole review system would encourage judges to hand down the life sentence instead of the death penalty on the defendants convicted of committing brutal and inhumane crimes.

Until now, the MOJ has not yet decided to adopt the proposal to replace the death penalty with a special life sentence as reported by a local newspaper.[20] In fact, the report raised the concerns of some crime victims and their families, who staunchly opposed abolishing the death penalty. Eventually, the MOJ responded that the report was not fully correct because the Ministry has not yet endorsed the recommendation. The proposal should serve as a reference in deciding whether to revise our existing law to pave the way for the abolition of the death penalty, but it has by no means been established as official policy. It further said, "[o]ur policy has been that existing laws on the death penalty will remain in place until after a national consensus has been forged on the issue, public misgivings over abolishing capital punishment have been eased, and a reasonable alternative has been worked out."[21] The decision to execute the death penalty on some convicted prisoners, apparently demonstrates the Government's passive attitude towards its obligation to respect human rights. The reason for this may correspond to one of the aforementioned factors appearing in Asian culture, namely, predominant collective interest over individual interest.

When viewed from the resumption of the death penalty in Taiwan, human rights advocates may have reason to doubt whether the internalization of the Two Covenants in the legal systems of Taiwan is only a symbolic gesture. In that connection, a NGO called Alliance of the Two Covenants Watch was soon established in view of the lack of mechanism for implementing the rights and freedoms stipulated in the Covenants.[22] In fact, in addition to the absence of an implementation mechanism, some other situations that merit more attention are, i.e., the problem of methodology as applied by the Convention of Grand Justice in Constitutional Interpretation and the publicist scholars in the construction of the idea and the elaboration of the normative contents of human rights. Even though the realization of enjoyments of fundamental rights and freedoms has indeed made tremendous progress in recent years, the methodology applied in that concern is, however, unrecognizable. The *ratio legis* for interpretation is sometimes rather

[20] Ibid.

[21] Ibid. See also the public hearings on the policy of the death penalty held by the Ministry of Justice. Available at http://www.moj.gov.tw/lp.asp?ctNode=28133&CtUnit=9153&BaseDSD=7&mp=001

[22] The website available at http://covenants-watch.blogspot.com/

subjective and capricious.[23] Interpretations seldom refer to the sources of standards as the basis of judicial reasoning. Consequently, one will wonder from where the notion of human dignity comes. It seems that it is self-evident already.[24] The Interpretation of Nos. 603, 656 (Issued on 3 April 2008), and 490 (issued on 1 October 1999) are examples to that effect. In fact, if the concept of human rights is recognized the same as constitutional rights guaranteed in the State's Constitutional Law, it will lose the idea of universality of human rights accordingly. Examining the theories applied in the elaboration of the constitutional rights and freedoms in constitutional interpretation in Taiwan, one may find that those theories are truly unknown or partisan in a sense.

In conclusion, if the concept of human rights has a protean face and the standards are indeterminate, then, "Who is afraid of human rights?" Recalling that the universalism of human rights is faced with serious challenges from the relativists and/or radicalists due to the emergence of the relative normativity of human rights, one has to admit that there is no reason to ignore or to escape from looking into the arguments and the thought of relativism. This is especially so with reference to the normative contents of human rights. We may want to take human rights as medicine to cure the failure of the government. Faced with the above-mentioned problems, one needs to look into the constitutive elements of each human right in order to cure the distinctive symptoms of illness that cause the failure of the enjoyment of human rights for most peoples in the world. In this connection, we may need to work out a proper theory for the interpretation and construction of human rights with the function of corrective justice in mind. Otherwise, what are human rights for in international law, when no one is afraid of the normativity of human rights?

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[23] Some separate opinions are especially so if we look into the reasons in their reasoning. The notorious one to that effect can be inferred from the separate opinions of the Convention of Grand Justice in the Interpretation No. 666. In this Interpretation, the majority held that the Social Order Maintenance Act that punishes any individual who engages in sexual conduct or cohabitation with the intent of financial gain violates the principle of equality prescribed in the Constitution, and shall cease to be effective no later than 2 years since the issuance of this Interpretation. Available at http://jirs.judicial.gov.tw/ENG/FINT/FINTQRY03.asp?cno=666&total=1&seq=1. In that connection, Several Grand Justices were of the opinion that the punishment was violating the sexual workers' right to work and therefore unconstitutional. The reasons for the right being legitimate and constitutional in nature were however unknown, but maybe influenced by personal preference or sympathy. See the separate opinions of the Convention of Grand Justice Hsu, Yu-shiu; Chen, Hsin-ming; Hsu, tsung-li. Available at http://jirs.judicial.gov.tw/ENG/CETransfer.asp?goto=c&datatype=c02&code=666

[24] In fact, there is nothing wrong with adopting a methodology that recognizes some fundamental elements of human rights, such as human dignity, as self-evident; the question left open in the constitutional interpretation is how the fundamental principles are identified.

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Chapter 10
Russia's Approach to the Universality of Human Rights

Daria Trenina and Mark Entin

10.1 Introduction

For the majority of human rights protection issues, Russia takes a very similar – or identical – approach to that of other European countries, including the EU Member States. Nuances and diversities have their roots in history, the social and economic situation of the country, with a great detriment caused by the social experimentation of the last decades.

The Soviet Union, to which Russia is a legal successor, made an important, though often now underestimated, contribution to the development and advancement of social and economic rights. Under its influence all countries changed their positions on the regulation of the relationship between labour and capital.

When the UN Charter was being developed and during the work on the content of the two Covenants later on, it was the Soviet Union that insisted on including civil, political, economic and social rights in a single document. That is to say, the people of the USSR contributed greatly to shaping the contemporary understanding of human rights protection.

The last 20 years have been hard times for the country. Russia was finally through with the Cold War, communist and totalitarian ideology. However this victory was far from easy. The country faced the free fall of the economy, a tremendous drop in living standards, a loss of guidelines and the unpreparedness of the vast majority of the population to live in the market economy conditions.

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Coincidently, it was the time when the democratic institutes were being shaped and references to human rights became popular and topical slogans. That is why the notions of democratic developments and human rights are, for too many, associated with chaos, devastation and a crime permissive environment.

During the last 2 years Russia has undergone a kind of renaissance. It is slow and not easy, but it makes itself felt in everything – a change in political lexis, the quality of standard-setting and task-setting, and a variety of substantiated views in the mass media. It is also reflected in the dozens of newly adopted liberalizing legislative acts and in actions taken to implement them. Again, there emerge preconditions for implementing the concept of human rights, which Russia shares with other leading countries, in the day-to-day life, reality and enforcement practices.

10.2 Universality

Speaking from the international law point of view, the question of universality of fundamental rights has been clearly answered in the mid-twentieth century. Through the ongoing work of United Nations and documents adopted by them, the universality of human rights has been clearly established and recognized in international law. Disputes on that issue or controversial assertions that might and do arise in practice should be addressed bearing in mind international documents and legally binding treaties. According to the UN Charter, the UN Member States are committed to advancing and promoting "universal respect for, and observance of, human rights and fundamental freedoms."

Russia fully shares the conviction that fundamental rights are universal and must be protected in any society. By neglecting its obligation to protect universal human rights, a state harms its own population and denies its citizens proper respect and opportunities for personal development. Only when human rights are respected and protected in a country can political stability and the due development of society be attained.

The wording of the Universal Declaration of Human Rights itself affirms the universal nature of human rights. The Declaration is asserted to be a "common standard of achievement for all peoples and all nations". The common standards were embodied in further documents through the ongoing work of the United Nations.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are the legally binding treaties based on the Universal Declaration. Around 150 countries that ratified them have formally committed themselves to the common understanding that political, civil, cultural, economic and social human rights are of equal value and apply to everyone.

According to the Vienna Declaration "the universal nature" of human rights is "beyond question". It further reaffirms the obligation of States to promote and protect human rights.

Though boundaries and borderlines between the rights are diminishing, they preserve their specificities. There are fundamental rights, the relativisation of which is inadmissible; and there are rights that can be guaranteed as the society achieves a certain level of development. A state cannot take upon itself more than it can implement. An impossible burden on national authorities, given a lack of legislative capacity or undeveloped implementation procedures, could result in the loss of the authorities' credibility. In this situation the state will also find itself lacking the possibility of economic maneuverability.

10.3 Human Rights as a Dynamic Concept

When interpreting the scope of human rights, one must consider their dynamic interpretation. The assumption is that human rights provisions must be construed with regard to contemporary realities. The principles of effective interpretation, used by the European Court of Human Rights (ECtHR), are to be applied in order to protect human rights in a practical and most effective way.

The understanding of human rights should evolve under the influence of new conditions of life. This evolution of the scope of protected rights will allow society and states to properly address risks emerging as a result of change in the environment and of scientific and technical progress. Human rights are to be implemented in line with contemporary representations, the current level of development of the society, new challenges that it faces and new demands of democratic development.

The European Court of Human Rights uses the determination of the European Convention on Human Rights as a "living instrument" to construe its clauses "in light of present day conditions". The Court applies social, legal and political developments in European countries as additional means of interpreting provisions of the Convention, which ensures that these provisions are relevant to the contemporary human rights issues, problems and challenges. The scope of a certain right is extended to address concerns, which previously did not exist.

This change in understanding is to be reflected in the change of legislative basis and law-enforcement practices. Consequently, the European Court of Human Rights could find, and often has found, that states that have failed to keep up with new trends are in violation of the Convention.

10.4 Approach Towards Obligations of States

Just like other countries, Russia approaches obligations of the modern state in both negative and positive forms. A state should obviously abstain from measures violating human rights, but it also should take actions to provide for the enjoyment of the rights.

Human rights entitle individuals to benefit from a good, which is the essence of a right in question, to demand that an enjoyment of a right is not obstructed or interfered with by other individuals and state bodies, to seek assistance from the state body when the fulfillment of a right is impossible without interference by the authorities, and to ask for protection of state authorities when another individual or a state body infringe a right or obstruct its exercise.

In accordance with the concept of positive obligations, citizens have a right to demand protection from crime and violence, and to demand the adoption of legislation safeguarding their rights, as well as the creation of effective structures to implement them.

The concept is well developed in the jurisprudence of the international bodies for protection of human rights. The European Court of Human Rights and Inter-American Court of Human Rights both agree that the state has the duty to adopt positive measures to fully ensure the effective exercise of the rights, and quote each other in judgments and opinions. Thus, in its advisory opinion on Juridical Condition and Human Rights of the Child (2002) the Inter-American Court underlines that states "*have the duty … to adopt any positive measures that ensure protection of children against mistreatment, whether in their relations with public authorities or in interrelationships with individuals or non-state entities.*" In support of its opinion the Court quoted, among other legal documents, judgments of the European Court of Human Rights regarding the obligations of states to protect children against violence, including in the family.[1]

10.5 International Treaties and Mechanisms

The primary responsibility to protect the rights of individuals in their jurisdiction rests upon the states themselves rather than on international bodies and mechanisms. The latter play a subsidiary role. The collective work of states to improve international cooperation and exchange legal expertise, as well as the adaptation of the international legal order to the realities of today, serves the national interests of the countries in ensuring a high level of protection for their own citizens and on a global scale.

Russia is a party to numerous international treaties, including those aimed at protecting, promoting and advancing human rights, and is one of the original members of the Human Rights Council, an inter-governmental body within the UN system consisting of 47 States "responsible for strengthening the promotion and protection of human rights around the globe". In this respect, Russia believes that the UN

[1] Inter-American Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 87 and 91, Committee on the Rights of the Child, General Comment N° 8, The right of the child to protection against bodily punishment and other forms of cruel and degrading punishment, CRC/C/GC/8, August 21, 2006, 24.

human rights architecture should be reinforced, avoiding politisation of human rights, to be able to provide assistance to countries.

Russia's approach is to offer cooperation initiatives rather than passing judgments upon another country. Making decisions that criticise situations in other countries does not contribute to establishing constructive dialogue. Joint efforts to find solutions to problems which are common to all societies are seen as an essential feature of international cooperation, beneficial for all counterparts.

With regard to the response of the global community to peace-threatening situations, humanitarian challenges and known violations of peace, Russia insists on the strict observance of the exclusive rights granted by the UN Charter to the UN Security Council as a main body responsible for maintaining international peace and security. The capacity of the United Nations in this regard should be fostered through more efficient cooperation with regional and sub-regional partners. An effective response to human rights problems with domestic origins and the global challenge of international terrorism can only be ensured on the basis of the UN Charter and in strict compliance with it, together with other rules of international law. The UN Member States should make all efforts to ensure the maximum use of the consensus-driven UN Counter-Terrorist Strategy.

The United Nations sanctions are considered to be a major instrument for diplomatic settlement of conflict situations and tensions. They should be targeted, proportionate and imposed with caution. The scope of respective resolutions of the UN Security Council should never be extended or widely interpreted.

Russia actively promotes the development of inter-civilization dialogue within the UN and supports the facilitation of activities of the Alliance of Civilizations by taking an active part in the work of the Group of Friends of the Alliance of Civilizations and within its framework.

Priority is also given to collaboration with UNESCO. Russia has contributed to strengthening its role and plays an active part in implementing its goals and projects. Russia promotes further development of the organization and supports its transformation into an effective tool for the realization of UN goals.

10.6 Humanitarian Intervention

The difference in Russia's approach towards humanitarian intervention from that of other countries is not in line with how this difference is often perceived by foreign observers. What is usually written or said regarding Russia's position towards humanitarian intervention is a misunderstanding. The approach may differ but not concerning the essence of the problem. Russia identifies with those who believe that the world community or a single state cannot abstain in the case of the systematic and gross violation of humanitarian rights of thousands of people, genocide committed by the state authorities against peoples living in the country, and war waged towards the country's population or a part of the population.

There is no difference or dispute on this point. It is impossible, however, to bring an end to violations of international humanitarian law by actions contrary to the Charter of the United Nations. The decision to intervene in the domestic situation of another state must not be taken unilaterally. The effective responses to the humanitarian challenges should be searched for collectively. In the case of mass-scale violations of basic human rights, the international community should respond jointly and on the basis of a decision taken by UN Security Council. Otherwise the basis of international cooperation, legal foundations of the modern world order and the United Nations Charter are undermined.

When some countries judge others and act in circumvention of the internationally agreed mechanisms, without taking into account the position of other countries, it results in an atmosphere of permissiveness rather than in effective help and assistance to a population, or the establishment of peace and stability. The assessment of a given situation, its scale and seriousness, risks for the population and perspectives of development should be made by a duly authorized international body. The standards, on the basis of which decisions to employ military force are taken, and high thresholds for the Security Council authorization, should not be lowered. They serve important aims, such as to minimize the resort to force as a means of conflict resolution and thereby promote stability, to protect state sovereignty and political societies within a state from violent external interference.

Therefore humanitarian intervention without a United Nations mandate is illegal under the rules of the UN Charter, and also impermissible for the abovementioned reasons.

10.7 Regional Instruments

The overwhelming majority of European countries are Member States of the Council of Europe, with its extensive system of legal instruments, effective implementation mechanisms and procedures of monitoring. Interpretation of the Council of Europe Charter and European Convention of Human Rights (ECHR) leads to the conclusion that the European Human Rights protection system is designed for legal rapprochement and integration of the countries of Greater Europe, and, therefore, to the creation of a common European legal and humanitarian space.

In 1996 the Russian Federation became the 39th Member State of the Council of Europe and committed itself to the joint efforts of the European countries to ensure greater unity of Europeans by promoting human rights protection, pluralist democracy and the rule of law.

Political dialogue between Russia and the Committee of Ministers of the Council of Europe has been established since May 1992 when Russia applied to join the Council. Since then the country has taken part in various activities of the Council of Europe through participation in intergovernmental cooperation and assistance programmes in the fields of legal reforms and human rights. Prior to accession in 1996,

a number of legislative acts were prepared with international consultations and on the basis of Council of Europe values, principles and standards, such as the new criminal code, the criminal procedure code, the civil code and the civil procedure code, as well as the new law on the penitentiary system.

At the present time, Russia is a party to a long list of 54 Council of Europe legal instruments, including its most important conventions.[2] Russia takes part in 5 out of 13autonomous organizations of the Council of Europe system and plays an active role in cooperation through the Pompidou Group, aimed at combating drug abuse and illicit drug trafficking, and the GRECO (Group of States against Corruption). The main motive behind entering the Council of Europe was the Convention on Protection of Human Rights and Fundamental Freedoms. It was also one of the commitments undertaken by the country to be admitted to the Council of Europe. The European Convention entered into force on the May 5, 1998.

Apart from the ratification of the ECHR, the Opinion of the Council of Europe Parliamentary Assembly on Russia's accession[3] laid down a long list of 24 other obligations. Some of them are more specific, like accession to Protocol No. 6 to the ECHR on the abolition of the death penalty in times of peace, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Framework Convention for the Protection of National Minorities, the European Charter of Local Self-Government and the European Charter for Regional or Minority Languages.

Some of these obligations have now been fulfilled but others are still due, such as accession to the Protocol No. 6 and the Charter for Regional or Minority Languages. Notwithstanding the non-ratification of the death penalty Protocol, which is still in question, there have been no executions since 1999, and in December 2009 the

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[2] Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005, 4. XI.1950), European Cultural Convention (ETS No. 018, 19.XII.1954), European Convention on Extradition (ETS No. 24, 13.XII.1957), European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 20.IV.1959), European Convention on Academic Recognition of University Qualifications (ETS No. 32, 14.XII.1959), Convention on Suppression of Terrorism (ETS No. 90, 27.I.1977) and Convention on the Prevention of Terrorism (CETS No. 196,16.V.2005), Convention on Transfer of Sentenced Persons (ETS No. 112, 21.III.1983), European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (ETS No. 126, 26. XI.1987), Framework Convention for the protection of Minorities (ETS No. 157, 1.II.1995) and European Social Charter (ETS No. 163, 3.V.1996).

As far as the Interlaken declaration the citation could be: High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010.

The recommended citation for the Annual report of the European Court of Human Rights, that could be found on official site is: Annual Report 2009 of the European Court of Human Rights, Council of Europe.

As far as the General Comments is concerned it was reissued and the correct citation would be then: Committee on the Rights of the Child, General Comment N° 8 (2006), The right of the child to protection against bodily punishment and other forms of cruel and degrading punishment, CRC/C/GC/8, CRC/C/GC/8, 2 March 2007, para. 24.

[3] PACE Opinion 193(1996) of 25 January 1996.

Russian Constitutional Court made it impossible for the country to reinstate the execution of the death penalty.

Though under the Russian Constitution of 1993, the International Treaties of the Russian Federation automatically form part of the Russian law (Article 14), and human rights and freedoms are guaranteed in accordance with generally recognized principles and norms of international law (Article 17), the real transfer of the European Convention norms into the legal system of the Russian Federation has not been easy to achieve and has not been fully achieved yet.

The Constitutional Court of the Russian Federation and the High Court consistently stress the obligatory nature of the Convention and jurisprudence of the ECtHR and the obligation of the state to comply with them. Such compliance is obligatory not only in following the ECtHR's judgment, but also when taking general measures aimed at the prevention of violations of the Convention rights. Accordingly, the obligation to bring national law, administrative practices and organization of justice into conformity with the high standards of the Convention and case law of the ECtHR is based upon the subsidiary principle. This was also emphasized in Section B (Implementation of the Convention at the national level) of the Action Plan of the Interlaken Declaration of 19 February 2010.[4]

The drawbacks of the Russian legal system and law-enforcement practices are reflected in more than 800 judgments on violations of Convention rights by the Russian authorities delivered by the European Court of Human Rights so far. Judging by the continually increasing number of applications concerning alleged violations, there are many serious problems which have still not been fully addressed. There are more applications against Russia than any other state party to the Convention (28.1% out of 119 300 pending applications at the end of 2009).[5] However, the growing number of applications reflects not only the existing problems but also the active position of the population and the readiness of individuals to protect their rights, going, if necessary, to international institutions. This is also one of the criteria to assess the integration of society into the European human rights protection system.

It should also not be forgotten that although the judgments of the Courts are aimed at protecting individual rights, they give impetus to the development of the national legal system, the integration into the common legal space of European countries and the establishment of the same level of human rights protection across Europe. Reforms launched by the Russian Federation to satisfy the standards of the Convention involve fundamental changes in the judicial system, including the administration of justice in commercial, civil and criminal courts, as well as the penitentiary system, social security policy and counter-terroristic regulation etc.

Following unambiguous commitment voiced at the highest political level to change the unacceptable situation with regard to the number of detained persons being

[4] Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights, 19 February 2010.

[5] European Court of Human Rights, Annual Report 2009.

suspected or accused of offences of low or medium gravity, important legislative initiatives were launched to ensure effective use of alternative preventive measures. Among the important and long-awaited reforms are humanizing amendments to the Criminal Code inserted by several federal laws, abolishing detention on remand for alleged crimes of an economic nature and imprisonment for certain minor offences. One of these laws introduced house arrest as a new type of restraint on liberty.

Following numerous judgments of the ECtHR, including a pilot judgment stating a violation of a right to a fair trial arising from the excessive length of court proceedings and the non-execution of domestic judgments, mainly in the social protection field; a revolutionary law was adopted in April 2010 laying down the guarantees and procedures for obtaining compensation for red tape and non-execution.

Russia's commitment to the core values has recently been reaffirmed by the ratification of the European Social Charter, which complements the ECHR to guarantee social and economic rights in a practical way and covers such issues as housing, health, education, employment, legal and social protection, free movement of persons and non-discrimination. It took 9 years for Russia to harmonize national legislation regulating social policy, which made it possible to ratify the Social Charter in October 2009.

10.8 Human Rights Issues and Integration

Globalisation is perceived to promote the trans-border movement of capital and the pursuit of business activities. The drawback of the globalisation process is that the problem of harmonisation of individual status is not addressed. Globalisation tends to turn into competition rather than cooperation for the benefit of promoting human rights. However, the respectful treatment of human rights is an impetus, a means, and, at the same time, a result of integration. Orientation towards developing and implementing common human rights standards could be secured though international cooperation instruments.

The main effect of developments in Russia over recent years in the sphere of Russian external politics is that Russia has strengthened its role in international affairs. This is in line with Russian political tradition and history. Russia intends to fully contribute to solving global problems, and to developing a more democratic world order, based on international law and the principle of collective adoption of measures.

Russia is involved in integration processes within the Commonwealth of Independent States, within 'Greater Europe' and within other regions. The EU-Russia relations are being developed within the framework of Four Common Spaces and mechanisms for sector dialogues. Cooperation between Russia and the EU in the area of Freedom, Security and Justice has been carried out on the basis of the respective road map adopted at the Moscow Russia-EU summit in May 2005, which defines freedom of movement of persons, the fight against terrorism and organized crime, drug trafficking, money laundering, corruption, human trafficking and judicial matters as key cooperation fields.

10.9 Human Rights and Values

The set of values inherent to each society is never absolutely identical. Human rights are underlain by traditional values, and cultural and civilization diversity. Therefore classical rights may hold different places in the list of rights included in the national package, and this diversity must certainly be respected. Upsetting the balance may have negative effects on society's capabilities to adapt to contemporary standards and requirements. As was noted by the Minister of International affairs, Sergey Lavrov, to claim validity of the common values, the European civilization should become truly inclusive for all who live there and consider Europe to be their home. This means tolerance in the first place, and respect for identity, including religious feelings (Lavrov 2008).

It is virtually impossible to bring a society to accept a set of rights which is not compatible with a traditional or ancestral life pattern. A way of life is worthy of respect and must be used for the benefit of development of the society, and relied upon in achieving modernization.

As for Russian society, the list includes not only classical human rights but also family values, morality and ethics, including perceptions formed under the influence of Orthodoxy, Islam and other main religions. The social experimentation of the recent years concerning family, and all the other elements of the package, provokes rejection and a more critical approach towards the classical concept of human rights.

10.10 The Conflict of Values

The conflict of values has been very actively discussed in foreign mass media sources. International observers called into question the extent of the shared values between Russia and the West. Diversities were explained to be a result of the mismatch in the systems of values. The discussions finally resulted in nothing; but the misperceptions about the alleged conflict remain.

The values that are shared by others were never challenged or denied by Russia, they are common to Russia as well. What has always been, and will continue to be refused by Russia is the self-entitlement of a single country or several countries to pass judgment on others from a position of innocence.

As far as values are concerned, Russia believes that there are no grounds for conflict. To explain the differences by inconsistency of values is a very unproductive and dangerous approach, since it makes a conflict a permanent feature in the relations. As Konstantin Kosachev stated when responding to publications in the foreign mass media in 2006–2007 alleging a gap in values between Russia and the West, the "[c]onflict of values is a matter of propaganda, rather than ideological, civilizational or psychological realities; so the issue should be resolved from this point of view, instead of using this sensitive topic as a political weapon" (Kosachev 2007).

The way to solve this contrived conflict lies again in deepening and extending cooperation. It is important to engage partners in a focused, systematic discussion of positions on sometimes sensitive questions and difficult realities of a modern world. Efforts must be invested into the creation of conditions for joint discussion based on trust and cooperative attitude, where decisions would be taken and voiced collectively rather than unilaterally.

To create effective dialogue, based on shared understanding of the values to be protected against common challenges, requires effort from all sides. Russia must voice and explain grounds for certain assumptions, if they are different; its Western partners, in return, must be "willing to re-evaluate their stereotypes about Russian political culture and, ultimately, (…) embrace Russia as a necessary and vital part of the Western community" (Petro 2006).

10.11 The Problem of Double Standards

The problem of double standards is closely related to the issue of the "conflict of values" discussed above. Traditionally, the Russian individual and Russian society as a whole have possessed an innate sense of fairness and a tendency to hunt truth and justice. The notions of justice and fairness are perceived as essentially embracing equal treatment, as well as consistency in one's assessments and conduct.

From the point of view of Russian population, the countries of Western Europe and the United States have lost, in some respects, the role of moral leaders. When the high standards of human rights protection are guaranteed on national levels and for their own population, the violent use of force, such as aggressive bombing, outside the national territories would be regarded as a violation and denial of the same standards of protection and same principles.

Double standards violate the impartiality principle inherent to justice. Justice and impartiality demand that the same approach and equal treatment be applied to all peoples and countries. Even if historically they have not evolved and developed in the same way. The use of human rights as a political weapon, as a pretext to interfere in the internal affairs of other countries in order to pressure the authorities to help the achievement of different goals, or as a cover to gain the control over certain markets should be condemned as being a real discredit to human rights and to the political forces employing the double standards approach.

10.12 Different Population Groups

One of the main purposes of the advancement of human rights is the support of groups of people that are objectively in a less advantageous position compared to others, such as children, elderly and disabled people.

In the Soviet Union, under the conditions of socialism, the state system was designed to support socially vulnerable groups of the population. During the period

of "wild capitalism", the respective social institutions were undermined. They suffered, firstly, from inertia and lack of policy on the part of the authorities in the early years and, secondly, from the unsuccessful social experimentation during the times of development of a market economy.

During the period of economic boom, the institutions and structures for social support started to be developed and improved. However, they were again hit hard by the world economic crisis. Nevertheless, they benefit from the experience gained of how to create and set in motion effective mechanisms, and have set clear tasks, which now have to be implemented.

International cooperation in this direction has always been much appreciated. Russia supports further development of practical measures aimed at implementing the "global partnership" concept provided for in the 24th special session of the General Assembly, the Millennium Declaration and decisions of the World Summit for Social Development. In 2008, the Russian Federation signed the Convention on the Rights of Persons with Disabilities, applying international human rights standards to this category of the population without discrimination. It must be mentioned that Russia made a significant contribution to the elaboration of this Convention.

Ongoing work is also conducted in the other directions of international cooperation through social and non-discrimination initiatives. Russia has recently ratified the Optional Protocol to the Convention on the Rights of Child on the involvement of children in armed conflict, and was one of the first countries behind the UN Declaration on the rights of Indigenous Peoples, used as a basis for a national concept of sustainable development of indigenous peoples living in the regions of Russia.

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Chapter 11
The Legal and Constitutional Impact of the European Convention on Human Rights in the United Kingdom

Steven Greer

11.1 Introduction

Over the past few decades, human rights have moved from the edge of the periphery of legal scholarship and debate to the centre of the core. The following are amongst the issues which have aroused most interest amongst jurists. How can human rights be effectively installed in international and national legal systems? Once installed, in what senses do they bind national and international public institutions and what legal relationships do they produce between them? What is the relationship between human rights provided by international legal texts and processes, on the one hand, and those found in their national counterparts on the other? In particular, is there scope for a range of equally legitimate judicial interpretations of the same human rights, and, if so, how can this be reconciled with their universality? To what extent does the incorporation of human rights in international and national legal systems materially prevent and remedy violations? The purpose of this chapter[1] is to consider these issues in the context of debates about the legal and constitutional impact of the European Convention on Human Rights in the United Kingdom, particularly following its incorporation by the Human Rights Act 1998 which came into effect on 2 October 2000.

[1] Some material from the following sources is reproduced in what follows: 11.2. – Greer 2006 (© Steven Greer 2006, with permission of Cambridge University Press), Greer 2010 (by permission of Oxford University Press); 11.3. – Greer 1999 (by permission of the *European Law Review*).

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11.2 The European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms (more commonly known as the "European Convention on Human Rights" or ECHR), drafted by the Council of Europe in 1950 and in force from 1953, has been a condition of membership of the Council of Europe since its foundation by ten western European liberal democracies on 5 May 1949, in which the UK took the leading role (Greer 2006, Ch. 1). At its inception, the Council of Europe had four principal objectives: to contribute to the prevention of another war between western European states, to provide a statement of common values contrasting sharply with Soviet-style communism (as expressed by the mostly civil and political rights subsequently contained in the ECHR), to re-enforce a sense of common identity and purpose should the Cold War escalate into active armed conflict, and to establish an early warning device by which a drift towards authoritarianism in any member state could be detected and dealt with by complaints from states against each other – or, where states had opted for it, by individual applications – to an independent, transnational judicial tribunal in Strasbourg. And even this "early warning" function was also inextricably linked to the prevention of war, because the slide towards the Second World War indicated that the rise of authoritarian regimes in Europe made the peace and security of the continent more precarious. The ECHR's central objective is to provide the Council of Europe with an independent judicial process at Strasbourg which can authoritatively determine whether or not a Convention right has been violated by a given member state. Although the Council of Europe has since sponsored over 200 treaties on a wide range of common European problems, the ECHR remains the principal means by which it seeks to realise its core goals.

The Convention is similar in content to other international and national instruments which deal with civil and political rights. Article 1 requires Member States "to secure to everyone within their jurisdiction" the rights and freedoms the ECHR contains, while Articles 2–13 provide: the right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude or to be required to perform forced or compulsory labour; the right to freedom from arbitrary arrest and detention; the right to a fair trial; the right not to be punished without law; the right to respect for private and family life, home and correspondence; the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to freedom of assembly and association; the right to marry; and the right to an effective remedy before a national authority. Article 14 states that the enjoyment of any Convention right shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 15 provides for the suspension of all but a handful of rights "in time of war or other public emergency threatening the life of the nation" provided such departures are "strictly required by the exigencies of the situation" and are not incompatible with other international legal obligations. Article 16 states that nothing in Articles 10, 11, and 14 shall be regarded as preventing

restrictions on the political activities of aliens. Article 17 prohibits anything in the Convention from being interpreted as implying the right to engage in any activity, or to perform any act, aimed at the destruction of any Convention right or freedom, or its limitation to a greater extent than the Convention itself permits. Article 18 limits restrictions upon rights to those purposes expressly provided in the Convention itself.

Fourteen subsequent protocols have either added further rights or instigated procedural reforms. Protocols containing additional rights are optional and usually come into effect when a specified number of states have completed the formalities. Protocol No. 1, for example, contains rights to education, the peaceful enjoyment of possessions, and to free elections, while Protocol No. 4 provides the right not to be imprisoned for debt, the right to freedom of movement, the right of nationals not to be expelled from the state to which they belong, and the right of aliens not to be collectively expelled. Protocol No. 6 abolishes the death penalty except in time of war, and Protocol No. 7 contains procedural safeguards regarding the expulsion of aliens, the right of appeal in criminal proceedings, the right to compensation for wrongful conviction, the right not to be tried or punished twice in the same state for the same offence, and the equal right of spouses under the law. Protocol No. 12 outlaws discrimination in relation to any right "set forth by law", in contrast with Article 14 of the Convention which prohibits discrimination only with respect to Convention rights. Protocol No. 13 outlaws the death penalty even in time of war. Protocol No. 14bis, a temporary measure pending ratification, by every member state, of Protocol N. 14 (considered further below), was in force for only a year and is the only procedural protocol so far to be introduced without universal assent.

The European Court of Human Rights (ECtHR) came into operation in 1959 as part of a two-tiered judicial system. The other element was the European Commission of Human Rights, which ascertained the facts, determined if the admissibility criteria were satisfied, and explored the possibility of friendly settlement. If no such settlement could be found, it delivered a non-binding opinion on whether or not the Convention had been violated. Then, providing the jurisdiction of the ECtHR had been accepted by the state or states concerned, the case could be referred by the Commission, the respondent state, or the state of which the applicant was a national – but not by individual applicants themselves – to the Court for a legally binding decision. The Committee of Ministers also decided cases over which the ECtHR did not have jurisdiction and those which the Commission did not refer to the Court.

In 1998, Protocol No. 11 abolished the Commission and stripped the Committee of Ministers of the power to settle disputes. The Court also became a professional full-time institution, delivering legally binding judgments, and issuing advisory opinions at the request of the Committee, whilst also assuming the Commission's former tasks. The right of individual petition, and acceptance of the Court's jurisdiction, also became compulsory, although by the 1990s each had already been voluntarily endorsed by all Member States. Forty seven judges – chosen by the non-legislative Parliamentary Assembly of the Council of Europe from the lists of three candidates nominated by each member state – currently serve on the ECtHR.

With just under two dozen inter-state applications in the ECHR's entire history, and less than a resounding success in correcting alleged violations, this process appears now to be largely moribund. However, two applications made by Georgia against Russia, declared admissible in June 2009 and December 2011 respectively, indicate that there is life in it yet. For the first 30 years, the Strasbourg institutions received an annual average of only 800 individual applications. But, from the mid-1980s onwards, things began to change dramatically and, by the late 1990s, it was clear that the individual application rate had reached crisis proportions. This was due to three main factors. First, following the end of the Cold War, there was a huge expansion in the number of states belonging to the Council of Europe, from a mere ten in 1950 to 47 by the end of the first decade of the twenty-first century, including all the former communist states of Central and Eastern Europe except Belarus. A combined population of 800 million was thereby brought under the Court's jurisdiction. Second, Protocol No 11 made the right of individual petition obligatory on all Member States. Third, the ECHR is now much better known by lawyers and by the general public throughout Europe.

However, by 2000, Protocol No. 11 was already officially recognised as inadequate, not least because the consequences of the post-communist enlargement had not been adequately anticipated. In May 2004 another modest reform package, Protocol No. 14, was unanimously endorsed by all states parties. But, as a result of a delay in ratification by the Russian parliament, it did not come into effect until 1 June 2010. Amongst other things, Protocol No. 14 enables decisions regarding the admissibility of individual applications to be taken by "single judge formations", and for cases to be judged on the merits by three-judge committees where the Convention has patently been violated. The existing admissibility tests are preserved and a new one added. As before, individual applications can be ruled inadmissible if the applicant (including legal persons and non-governmental organisations) was not a victim of a Convention violation, redress has not been sought through the national legal system as far as it could have been taken ("exhaustion of domestic remedies"), more than 6 months have elapsed between the last national decision on the matter and formal application to Strasbourg, the complaint is substantially the same as one already examined, it is incompatible with the Convention, it is an abuse of process, and/or it is "manifestly ill-founded" (it obviously has no hope of being settled in the applicant's favour). But since Protocol No. 14 came into effect, the ECtHR can also reject a complaint as inadmissible, where no significant disadvantage has been suffered and the issue has been "duly considered" by a domestic tribunal, unless respect for human rights requires it to be heard (New Art 35(3)(b)). It has been estimated that the combined effect of both single-judge formations and the new three-judge committee procedure for manifestly well-founded complaints will enhance the Court's case processing efficiency by 20–25% (Committee of Ministers 2009, 3). The ECtHR has also sought to manage its mushrooming workload by prioritising applications according to their seriousness and urgency.

By the end of 2011 the annual individual application rate had reached 64,500. Over 150,000 cases were also awaiting a decision about admissibility, 61.1 per cent

of which had been lodged against five states: Russia (26.6 per cent), Turkey (10.5 per cent), Italy (9.1 per cent), Romania (8.1 per cent), and Ukraine (6.8 per cent) (European Court of Human Rights 2012(a), 7, 5). Some 95% of individual applications are rejected as inadmissible (European Court of Human Rights 2011(a), 155), but over 90% of those which are judged on the merits result in a finding of at least one violation (European Court of Human Rights 2011(b)). Every month, the gap between the influx of new applications and their disposal increases by over 1,000 cases (European Court of Human Rights 2012(b), 4).

All admissible inter-state and individual applications – provided they have not been struck off or settled summarily by the new committees of three judges – are resolved either by friendly settlement or full adjudication of the merits. In inter-state cases this is effectively a diplomatic process, while in individual cases friendly settlements typically involve offers of money by the respondent state, some other benefit (for example a residence permit the applicant claims to have been deprived of by the alleged violation), and sometimes an undertaking to make legislative or policy changes. Between 1 November 1998 and 31 December 2010, 4,604 applications (1% of the total number formally received and 30% of those ruled admissible) were struck out by decision or judgment following friendly settlement (ECtHR 2011(a), 135; Keller et al. 2010).

Most admissible applications, not resolved by friendly settlement or struck off for other reasons, are judged on the merits by Chambers of seven judges. Between 1959 and 1999 the Court delivered fewer than 1,000 judgments, yet by the end of December 2011 the figure had risen to over 14,000 (European Court of Human Rights 2012(c), 12). Nearly 70% of the Court's judgments concern clear cut violations, mostly stemming from the same systemic problem in the respondent state already condemned in an earlier judgment (Committee of Ministers 2009, para. 16). Of the total number of judgments delivered between 1999 and 2004, only an annual average of 86 out of 670 (13%) were of "high importance" (European Court of Human Rights 2005, 7). Nearly half the Court's judgments between its establishment in 1959 and 2011 concern four states: Turkey (2, 747), Italy (2, 166), Russia (1, 212) and Poland (945) (European Court of Human Rights 2012(a), 6). Up to the end of 2009, the provisions of the Convention most frequently found to have been violated were the right to fair trial under Article 6 (47.5% of judgments finding at least one violation, over half of which concerned excessive length of proceedings), the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 (14.6%), and the right to liberty and security under Article 5 (10.7%) (European Court of Human Rights 2010, 18). Where the application raises a serious question affecting the interpretation of the ECHR, or where there is a possibility of a departure from previous case law, a Chamber may, subject to the consent of the parties, relinquish jurisdiction to a Grand Chamber of 17 judges. But this is extremely rare, occurring, for example, in an average of only five cases a year between 2002 and 2005, out of an annual average of around 850 judgments (Mowbray 2007, 507, 509; ECtHR 2011(a), 137). In urgent cases, where serious consequences such as death or torture could ensue before the matter is resolved, a Chamber may also "indicate to the parties any interim measure which it considers should be adopted" (Rule 39, Rules of Court).

The number of such requests has increased greatly in recent years, reaching 3,680 in 2010, mostly in cases involving imminent expulsion or extradition, 1,440 of which were granted (ECtHR 2011(a), 12). The Court now regards interim measures as binding on respondent states with, in most cases, failure to comply constituting a violation of the obligation under Article 34 ECHR not to hinder the right of individual application (*Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25). Such breaches are, however, uncommon. In a speech delivered at the opening of the judicial year, on 28 January 2011, the then President of the ECtHR, Mr Jean-Paul Costa, warned that these developments were "threatening to turn" the Court "into a first-instance immigration tribunal while also taking up an excessive portion of its time and human resources, to the detriment of the examination of cases on the merits" (http://www.echr.coe.int/NR/rdonlyres/0488067D-5495-4539-B43C-05666973826D/0/20110128_AUDIENCE_Discours_Costa_EN.pdf, 5).

In judging the merits, the primary issue the ECtHR has to consider is whether the respondent state has violated the ECHR. This involves interpreting the alleged misconduct in context and determining what the sparse and abstract statements of the relevant rights mean. While a handful of Convention rights, such as the right not to be tortured, are subject to no express exceptions and cannot be suspended in time of war or public emergency threatening the life of the nation under Article 15, the remainder are subject to various express limitations and can also be suspended under Article 15. In reaching judgment, the ECtHR also has at its disposal a dozen or so "principles of interpretation" not found in the text of the Convention itself but identified and developed in the process of litigation (Greer 2006, Ch 4). These are rooted in the "teleological principle", derived from Articles 31–33 of the Vienna Convention on the Law of Treaties 1969 which requires the text of international treaties to be interpreted in good faith according to the ordinary meaning of their terms in context – unless any special meaning was intended by the parties – and in the light of the overall object and purpose of the treaty in question. But, unlike most international treaties which are merely reciprocal agreements between states, the ECHR is a "constitutional instrument of European public order in the field of human rights", which creates a "network of mutual bilateral undertakings … [and] … objective obligations" (*Ireland v UK* (1980) 2 EHRR 25, para 239; *Austria v Italy* (1961) YB, 116, 138). The principle of effective protection of individual rights holds that given the primary function of the ECHR, rights should be interpreted broadly and exceptions narrowly. This is linked to the principle of non-abuse of rights and limitations which prohibits states and others from undermining the protection of rights by abusing either the rights themselves or their limitations. However, the principles of implied rights and implied limitations allow some scope for extensions of rights, and also inherent but not extensive restrictions, to be read into the text. The principle of positive obligations allows the Court to interpret the ECHR in a manner which imposes obligations upon states actively to protect Convention rights and not merely the negative obligation to avoid violating them.

Armed with the principle of autonomous interpretation, the Court defines for itself some of the Convention's key terms in order to prevent states conveniently re-defining their way around their obligations, for instance, by re-designating crimes

as merely 'administrative infractions'. Similarly, the principle of evolutive (or dynamic) interpretation enables outmoded conceptions of how terms in the Convention were originally understood to be abandoned when significant, durable, and – according to the principle of commonality – pan-European changes in the climate of European public opinion have occurred, for example that homosexuality and transsexuality are aspects of private life requiring respect from public authorities. The twin principles of subsidiarity and review indicate that the role of the ECtHR is subsidiary to that of Member States and is limited to determining whether the Convention has been violated rather than acting as final court of appeal or fourth instance. The principle of proportionality, closely allied with the margin of appreciation, limits interference with Convention rights to that which is least intrusive in pursuit of a legitimate objective. The margin of appreciation, typically described as a "doctrine" rather than a principle, refers to the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their Convention obligations. Pervasive in the ECHR are the closely related principles of legality, the rule of law, and procedural fairness – which seek to subject the exercise of public power to effective, formal legal constraints in order to avoid arbitrariness – and the principle of democracy, which assumes that human rights flourish best in the context of democratic political institutions and a tolerant social climate.

Judgments against respondent states typically declare only that the ECHR has been violated because the ECtHR considers itself less well placed than national authorities to be more prescriptive about what precisely should be done to correct it. Even if the ECtHR decides that the ECHR has been violated, an award of compensation is not automatic and, although some general principles have been identified, the relevant case law is not consistent (Harris et al. 2009, 856). Recently, in a number of so-called "pilot judgments", the ECtHR has shown greater willingness to indicate the type of remedial action required, primarily in order to stem floods of similar complaints to Strasbourg (Leach et al. 2010). For example, in *Broniowski v Poland* the Grand Chamber held that the applicant's right to the peaceful enjoyment of possessions under Article 1 Protocol No. 1 had been violated by the expropriation of his property coupled with the payment of inadequate compensation. While in itself not an unprecedented outcome, the judgment added that, since this violation "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice … which has affected and remains capable of affecting a large number of persons", appropriate measures were required to secure an adequate right of compensation or redress, not simply for the particular applicant, but for all similar claimants ((2005) 40 EHRR 495, paras. 189, 200). Subsequent applications complaining of violations stemming from the same state of affairs can, therefore, be directed back to the Polish authorities to settle according to the terms of the *Broniowski* judgment without the ECtHR having to reconsider the merits afresh in each case (Leach et al. 2010, 178).

A Chamber's verdict, whether unanimous or by majority, usually disposes of the matter. However, exceptional cases may be referred by one or more of the parties to a Grand Chamber within 3 months of the original judgment. Technically, such referrals are not "appeals" but "re-hearings" and are conditional upon the approval of the

Grand Chamber's five-judge "admissibility" panel which is obliged to accede to them where the case in question raises, according to Article 43(2) ECHR, "a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance". Judgments of Chambers become final under three circumstances: when the parties declare that they will not request a reference to the Grand Chamber, 3 months after the date of judgment if a reference to a Grand Chamber has not been made, or where a reference to a Grand Chamber has been made but the five-judge panel has rejected it. Between 2002 and 2005 an annual average of 116 cases were referred to the Grand Chamber but 91% were rejected as inadmissible and, of the 23 judgments delivered, 13 confirmed the original verdict (Mowbray 2007, 512, 513, 518).

When the ECtHR delivers a judgment finding a violation, supervision of its execution passes to the Committee of Ministers which considers whether the respondent state's obligation under Article 46(1) ECHR, to "abide by the final judgment of the Court", has been discharged. This is a political process involving negotiation between respondent, and other member, states. Not surprisingly, the Court's workload problems are also mirrored in the enforcement process with about 3,000 cases scheduled for each session, only 20–40 of which are actually debated (Harris et al. 2009, 872). In the past, what the Committee regarded as sufficient evidence of execution varied from case to case with little apparent rationale (Tomkins 1995, 59–60). But it is now said to require more convincing evidence that the source of the violation has been effectively tackled (Lambert-Abdelgawad 2008, 37–38). When it is satisfied that any compensation has been paid, and that any other necessary measures have been introduced, the Committee of Ministers publicly certifies that its responsibilities under Article 46(2) ECHR have been discharged. This can take years, for example over eight-and-a-half in the notoriously protracted case of *Marcks v Belgium* which involved discrimination between legitimate and illegitimate children in the law of affiliation. States may find it difficult to correct the systemic source of the violation for various reasons, including: a lack of clarity in the Court's judgment, political problems, the daunting scale of the reforms required, managing complex legislative procedures, budgetary issues, adverse public opinion, the possible impact of compliance on obligations deriving from other institutions, and bureaucratic inertia (Steering Committee for Human Rights 2003, 34).

Protocol No. 14 facilitates the involvement of the ECtHR in the supervision of the execution of its own judgments in two ways, each activated by a two-thirds majority vote of the Committee of Ministers. First, where execution is deemed hindered by problems in determining what the judgment means, the Court may be called upon to provide further clarification. Second, the Committee will be able to refer to the Grand Chamber the question of whether the respondent state has complied with the original judgment. Under these arrangements, there will be no prospect of re-opening the original verdict or of financial penalties. But the impact these provisions will have remains to be seen. At the end of the supervision of the execution of judgments process, there is very little the Council of Europe can do with a state persistently in violation, short of suspending its voting rights on the Committee or expelling it from the Council of Europe, each of which is likely to prove counterproductive in all but the most extreme circumstances. Only one state,

Greece, has ever been expelled from the Council of Europe. But the military government at the time withdrew before this took effect. Greece rejoined when democracy was restored in 1974.

There have been two seminal inter-state cases against the UK in the ECHR's history. In 1956 and 1957, Greece complained to the Commission over alleged mistreatment by British forces in Cyprus of those suspected of involvement with the armed nationalist movement, AOKA (*Greece v United Kingdom* (1956–57) 2 YB 174). However, Cyprus gained its independence in 1960 before the issue could be considered by the Committee of Ministers. In 1971 Ireland also brought a case against the UK over the "five techniques" of interrogation used against selected internees as a counter-insurgency experiment in the Northern Irish "Troubles". The Commission found these amounted to torture, but the ECtHR disagreed. In a judgment delivered on 18 January 1978, it declared that they fell short of torture but amounted to inhuman and degrading treatment (*Ireland v United Kingdom* (1980) 2 EHRR 25). However, in March 1972, long before this verdict was reached, the British government accepted the conclusions of the minority report of an official domestic inquiry and announced that the practice would be discontinued.

The UK did not accede to the right of individual petition until 1966. Between then and 31 December 2006, a total of 11,994 applications against it were received by the Strasbourg institutions (Besson 2008, 56). However, the vast majority were ruled inadmissible and only 255 were settled by the ECtHR on the merits. From 1953 to 1999, the number of judgments by the ECtHR in British cases increased slowly but steadily: from less than a handful annually between 1975 and 1985, reaching an average of seven per year in the 1980s, 12 in the 1990s, and 34 in the 2000s. Half the judgments of the ECtHR in UK cases up to the mid-2000s were delivered between 2000 and 2006. The number of judgments rendered in cases against the UK since 2000 averages 22 per annum. The decline in the mid-2000s to between 15 and 20 has been attributed by some commentators to the increasing effectiveness of Convention rights in the UK's domestic legal system (Klug and Gordon 2010, 552; Besson 2008, 57), a matter returned to later. Of the 255 judgments against the UK, the majority (148) concern Article 6(1) and (3) ECHR, followed by 75 on Article 8 and 56 on Article 13 (Besson 2008, 57). Some of these have had an impact upon the European constitutional order and the issues raised have included: telephone tapping, closed-shop trade union practices, discretionary life sentences, corporal punishment, press freedom, parental rights of access to children, the treatment of terrorist suspects, suspects' right to silence, homosexuality and trans-sexuality, the status of frozen embryos, discriminatory immigration rules and inhumane extradition procedures (Besson 2008, 57–58). The UK has one of the highest official violation rates before the ECtHR, ranking sixth in the period 1960–2000 and fifth between 1999 and 2000 (Greer 2006, 81) and 13th between 1 November 1998 and 31 December 2011 (Greer 2012). This has been attributed to the fact that complainants could not litigate alleged violations of the Convention in domestic courts before the Human Rights Act 1998 came into effect on 2 October 2000, the lack of comparable justiciable national constitutional rights, some problems with anti-terrorist and immigration laws, and a particularly well organised human rights movement in both civil society and the legal profession (Besson 2008, 57).

11.3 The Human Rights Act 1998

Since the UK is a "dualist" state, international treaties only take effect in domestic law by Act of Parliament. However, although British officials were instrumental in drafting the ECHR, the post-Second World War Labour government was suspicious of incorporating the Convention into domestic law, and also of granting the right of individual petition to Strasbourg, on the grounds that the sovereignty of Parliament would be compromised and the common law subjected to supervision by judges from an alien legal tradition (Marston 1993; Lester 1984; Lord Lester 1996, 100). However, the incorporation debate rumbled on largely beneath the surface of British political and legal life in the form of pamphlets and discussion papers from lone activists and campaigning organisations, and occasional attempts by MPs to persuade Parliament to pass appropriate legislation (Zander 1997, Ch. 1). Broadly speaking, three viewpoints, transcending the traditional demarcation lines of the established political parties, emerged. Some argued for direct incorporation of the ECHR as the most direct and straightforward option, making the rights it contains directly litigable before British courts (Bingham 1996, 1–11; Dworkin 1996, 59–77). Others, whilst not wholly opposed to this alternative, advocated a tailor-made British Bill of Rights which would be informed by, but not limited to, existing international human rights instruments (Wadham 1996, 25–36). Yet others opposed both alternatives; either on the traditional ground that human rights were already adequately protected by UK law (Lyell 1997; Samuels 1997) – or at least that improvements could best be achieved by issue-specific legislation – or because of concerns that a bill of rights would give judges too much power at the expense of the popular sovereignty exercised by Parliament (Ewing and Gearty 1990, 262–275).

The lack of official endorsement by the Conservative and Labour parties throughout the half century following the Second World War condemned the various proposals to remain discussion pieces rather than become blue-prints for change (Greer 1999, 4). In 1973 the UK joined the European Economic Community and, from then on, it increasingly felt the impact of EC law which takes precedence over conflicting elements in domestic law. Although EC law was then largely focused on issues other than human rights, it nevertheless included a strong commitment to the elimination of discrimination, and as the European Court of Justice increasingly endorsed principles found in the ECHR, commentators and judges observed that the ECHR was becoming part of UK law by the back door.[2] The autocratic temperament of the Conservative governments of the 1980s and 1990s gave the incorporation movement added impetus drawing an increasing number of senior judges and other leading public figures to the cause. Eighteen years of exclusion from office also prompted fresh thinking on a range of issues by the British Labour Party. On 23 October 1997, following the Labour landslide in the general election that May, the Human Rights Bill received its first reading in the House of Lords. According to the

[2] E.g., Lord Slynn, HL Debs., 26 November 1992, col. 1095 et seq.

White Paper which accompanied publication of the bill, the change of heart on the part of the Labour leadership was due to the persuasiveness of two arguments which had been particularly difficult to refute over the preceding years (White Paper 1997, paras. 1.4 & 1.14). First, it is difficult to justify allowing applicants to pursue human rights claims in Strasbourg, with all the extra expense and delay this entails, which they cannot litigate effectively at home. Second, the view that British law already fully complied with the ECHR had been discredited by the fact, as already noted, that by the late 1990s, the UK had a high official violation rate, in fact the sixth highest out of 24 western European states.

The scope of the Human Rights Act 1998 (the "HRA") is defined by s. 1(1) to include those "Convention rights" found in Articles 2–12, and in Article 14 of the Convention, plus those in Articles 1–3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol. These are to be read with Articles 16–18 of the Convention and are subject to any designated derogation or reservation in the Act itself (see below). The HRA can be amended, subject to subsequent Parliamentary approval, by order of the Secretary of State "as he considers appropriate", in order to accommodate the effect of a protocol the UK has ratified, or has signed with an intention to ratify (HRA, s. 1(4) & (5); s. 20(4)). Article 1 ECHR (the obligation to protect ECHR rights) and Article 13 ECHR (to provide an effective national remedy) were excluded from the HRA because its enactment was itself deemed to fulfill these obligations (Hoffman and Rowe 2010, 110).

As originally enacted, only "persons" including legal persons claiming to be victims or potential victims as defined by Article 34 ECHR, could bring legal proceedings for alleged Convention violation against national public authorities in the UK (HRA, s. 7 (1) and (7)). This precluded third parties from bringing public interest actions as they can in other judicial review proceedings where sufficient interest can be shown. However, the Equality Act 2006, which amongst other things established the Equality and Human Rights Commission, enables the Commission to initiate proceedings under the HRA on behalf of others.

The HRA makes it unlawful for "public authorities" to "act in a way which is incompatible with a Convention right" (HRA, s. 6 (1)). The term "public authority" is not defined. But it expressly includes courts and tribunals (thereby requiring the common law to be rendered Convention compliant) and "any person certain of whose functions are functions of a public nature" – so-called "hybrid" public authorities (HRA, s. 6 (3)(b)). The private acts of public authorities are not included, nor is it unlawful for a public authority to violate Convention rights if it was acting under primary legislation or under secondary legislation which cannot be interpreted or applied in a manner compatible with the ECHR. The ambiguity of the distinction between public and non-public (or private) institutions found in the HRA is common in documents of this kind (Marshall 1998, 79). It may even indicate a deliberate intention to entrust the matter to the courts to resolve on a case-by-case basis. When the HRA was passed, there was much debate about whether the judiciary would consistently draw the distinction in a manner properly reflecting what is at stake. In a broad sense, "public" can mean either "pertaining to people generally or collectively", or, more narrowly, "governmental" or "official". In the House

of Lords Second Reading debate, for example, Lord Donaldson suggested that supermarket chains such as Safeways might qualify as ‘public authorities’ (HL Debs, 3 Nov. 1997, col. 1293). And, when the Bill was at the House of Lords Committee stage, the Lord Chancellor, Lord Irvine of Lairg, said that a physician treating an NHS patient would be a “public authority” under the legislation, but the same doctor treating a patient under a private health care scheme would not (HL Debs, 24 Nov. 1997, col. 811). While the ECHR is generally restricted to enabling rights to be enforced against the state, applicants to Strasbourg have, nevertheless, successfully argued that, although their rights may have been infringed by a private individual or a non-public organisation, the state itself should be held to have violated the Convention for having failed to offer adequate protection, for example by providing appropriate legislation. This is not directly possible in domestic courts in the UK since Parliament is not a public authority for the purpose of the HRA.

In spite of much debate both inside and outside, Parliament, and some judicial decisions on the point since the HRA came into force, it is still not wholly clear precisely which agencies and institutions are to be regarded as “public authorities” for the purposes of the Act (Williams 2011, 139). It has been judicially confirmed that the issue should be settled by reference to a cluster of characteristics rather than by any single factor (*Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All ER 604; *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366). A private body does not become a public authority merely because it discharges a function which would be public if performed by a public authority, nor if it acts in the public interest on a non-commercial basis. But it is more likely to be deemed a public body if it is subject to judicial review, derives its authority from statute, and is controlled by another authority whose ‘public’ character is not in question. It initially proved difficult, therefore, to apply the HRA to non-state service providers in respect of some public functions “contracted out” to them by public authorities, for example residential care (Craig 2002). However, s. 145 of the Health and Social Care Act 2008 now makes it clear that anyone who provides “accommodation together with nursing or personal care, in a care home”, pursuant to relevant statutory provisions, is exercising functions of a public nature for the purposes of s. 6 of the HRA.

Claims that Convention rights have been violated by public authorities can be made in any legal proceedings, including appeals, and in legal proceedings brought expressly for this purpose in an “appropriate court or tribunal” (HRA, s. 7(1)(a)). Courts and tribunals determining issues relating to Convention rights under the HRA “must take into account” relevant decisions and opinions of all the Strasbourg institutions, viz. the now defunct European Commission of Human Rights, the ECtHR and the Committee of Ministers (HRA, s. 2(1)). While the HRA does not say how this is to be done, the White Paper states that, unlike decisions of the European Court of Justice applying EU law, the Strasbourg case law is to be considered persuasive rather than binding authority (White Paper 1997, para. 2.4). Complaints that courts have breached ECHR rights may only be brought through the appeals process, by an application for judicial review, or in such other forum as may be prescribed by rules.

Where a public authority is found to have breached an ECHR right, the court or tribunal concerned can make such an order, or grant such relief or remedy as it considers just and appropriate within its powers. Damages may only be awarded by those courts which have power to do so, and will not be available in respect of judicial decisions made in good faith, except in cases of arrest and detention in violation of the ECHR. Where other forms of relief, or other remedies, have been granted, no award of damages is to be made unless the court is satisfied that it is necessary to afford just satisfaction to the aggrieved party taking all the circumstances of the case into account. The existing recourse to Strasbourg has not been touched by the HRA and, therefore, remains as a final recourse for aggrieved applicants.

If certain rights are deemed fundamental, as a bill of rights suggests, it appears to follow that they ought to enjoy special entrenched status, placed somehow beyond the scope of repeal or at least easy repeal, in the constitutional and legal systems of which they are a part. However, given the cornerstone doctrine of Parliamentary supremacy in the UK's constitution, the HRA could not be entrenched. It, therefore, remains technically capable of being repealed in its entirety by a subsequent statute, providing this is Parliament's clear intention. The HRA also has four distinctive features designed to avoid repeal by stealth or by accident. First, draft legislation is scrutinised by the Joint Parliamentary Committee on Human Rights and by the Equality and Human Rights Commission. Commentators marking the tenth anniversary of the HRA agreed that the elimination of possible Convention violations in both the policy and legislative drafting processes have been among the Act's most significant achievements (Hunt 2010, 603; Gearty 2010, 582–8, 585; Straw 2010, 576–81, 580).

Second, s. 19 HRA requires Ministers responsible for presenting bills to Parliament to make a written and published statement before the Second Reading, either to the effect that the proposed legislation is compatible with Convention rights ("a statement of compatibility"), or that the government wishes the House to proceed even though such an assurance cannot be given. To date only one government bill, which became the Local Government Act 2000, has been enacted without a statement of compatibility (Lord Bingham 2010, 569).

Third, s. 3 creates a general obligation for primary and secondary legislation, whether enacted before or after the HRA came into force, to be read and given effect to, "so far as it is possible to do so", in a way which is compatible with Convention rights. Where this is not possible, the validity, continuing operation and enforcement of such legislation remains unaffected. There has been much debate about this requirement and senior judges have been unable to agree about how to apply it. Broadly speaking, three approaches have been considered as ways in which the courts might render statutory provisions ECHR-compliant. "Reading in" refers to words or phrases being deliberately added, "reading out" means words or phrases being ignored, while "reading down" means words or phrases being given a narrower rather than broader meaning. None of these techniques is particularly controversial, within limits, when applied to pre-HRA legislation. "Reading down" is, arguably, the least constitutionally controversial for post-HRA legislation since it merely involves choosing between several possible interpretations. However, while the courts have sometimes read words into statutes in order to avoid having to find the

provision incompatible with the ECHR, the vast majority of HRA cases in the decade since the Act came into force have concerned executive action rather than legislation (Singh 2010, 589–592, 589).

Fourth, if, in any proceedings in the high court or any superior court, a provision of primary legislation is found to be incompatible with an ECHR right, the court may issue a "declaration of incompatibility" (HRA, s. 4(1) & (2)). These do not affect the validity, continuing operation, or enforcement of such legislation, are not binding on the parties, and as such are not regarded by the ECtHR as an effective domestic remedy. Where a domestic court or the ECtHR has declared specific statutory provisions incompatible with Convention rights, s. 10 HRA enables them to be amended, subject to subsequent Parliamentary approval, by remedial order made by a Minister where he or she considers there are "compelling reasons" for doing so. When the HRA was passed, it was predicted that judicial declarations of incompatibility would be rare since they would offer little to litigants and the courts would do their utmost to avoid having to issue them (Duffy 1998, 103). In fact, there have only been 26 in the 10 years the Act has been in force, most concerning pre-HRA legislation, 18 of which have not been overturned on appeal. In only three has Parliament chosen not to resolve the incompatibility (Gearty 2010, 584; Singh 2010, 590). The HRA has also had a very marginal impact on the daily business of the courts, featuring, for example, in only 2% of reported appellate cases, and around 30% of House of Lords judgments where it has substantially affected the result in about one tenth (Department for Constitutional Affairs 2006, 10).

The HRA extends into domestic law the permission the ECHR gives states to enter reservations with respect to their obligations and to derogate from them under Article 15. A reservation is a statement made at the time of signature or ratification of a treaty – the process by which it is formally approved by the signatory state – that specific elements of domestic law are incompatible with one or more of its provisions. The UK has entered only one reservation to the ECHR – to Article 2 of the First Protocol. The effect is to affirm that the UK accepts an obligation to respect the right of parents to have their children educated in conformity with their religious and philosophical convictions, but only in so far as this is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. While it is now too late for the UK to make any further reservations to the ECHR itself, it may, nevertheless, do so in respect of the three substantive protocols – Nos. 4, 7 and 12 – which it has not yet ratified. Section 15 (1)(b) of the HRA empowers the Secretary of State to "designate", and lay before Parliament, any other such reservation by order, thus bringing it within the scope of the Act. Reservations are to be reviewed by the "appropriate Minister" every 5 years and a report made to Parliament (s. 17).

Derogation is a formal suspension of rights permitted by Article 15 of the Convention "in time of war or other public emergency threatening the life of the nation". But even in these circumstances, a handful of rights must still be respected: the right not to be arbitrarily killed; the right not to be subjected to torture, or to inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; and the right not to be punished without law. The suspension of other

Convention rights is subject to a strict necessity test and there is an obligation to keep the Secretary General of the Council of Europe informed about the measures taken, with reasons, and when they are no longer in operation. The HRA requires any derogation to lapse after 5 years, extendable by the Secretary of State for up to two further periods of 5 years. On 23 December 1988, the UK entered a derogation from Article 5(3) ECHR in respect of the extended detention provisions then found in anti-terrorist legislation relating to Northern Ireland which were subsequently lifted in February 2001. But in November 2001, in the aftermath of the events of September 11, a further derogation was entered from Article 5(1) in respect of the extended powers of arrest and detention under Part IV of the Anti-Terrorism, Crime and Security Act 2001. However, this was also withdrawn on 16 March 2005 following the decision of the Judicial Committee of the House of Lords, the precursor to the UK's Supreme Court, in (*A v Secretary of State for the Home Department* [2004] UKHL 56), which held that these powers were discriminatory and disproportionate and, therefore, violated the ECHR in spite of the derogation.

Prior to the publication of the Human Rights Bill, the Labour government seemed to favour creating a Human Rights Commission to provide extra-parliamentary supervision for the regime it proposed. But the HRA made no provision for such an institution, an omission which greatly disappointed human rights NGOs. In March 1999 the Northern Ireland Human Rights Commission was created in accordance with a commitment made in the Belfast (or "Good Friday") Agreement 1998 which heralded the end of 30 years of violent political conflict in Northern Ireland. And, as already noted, in 2006 the Equality Act established a single Equality and Human Rights Commission with responsibility for the promotion and enforcement of equality and non-discrimination law, including scrutinising draft legislation, in England, Scotland and Wales, except for issues falling within the remit of the Scottish Human Rights Commission established by the Scottish parliament in 2006 (Equality Act 2006, s. 7).

The two main issues relating to the impact of the ECtHR on the UK's three legal systems – one for England and Wales, another for Northern Ireland, and a third for Scotland – both before and after the enactment of the HRA, concern the UK's response to adverse judgments and the impact of the ECtHR's jurisprudence on British courts. First, prior to the HRA, the UK largely met its binding international legal obligations to amend laws the ECtHR found in violation of the ECHR. But subsequently, there have been long delays in passing remedial legislation (Besson 2008, 65, 67). Second, although the ECHR was not a binding authority for British courts until the HRA came into force, judges sometimes referred both to it and, more rarely, to the jurisprudence of the ECtHR as an aid to construction of ambiguous legislation, to help resolve an ambiguity in the common law, or to assist with the exercise of judicial discretion (Hoffman and Rowe 2010, 52–53). This practice became more common from 1988 onwards (Besson 2008, 48). Similarly, while in the 1970s references to the ECHR in the judgments of British courts were also short and fleeting, by the 1990s they had become more detailed and thorough. Judges thereby gained valuable experience in using the ECHR as a tool for the interpretation of national law, even before it was formally incorporated by the HRA and also used

it to quash subordinate, but not primary, legislation found to be in violation of the Convention (Besson 2008, 48–49).

As already indicated, since the HRA came into force, s. 2 has obliged British courts to “take into account” the jurisprudence of the Strasbourg institutions. Krisch maintains that, as a result, the UK’s courts have “come to refer to the Convention and to ECtHR judgments with a frequency and diligence hardly matched anywhere in Europe” (Krisch 2008, 202). Klug and Wildbore distinguish three approaches (Klug and Wildbore 2010). Under the “mirror approach” British courts, acting as if effectively bound by relevant Strasbourg jurisprudence, use it as “both a floor and a ceiling” (Klug and Wildbore 2010, 624). Three further distinctions are made in this category: those cases where there is clear established Strasbourg jurisprudence to follow; those where there is (or the British court thinks there should be) a pan-European consensus on the meaning of given ECHR rights; and those where it is open to an unsuccessful claimant to appeal to Strasbourg. Taking the second, the “dynamic approach”, the Strasbourg case law is used as a floor but not a ceiling in two circumstances: where the margin of appreciation applies and where there is no relevant Strasbourg jurisprudence beyond broad principles. Third, the “municipal approach” refers to those cases where British courts have declined to follow Strasbourg, preferring instead to develop their own domestic interpretation in three circumstances: where there is no pan-European consensus on the issue or where the margin of appreciation applies; where the British court believes the Strasbourg judicial institutions had a poor appreciation of domestic law, the UK constitution, or the facts of the case; and where the British court believes it is bound by precedent set by another national court with greater authority.

In the 10 years or so the HRA has been in force, it has rarely been far from controversy. Those on the left of the political spectrum in the UK tend to regard it as a failure because they believe it has changed so little, while others on the political right regard it as a failure because they think it has changed too much. Certain sections of the right-wing press have, for example, been campaigning for the repeal of the HRA on the grounds that it has tilted the balance in favour of criminals, foreigners, minorities, immigrants etc. at the expense of the human rights of the long-suffering silent majority. In 2011, the coalition government set up a commission to investigate the creation of a British bill or rights building on ECHR obligations. Its report is expected at the end of 2012.

11.4 Conclusion

We are now in a position to answer the questions raised in the introduction. As an international treaty, the ECHR has been binding on the UK in international law since the UK ratified it in 1951. From then onwards, other states could, but rarely did, bring the UK to the European Commission of Human Rights, and later to the ECtHR, alleging a breach of Convention obligations. From 1966 onwards, the UK could also be brought before the Commission, and later to the ECtHR, by aggrieved individuals. The Commission’s opinions were non-binding. By contrast, a judgment

of the ECtHR, in both inter-state and individual applications, binds the member state against which it has been delivered but does not legally mandate any specific national legal or other solution beyond compensating the individual applicant if the Court deems this appropriate. The enforcement of the ECtHR's judgments is a political matter involving negotiation between the respondent state and the Committee of Ministers.

As a result of the HRA, the ECHR has become legally binding in UK law, enabling victims, and more recently the Equality and Human Rights Commission, to bring complaints about Convention violation by public authorities before national courts. British courts are also required to respect the ECHR in all other cases where it might be relevant. But, apart from judgments against the UK itself, the jurisprudence of the ECtHR is of persuasive rather than binding authority. The HRA also remains faithful to the cornerstone of the British constitution – the doctrine of Parliamentary supremacy – and could be repealed, partially or in its entirety, by a simple Act of Parliament providing this was the clear intent. Nevertheless, as a highly significant piece of constitutional legislation, the HRA has subtly altered the balance of power between courts, legislature and executive, introducing, in effect, an institutional dialogue at the heart of the British constitution (Hoffman and Rowe 2010, 391; Hickman 2008, 84–100).

Given the "margin of appreciation" doctrine developed by the ECtHR, and the fact that British courts are not obliged by domestic law to follow Strasbourg interpretations of ECHR rights in all circumstances, there can be no doubt that the same human right can be judicially interpreted in a range of equally legitimate ways. But this does not undermine its "universality" because "universality" refers to the core interests and values a right enshrines and not to all possible outcomes in all possible situations. Different circumstances may, quite properly, affect how any right is weighed against competing rights or wider public interests. The extent to which incorporation of the ECHR has materially prevented the violation of Convention rights by public authorities in the UK is difficult to determine. But a positive indicator is the declining rate of adverse judgments by the ECtHR since the effects of the HRA began to be felt.

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Chapter 12
The Binding Effect of the ECHR in the United Kingdom – Views from Scotland

Jim Murdoch

12.1 International Approach

International legal texts are not part of domestic law in the United Kingdom[1] directly; but these may be relied upon as an informal source of domestic law (e.g. in respect of statutory interpretation and the development of the common law, and in administrative law in assessing the reasonableness of challenged actions of public authorities). Unless transformed by an Act of Parliament (i.e. Parliament may pass a law which mirrors the terms of a treaty), treaties are not a formal source of law – but it is not the treaty but the statute that is the formal source of law. Thus the statute may incorporate the treaty into domestic law. International legal norms thus do not prevail over national laws, but the courts will try to construe the legislation seeking to 'transform' a treaty in a way which does not put the United Kingdom in breach of its international obligations. In other words, international law is not a formal part of domestic law – but may be relied upon as an informal source of law. Some reference can thus be made by domestic courts to universal texts.

The United Kingdom, of course, is a member of the European regional fundamental rights system. In particular, the European Convention on Human Rights (the ECHR) has a significant importance for domestic law. International law may also play a part in the development of regional human rights protection which in turn has a direct relevance in domestic law. In accordance with the Vienna Convention, Articles 31(2) and (3), the European Convention on Human Rights (ECHR) has to be interpreted

[1] Please note that this chapter concentrates upon Scots law. Chapter 11 covers the situation in the United Kingdom as far as international human rights norms are concerned. This chapter seeks to address the particular perspective of Scots law on key questions. The text draws upon Lord Reed and Murdoch, J (2011) *Human Rights Law in Scotland* (3rd edn), Bloomsbury, Edinburgh.

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in the light of any relevant rules and principles of international law applicable in relations between the contracting states. Reference to such treaties and their interpretation can influence not only the European Court of Human Rights in Strasbourg, but also – through the recognition of human rights as 'general principles' of EU law and now by virtue of the Treaty of Lisbon – the Court of Justice of the European Union in Luxembourg. Other international instruments may therefore be relevant to the interpretation of the ECHR. More generally, the Convention is to be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Al-Adsani v United Kingdom* [GC] 2001-XI, 60). In practice, international instruments are often referred to by the European Court of Human Rights and can be an important source of guidance, whether or not they have been signed or ratified by all or most or any of the Council of Europe states[2]; or are binding in international law. These have included United Nations instruments.[3] A related question is whether the obligations of a contracting state under the European Convention on Human Rights may be qualified by its obligations under some other international treaty. Article 103 of the UN Charter, in particular, provides that in the event of a conflict between the obligations of the members of the UN under the Charter and their obligations under any other international instrument, their obligations under the Charter shall prevail. This was applied in R (Al Jedda) v Secretary of State for Defence [2008] AC 332, where the House of Lords held that British forces could lawfully exercise a power of detention without trial in Iraq, authorised by UN Security Council resolutions, but must ensure that the detainees' rights under the ECHR, Article 5 were not infringed to any greater extent than was inherent in such detention.

12.2 Regional Protection Level

The European Court of Human Rights ('the Strasbourg Court') may make reference to other Council of Europe human rights initiatives (e.g., the European Social Charter in respect of economic and social rights, the Convention for the Prevention of Torture, etc. – and the work of the Committee, the 'CPT'). In recent years, the Court of Justice of the European Union has developed a practice of citing the case law of the European Court of Human Rights. The Strasbourg Court in turn has acknowledged the extent of review by the Court of Justice for compliance with the ECHR, and has treated that review as limiting the need for it to carry out an independent

[2] E.g. Marckx v Belgium (1979) Series A no 31, 41.

[3] E.g. Al Adsani v United Kingdom 2001-XI [GC] (UN Convention against Torture), International Labour Organisation instruments (e.g. Van der Mussele v Belgium (1983) A 70 (ILO Convention on Forced or Compulsory Labour), EU instruments (Vilho Eskelinen v Finland 2007-XX [GC] (EU Charter on Fundamental Rights)) and other international conventions (e.g. Marckx v Belgium (1979) A 31 (Brussels Convention on the Establishment of Maternal Affiliation of Natural Children)).

scrutiny. In its Bosphorus judgment (Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland [GC] 2005-VI), concerned with a complaint brought against a Member State whose implementation of an EC Regulation was alleged to have violated rights guaranteed under the ECHR, the Court stated that state action taken in compliance with the obligations flowing from membership of an international organisation is justified as long as the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the ECHR provides. The Court found that the system of protection of fundamental rights in EU law could be considered equivalent to that of the ECHR system. Further strengthening of the two European systems – with consequences for domestic law – is likely. Article 6 of the Treaty on European Union (TEU), as amended by the Treaty of Lisbon (given effect by the European Union (Amendment) Act 2008), contains three important provisions. First, Article 6(1) provides that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, 'which shall have the same legal value as the Treaties'. Secondly, Article 6(2) provides that the EU shall accede to the ECHR. Thirdly, Article 6(3) provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law. The latter provision reflects the previous text of the TEU and the jurisprudence of the Court of Justice.

The ECHR 'creates, over and above a network of mutual, bilateral undertakings, objective obligations [which] benefit from a "collective enforcement"' (Ireland v United Kingdom (1978) Series A no 25, 239). It is however up to each state to decide the extent of the obligations it wishes to accept, and thus the level of human rights protection available to individuals can vary between European states, as the level will not only be dependent upon state ratification of optional protocols, but also any declarations or reservations made at the time of ratification and any subsequent use of the right to derogate under Article 15; and in addition, the recognition of a 'margin of appreciation' by the Court will influence the practical level of domestic human rights protection.. The United Kingdom is yet to ratify Protocols nos 4, 7 and 12, for example. The ECHR provides for dispute settlement via a right of individual petition to the ECtHR. ECHR, Article 35 details the criteria for admissibility of an application lodged by an individual. The vast majority of registered applications are declared inadmissible, and thus fall at this stage of proceeding: in 2009, for example, some 93% of admissibility decisions adopted involved applications being declared inadmissible (with another 3% being struck out) (European Court of Human Rights Annual Report 2009 (2010), 139). A decision declaring an application inadmissible is final. The principal issues considered in determining admissibility include: prior exhaustion of available domestic remedies; lodging an application within 6 months of the taking of the final decision; and compatibility ratione temporis, ratione loci, ratione personae, and ratione materiae. In addition, the Court will not deal with any application which is anonymous, or is substantially the same as a matter that has already been examined and which contains no relevant new information, or is 'manifestly ill-founded' or considered an abuse of the right of petition. A new

admissibility criterion has been introduced by Protocol no 14 permitting the Court to reject an application where the victim has not 'suffered a significant disadvantage' (Article 35(3)(b)).

We have already noted the ECHR is interpreted in line with international texts. It is also important to note the Strasbourg Court also interprets the text in an autonomous way. Many of the terms contained in the ECHR have been interpreted by the European Court of Human Rights as having a specific meaning in the context of the Convention, independent of any meaning which they might have in domestic legal systems. This approach not only secures uniformity of interpretation of the terms in question throughout the contracting states: it also ensures that the effectiveness of the Convention cannot be compromised by contracting states interpreting or applying its provisions in a restrictive manner. An example is the expression 'criminal charge' in Article 6 of the Convention (e.g. Öztürk v Germany (1984) Series A no 73, 53).

At the same time, the Strasbourg Court may also be influenced by national legal orders. This may happen in three ways. First, despite the notion of autonomous concepts, certain expressions used in the ECHR can be regarded as a hybrid between autonomous concepts and terms interpreted according to domestic law. For example, the expression 'prescribed by law' (or its equivalents) refers to domestic law in order to determine whether the act in question was in accordance with domestic law, but is also interpreted as requiring that the domestic law in question must satisfy certain requirements implicit in the Convention. A particularly complex concept is that of 'civil rights and obligations' (Article 6). 'Civil' has an autonomous meaning, so that the classification of the right or obligation under domestic law is not conclusive (see *König v Germany* (1978) series A no 27, 88). Domestic law, on the other hand, determines the content of the right in question. Domestic law's denial that there is a right (e.g. because of an immunity or defence pleaded by the defender) will not, however, prevent there being a civil right for the purposes of Article 6 if the domestic law in question is so disproportionately restrictive as to be incompatible with the right of access to a court.[4]

Second, the Strasbourg Court recognises a 'margin of appreciation' in particular aspects of human rights protection. In accordance with the principle of subsidiarity, the European Court of Human Rights exercises a degree of restraint in determining whether the judgment made by national authorities (including national courts) is compatible with the state's obligations under the Convention. That restraint is exercised by means of the doctrine of the margin of appreciation: a translation of the French expression 'marge d'appréciation'. The concept of the margin of appreciation is thus one of the means by which the European Court of Human Rights recognises, to some extent, the right of free societies to choose for themselves the human rights policies that suit them best. The concept is therefore the basis for the allocation of responsibility for protecting human rights between national courts (and other national institutions) and the Strasbourg court. The doctrine does not appear in the

[4] E.g. Fayed v United Kingdom (1994) Series A no 294-B.

Convention, and is one which has been developed by the Strasbourg court itself. It is an essential tool for applying the Convention, given the diversity of societies and situations to which the Convention applies. It is a concept which is difficult to apply in practice and is apt to give rise to controversy. It suffers from a lack of clarity and analysis, and underlies a lack of consistency in the case law.

Third, the law and practice of European domestic legal systems may be of relevance in deciding whether an interference with certain human rights under the ECHR has been 'necessary in a democratic society'. In considering this phrase, it is important to bear in mind both the word 'necessary' and the words 'in a democratic society'. The Strasbourg Court has said that 'whilst the adjective "necessary", within the meaning of art 10(2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need" (*Sunday Times v United Kingdom (no 1)* (1979) Series A no 30, 59). The Court has also identified certain characteristics of a 'democratic society', for example describing pluralism, tolerance and broadmindedness as the hallmarks of such a society, and describing freedom of expression as one of the essential foundations of a democratic society (*Handyside v United Kingdom* (1976) Series A no 24, 49). Deciding whether an interference is 'necessary in a democratic society' may involve considering whether the law or practice in question is out of line with standards generally prevailing elsewhere in the Council of Europe states (either domestically, or in international conventions which they have accepted), as it is more difficult to justify a measure as being 'necessary in a democratic society' if the great majority of other Council of Europe states adopt a different approach.

12.3 The ECHR: Complementary or Alternative to Universal Human Rights Protection?

The Human Rights Act 1998 (Human Rights Act 1998) requires courts to 'take account of' ECtHR jurisprudence. In addition to the Human Rights Act 1998, the Scotland Act 1998 (Scotland Act 1998) provides that a provision of an Act of the Scottish Parliament is incompetent so far as it is incompatible with any of the specified rights under the ECHR ('Convention rights' (Scotland Act 1998s 29)), and that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights (Scotland Act 1998s 57). Similar provision was made by the devolution statutes for Northern Ireland and Wales. In reality, then, the ECHR is the treaty of fundamental significance with international law being taken into account by the Strasbourg Court in its interpretation: but the role of the domestic judiciary in terms of the Human Rights Act and the Scotland Act is of some importance and this calls for some further discussion. But it is not the ECHR treaty but the statute which forms part of domestic law. And the courts will not be bound to give effect to interpretations of the treaty by an international court, unless and to the

extent that the statute so provides (R v Lyons [2003] 1 AC 976, 27 per Lord Hoffmann). As Lord Hoffmann said of the Human Rights Act 1998 in Re McKerr [2004] 1 WLR 807 at para 63:

> What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.

Although the Human Rights Act 1998 may be regarded as reproducing as rights in domestic law the guarantees found in certain Articles of the ECHR and its Protocols, it is important not to lose sight of the distinction between the obligations which the UK accepted by accession to the ECHR and the duties under domestic law which were imposed upon public authorities in the UK by the Human Rights Act 1998. It is possible, for example, for the UK to be in breach of the ECHR without there being any breach of a Convention right under the Human Rights Act 1998. Equally, legislation which might not be regarded by the European Court of Human Rights as resulting in a violation of the ECHR, on the basis that it fell within the state's margin of appreciation, may nevertheless be incompatible with a Convention right under the Human Rights Act 1998 In re G (Adoption: Unmarried Couple [2009] AC 173 at paras 29–38 per Lord Hoffmann, para 50).

As noted, there is a second route into domestic law for the ECHR. Human rights are also protected by EU law, to which effect is given in domestic law by the European Communities Act 1972. In consequence, EU law provides, within its scope, an important means of invoking fundamental rights, including those guaranteed by the ECHR, before UK courts. EU law is reflected in the Scotland Act 1998, in terms of which a provision of an Act of the Scottish Parliament is incompetent so far as it is incompatible with Community law, and a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with European Union law (Scotland Act 1998s 57).

12.4 The Human Rights Act 1998

For further discussion of the general impact of the Human Rights Act 1998, and of EU law, please see Chap. 11.

12.5 The Scotland Act 1998

The introduction of devolution in 1998 required consideration be given to minimising the risk that devolved institutions (i.e. the Scottish Parliament or Scottish Government ('the Scottish Administration')) would take action incompatible with the UK's international obligations under EU law (including human rights obligations) or with

the European Convention on Human Rights. As noted, the Scotland Act 1998, section 29(1) provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. The Scotland Act 1998, section 29(2) provides that a provision is outside that competence in a number of circumstances, including where it is incompatible with any of the Convention rights or with EU law. The expression 'Convention rights' is defined as having the same meaning as in the Human Rights Act 1998.

In terms of the Scotland Act 1998, section 101(2), a provision of an Act of the Scottish Parliament, or of a Bill for such Act, or of subordinate legislation made by a member of the Scottish Executive, is to be read as narrowly as is required for it to be within competence, provided such a reading is possible. In contrast, the Human Rights Act 1998, section 3(1) requires Acts of the Scottish Parliament and certain instruments made by Scottish Ministers to be read and given effect in a way that is compatible with the Convention rights, so far as it is possible to do so. The Scotland Act 1998 thus contains provisions designed to ensure that Bills are scrutinised before their introduction in the Scottish Parliament, and to allow for their further scrutiny prior to their submission for Royal Assent. For example, a member of the Scottish Executive in charge of a Bill must, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament. In addition, the Presiding Officer of the Parliament must, on or before the introduction of the Bill, decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision. Once a Bill has been passed, it is for the Presiding Officer to submit it for Royal Assent. There is a period of 4 weeks beginning with the passing of a Bill during which the Advocate General, the Lord Advocate or the Attorney General can refer to the Supreme Court the question whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament. A Law Officer cannot however make a reference if he has notified the Presiding Officer that he does not intend to make a reference in relation to the Bill. The Presiding Officer cannot submit a Bill for Royal Assent at any time when any of the Law Officers is entitled to make a reference, or when any such reference has been made but has not been decided or otherwise disposed of by the Supreme Court. If the Supreme Court decides that the Bill or any provision of it would not be within the legislative competence of the Parliament, then the Presiding Officer cannot submit the Bill for Royal Assent in its unamended form. There have been a number of challenges to legislation passed by the Scottish Parliament on the ground that statutory provisions are incompatible with the ECHR ('Convention rights'). These have concerned the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, the Protection of Wild Mammals (Scotland) Act 2002, the Convention Rights (Compliance) (Scotland) Act 2001 and the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Compatibility with Convention rights is further addressed in the Scotland Act 1998, section 57(2). It provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights. Compliance with Convention rights is thus a question of vires. The term 'act' in the Scotland Act 1998, section 57(2) has been given a wide interpretation.

12.6 The Scotland Act and the Human Rights Act

The relationship between the Human Rights Act and the Scotland Act is complex. Both statutes require domestic courts to consider 'Convention rights', but the manner in which compatibility with these treaty obligations is examined proceeds upon two contrasting approaches. As Lord Hope of Craighead explained in *Somerville v Scottish Ministers* 2008 SC (HL) 45 at paras 13–16, the Human Rights Act has two fundamental features:

> The first is that it does not disturb the principle of the sovereignty of Parliament. A finding that primary legislation is incompatible with a Convention right does not affect its validity (Section 3(6) Human Rights Act). Subject to the power that is given to ministers to make remedial orders under Section 10, it is left to Parliament to decide, in the light of a declaration of incompatibility, what should be done about it. An act or failure to act of a public authority is not unlawful if, as a result of primary legislation, the public authority could not have acted differently or it was acting so as to give effect to primary legislation which cannot be read in a way that is compatible with the Convention rights (Section 6(2) Human Rights Act). The second feature is that the language that it uses to describe acts or failures to act that are incompatible with the Convention rights is that they are "unlawful" (Sections 6(1), 7(1), 8(1)). Unlawfulness in terms of the Human Rights Act has certain consequences with regard to what can be obtained by way of a remedy. This is because the Human Rights Act makes the acts or failures to act unlawful in domestic law.
>
> The Scotland Act, on the other hand, is concerned with the consequences of devolving legislative and executive power to institutions which have limited competence. Sections 29 and 30 and Sections 4 and 5 define the legislative competence of the Scottish Parliament. The executive competence of the Scottish Ministers is limited in exactly the same way as that of the Scottish Parliament. Section 52 enables statutory functions to be conferred on the Scottish Ministers by the Scottish Parliament within its area of devolved competence. Section 29(1) Scotland Act provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. The effect of this provision is that the Scottish Ministers have no power to exercise functions that may be conferred on them which are outside the legislative competence of the Scottish Parliament. Section 53 provides for the transfer of functions previously exercisable by Ministers of the Crown to the Scottish Ministers, but only in so far as they are exercisable within devolved competence. The expression "devolved competence" is defined by Section 54. Subsection (2) of that section restricts the devolved competence of the Scottish Ministers with regard to making, confirming or approving of subordinate legislation to what would be within the legislative competence of the Scottish Parliament. Subsection (3) imposes the same restriction on the devolved competence of the Scottish Ministers in the case of the exercise of any other function that they may exercise under a pre-commencement statute.
>
> Section 57(2) Scotland Act reinforces, in the context of provisions about the devolved competence of the Scottish Ministers generally, the restriction that Section 29(2)(d) imposes on the legislative competence of the Scottish Parliament. It provides that a member of the Scottish Executive "has no power" to make any subordinate legislation, or to do any other act, so far as the legislation or other act is incompatible with any of the Convention rights or with Community law. Section 57(3) qualifies that restriction in the case of an act of the Lord Advocate in prosecuting an offence or in his capacity as head of the systems of criminal prosecution … so as to align his position with that of the equivalent authorities in England and Wales. It does so by providing that Section 57(2) does not apply to an act of the Lord Advocate in that capacity …. That qualification on the limits of devolved competence does not apply to any other member of the Scottish Executive or to the Lord Advocate acting in any other capacity. It is not open to them to claim that the act or the failure to act was within devolved competence because, as a result of primary legislation, they could not

> have acted differently or they were acting so as to give effect to primary legislation which cannot be read in a way that is compatible with the Convention rights…
>
> Fundamental, therefore, to a proper understanding of the Scotland Act is its concentration on the limits of devolved competence… So an act by a member of the Scottish Executive which is incompatible with the Convention rights is not described by the Scotland Act as "unlawful". It is described instead as "outside devolved competence" in Section 54(3), and as something that he has "no power" to do in Section 57(2). The machinery described in Section 98 and Section 6 Scotland Act is available for the resolution of questions as to whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law and any other questions as to whether a function is exercisable within devolved competence.

There are further distinctions between these two statutes. Devolution issues can be dealt with by a preliminary reference, whereas issues raised under the Human Rights Act 1998 cannot. The Scotland Act 1998 confers statutory powers on the courts and on the Scottish Government, in the event that Acts of the Scottish Parliament or acts of members of the Scottish Government are ultra vires, which are not available under the Human Rights Act 1998. The Scotland Act 1998 contains a number of provisions which help ensure broad congruence with the Human Rights Act 1998. First, in relation to standing, the Scotland Act 1998 does not enable a person to bring any proceedings on the ground that an act is incompatible with the Convention rights, or to rely on the Convention rights in proceedings, unless he would be a victim for the purposes of Article 34 of the ECHR (within the meaning of the Human Rights Act 1998) if proceedings in respect of the act were brought in the European Court of Human Rights (Scotland Act 1998, s 100(1)). This imports the same test as the Human Rights Act 1998, section 7(7). Secondly, in relation to damages, the Scotland Act 1998 does not enable a court or tribunal to award any damages in respect of an act which is incompatible with the Convention rights which it could not award if the Human Rights Act 1998, section 8(3) and (4) applied (Scotland Act 1998, s 100(3)). Thirdly, in relation to time limits, section 7(5) of the Human Rights Act 1998 and section 100(3B) of the Scotland Act 1998 are in similar terms. Nevertheless, the decision of the majority of the House of Lords in *Somerville v Scottish Ministers* that the Scotland Act 1998, section 100 implicitly enables the court to grant any remedy or relief which it considers appropriate in the case of acts or failures to act which are outside devolved competence, including damages, is capable of giving rise to a number of questions.[5]

12.7 Promoting and Protecting Human Rights

The emergence of national human rights institutions charged with the protection and promotion of human rights is a welcome phenomenon. For discussion of the Equality and Human Rights Commission, please refer to Chap. 11. In the last

[5] See e.g. the issues identified by Lord Mance in his dissenting speech in Somerville v Scottish Ministers 2008 SC (HL) 45, 182–192.

2 years, a new body – the Scottish Commission for Human Rights – has been established under the Scottish Commission for Human Rights Act 2006. It has a general duty to promote awareness and understanding of, and respect for, human rights and, in particular, to encourage best practice in relation to human rights. To this end, it may publish or otherwise disseminate information or ideas, provide advice or guidance, conduct research, and provide education or training. It may also review and recommend changes to any area of the law of Scotland, or to any policies or practices of any Scottish public authorities. It is precluded, however, from providing assistance (including giving advice, guidance and grants) to, or in respect of, any person in connection with any claim or legal proceedings to which that person is or may become a party. In relation to any matter relevant to its general duty, the Commission may conduct an inquiry into the policies or practices of a particular Scottish public authority, Scottish public authorities generally, or Scottish public authorities of a particular description. (However, this power is to be subject to certain restrictions: an inquiry into the policies and practices of a particular Scottish public authority may only be conducted if the authority is the only Scottish public authority with functions in relation to the subject matter of the inquiry, or the subject matter of the inquiry is about whether human rights are being respected by the authority.) Nor may an inquiry be conducted into the policies and practices of any Scottish public authority in relation to a particular case, but such policies and practices may be taken into account in the course of an inquiry. The Commission may not, in the course of an inquiry (including the report of the inquiry), question the findings of any court or tribunal. The Commission may require any Scottish public authority, or any member, officer or member of staff of such an authority, to give oral evidence, produce documents or otherwise provide information, may take into account any evidence, information or document relevant to the subject matter of the inquiry which it has obtained otherwise than by virtue of such a requirement, and may enter any place of detention, inspect it and conduct interviews in private with any detainee with that person's consent. At the conclusion of an inquiry (other than an inquiry into whether specified human rights are being respected), a report of the inquiry including the Commission's findings and any recommendations must be laid before the Scottish Parliament. The Commission is also empowered to intervene in civil proceedings (other than children's hearings proceedings) for the purpose of making a submission to the court on an issue arising in the proceedings which is considered relevant to its general duty and raising a matter of public interest. Such interventions may only be made with leave of the court or at the invitation of the court, and the court may grant leave or invite the Commission to intervene only if satisfied that such intervention is likely to be of assistance to the court.

It is too early yet to provide an assessment of the Commission's work. It has been observed that leave to intervene may be given to bodies such as the Commission in the expectation that their fund of knowledge or particular point of view will enable them to provide the court with a more rounded picture than it would otherwise obtain, but that an intervention is of no assistance if it merely repeats points which the parties have already made, and that it is not the role of an intervener to be an additional counsel for one of the parties.

12.8 Conclusion

The national human rights protection system has thus been replaced by the regional protection system to a highly significant extent, although domestic judges are not strictly bound by the ECHR (unless this has directly affected EU law). The influence of international human rights law is thus minimal, again unless this has been taken into account by the Strasbourg or Luxembourg Courts. The scope and modalities of the national protection system are thus comparable, as to the contents, form and modalities, to the regional systems – and international law to a very large extent on account of the Human Rights Act and Scotland Act, and the increasing importance in EU law of human rights jurisprudence of the ECtHR. The Human Rights Act requires courts to interpret the statute in the light of the ECHR; in Scotland, the Scotland Act reinforces this tendency for convergence. Strasbourg jurisprudence is frequently cited. Courts review the exercise of public power under human rights legislation.

Does all of this suggest a universal conviction of the indispensability of human rights? At best, any such 'conviction' relates only to the 'universality' of regional law. But this is no bad thing. European standards are (with minimal qualification) higher than standards adopted and applied elsewhere. One clear example is that of the death penalty. This has been abolished in the Council of Europe 'region' – this barbaric ritual is still widely practised, even by and in the United States of America. The core human rights are the right to life, the prohibition of torture, and protection against servitude and arbitrary deprivation of liberty. Diverging standards are apparent in national, regional and international law in respect of capital punishment, the use of torture, and unauthorised and unacknowledged deprivation of liberty ('rendition'). There is a strong European line on each of these, but we are – in international terms – light years away from accepting as binding standards abolition of the death penalty, adequate detention conditions, human trafficking and real protection against arbitrary loss of liberty. European regional standards are more demanding. It would be entirely inappropriate for Europe to defer to 'lowest common denominator' standards in these areas (as in the use of the death penalty). In other areas, the suggestion of deference to culture may be misguided – particularly in respect of the right to choose (and change) religion or faith, or even to challenge religious orthodoxy.

However, standard-setting does not necessarily mean delivery of human rights. In Europe, the key problem is now to ensure the effective implementation of regional standards in domestic law. Much, in my opinion, turns on establishing a free, independent and educated judiciary. All too often in several European States the judiciary is weak. There are two major failings at regional level. First, the Strasbourg machinery is overwhelmed. The entry into force of Protocol 11 on 1 November 1998 resulted in a significant overhaul of the enforcement machinery provided by the ECHR. This was made necessary by a dramatic increase in individual applications to Strasbourg, reflecting both a growing awareness of the ECHR on the part of individuals and legal practitioners and a significantly enlarged membership of the Council of Europe. The new procedures were designed to improve efficiency in the disposal of

applications: a full-time Court replaced a part-time Commission and Court, eliminating much of the duplication of effort inherent in the original arrangements, which had to some extent reflected a need to secure state confidence in international supervision. The reforms introduced by Protocol no 11 were not sufficient, however, to deal with an ever-increasing workload and backlog of applications, highlighting systemic failures in certain member states to ensure the provision of effective remedies at domestic level to allow individuals to challenge alleged shortcomings in law and practice. Further amendment of the enforcement machinery came in June 2010 with the entry into force of Protocol no 14 which seeks to improve the efficiency of the court through the use of new single-judge and committee procedures and greater opportunity to concentrate upon cases considered as requiring more in-depth examination. However, the Court remains overwhelmed by applications. This reflects an abysmal failure of many States to ensure the effective implementation of the ECHR in domestic law.

Second, there is often a failure to take effective action following an adverse judgment in Strasbourg. Final judgments are binding on the state which is a party to a case. Where the Court has established a breach of an ECHR guarantee, that finding 'imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach' (*Papamichaloupoulos v Greece* (Art 50) (1995) Series A no 330-B, 34). The expectation is that there should be *restitutio in integrum,* but the choice of means for achieving this is for the respondent state, and the Court cannot require the taking of any specific measure. The obligation to comply with a judgment of the Court may involve payment of any sum of money which has been awarded to an applicant in the form of just satisfaction. However, the general principle that the Court cannot dictate to a state the action it should take is now subject to two important qualifications, perhaps reflecting a degree of exasperation at weaknesses in domestic implementation of ECHR guarantees. First, in exceptional cases, the Court is prepared to indicate in the operative part of its judgment what action it considers necessary in light of the finding of a violation.[6] Second, where the underlying problem is 'a systemic problem connected with the malfunctioning of domestic legislation' (i.e., legislation which is incompatible with the ECHR and where in consequence there is (or could be) a significant number of applications of a similar nature), the Court has now determined that it is appropriate to make use of 'a 'pilot judgment' procedure which in essence directs a state to take action to remedy the defect (*Broniowski v Poland* [GC] 2004-V). Neither innovation should be seen as usurping the functions of the Committee of Ministers in respect of enforcement of judgments; rather, each is more properly considered an attempt by the Court to assist the Committee in ensuring the proper execution of judgments by the state concerned. More particularly, each development emphasises that the primary responsibility for securing Convention guarantees lies with the state authorities,

[6] See in particular Assanidzé v Georgia [GC] 2004-II, 202–203.

and the role of the Court should be a subsidiary one. The 'pilot judgment' procedure represents an attempt by the Court to force the early resolution of structural or widespread underlying problems in domestic legal systems resulting in the lodging of significant number of identical applications. Such 'repetitive cases' now constitute a significant proportion of the Court's workload. The procedure first involves the selection of one or more of these cases for priority treatment with the view to seeking a solution to all of these similar cases (and also with the possibility of the adjournment or 'freezing' of other related applications in the meantime but for a set period of time and normally upon the condition that the state will act promptly and effectively on any conclusions drawn in the pilot judgment). In the actual 'pilot judgment', the Court will identify the particular dysfunction or incompatibility at the root of the violation, determine whether there has been a violation of the Convention in the particular case; but then additionally and crucially indicate to the state in the operative part of the judgment that it must take action to eliminate the dysfunction so as to permit the settlement of all similar cases by bringing about the creation of a domestic remedy capable of dealing with similar cases.

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Chapter 13
The Struggle Concerning Interpretative Authority in the Context of Human Rights – The Belgian Experience

Matthias E. Storme

13.1 Introductory Remarks

The Belgian report will deal merely with some of the questions asked by the General Reporter, and does so probably even in an idiosyncratic way. Let me explain the two main reasons for this choice.

Firstly, as Belgium is a member state of the EU and the Council of Europe, many features of the law on human rights and their protection are not specifically Belgian, but common to the European countries. I will therefore limit my report to the elements that are more specific to Belgium, i.e. the position of international human rights instruments under Belgian (constitutional) law and the protection of fundamental rights under domestic law (including the Belgian Federal Constitution).

Secondly, it is my personal opinion that most so-called human rights do indeed express universal human values, but that their specific form and content varies from period to period and civilisation to civilisation. More precisely: the way these values, which are often conflicting, are balanced, will differ. This opinion is widely shared in Belgium, too; there are, however, certainly conflicting ideas as to the consequences of this opinion and related questions. Many of the conflicts relate to the question of which persons or institutions have or should have, in a democratic polity, the authority to interpret these human rights, and to what extent this involves margins of appreciation.

A third introductory remark concerns the structure and position of the judiciary in the Belgian legal system. Generally speaking, Belgium has a unitary judicial system at the federal level (no regional courts, except some very specific

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administrative Tribunals) which is basically also a system of general courts, with a possibility of appeal and in the end recourse to "cassation" before the Court of Cassation. These courts have the power to conduct judicial review of administrative decisions and subordinate legislation in all respects (decentralised review, Art. 159 Constitution[1]); they have no power to review the constitutionality of statutes (Acts of Parliament), but have for a long time had the power to review the conformity of statutes with international law (see infra). The review of the constitutionality of statutes was entrusted gradually (in stages, starting in 1980) to the Constitutional Court[2] (centralised review), which decides either on direct recourse (only within 6 months of publication of a statute) or on a preliminary question of constitutionality raised in a lawsuit before another court.

13.2 The Position of International Public Law in General

Belgian courts, followed by a large majority of scholars and by politicians, give supremacy over national law to any rule of international public law with direct effect. This priority of international law over national law is considered by most authors rather self-evident and a traditional characteristic of Belgian law, although it is not.

Let me first look at two issues: (a) under which conditions does international law become part of domestic law, and (b) whether it has priority.

13.2.1 Monism

13.2.1.1 Approved Treaties

There is no doubt that international treaties that have been ratified and approved by the competent (federal or regional) parliament[3] are consequently part of domestic law, without any need for further implementation or incorporation, and that the rules contained in them basically have direct effect (as to this question of "direct effect", see *infra*). The Belgian system is monistic in that sense – which, however, does not exclude the constitutional review of the statute of assent (Act of parliamentary assent).

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[1] An English translation of the Belgian Constitution can be found at http://www.const-court.be/en/basic_text/basic_text_constitution.html.

[2] http://www.const-court.be/. The main rules on constitutional review can be found in the Constitutional Act of 6 January 1989 on the Constitutional court (as amended); an English translation of that Act can be found at http://www.const-court.be/en/basic_text/basic_text_law_01.html.

[3] Approval is required by Art. 167 of the Constitution, before the treaty forms part of domestic law.

The main international treaties in the field of human rights have all been ratified by Belgium, including the European Convention on Human Rights and Fundamental Freedoms (ECHR) and most of the additional protocols, the UN Convention on Civil and Political Rights, the UN Convention on Economic, Social and Cultural Rights, the Convention against Racism (with a reservation on freedom of speech), etc. By ratifying the Lisbon Treaty on the European Union, Belgium has also ratified the Charter of Fundamental Rights of the European Union. Their rules are thus part of domestic law.

Belgium has, on the other hand, not ratified the European Framework Convention on the Protection of National Minorities, as important segments of Belgium fear that it may be contrary to our constitutional system. The Belgian federal system grants form of protection to the national linguistic groups, which in many respects goes much further than the Framework convention, especially by granting a large autonomy. The issue is that some rules in the Convention could be interpreted in such a way as to contradict some of the more fundamental building blocks which underpin this system of autonomy for the different national groups (basically the "territorial" character of autonomy, except in the bilingual capital region of Brussels).

13.2.1.2 Other Rules of International Law

Belgian law nowadays seems to admit that all rules of international public law binding upon Belgium are also part of domestic law – the so-called monistic doctrine, contrary to the dualistic doctrine accepted by many other countries.

In my view, this radical form of monism is partly the result of a misunderstanding. The basic decision to accept international law as part of domestic law is the decision in *Drecoll*, Hof van Cassatie/Cour de Cassation 25 January 1906:

> Attendu qu'à des degrés divers le Droit des Gens forme partie du Droit respectif des Nations;
>
> Que ce principe est si vrai que Blackstone déclarait que la Loi des Nations, c'est-à-dire le Droit des Gens, quand il s'élève une question qui est de son ressort, doit, en Angleterre, être adopté dans toute sa plénitude par la loi commune et être regardé comme faisant partie de la loi du pays;
>
> Que, de même, aux Etats-Unis le droit des Gens est considéré comme formant partie intégrante de la loi du pays, ainsi que l'attestaient déjà Thomas Jefferson et Daniel Webster, qui tous deux ont rempli des fonctions de secrétaire d'Etat;
>
> Que la Cour suprême y a placé le droit des gens coutumier au même rang que le droit des gens conventionnel, et a proclamé que les Cours fédérales doivent respecter le droit des gens comme une partie du droit national;
>
> Attendu que ce principe est également vrai en Belgique.

The principle that international law is part of domestic law was thus motivated by reference to English and American law, although it is rather doubtful that these systems are really monistic with regard to large parts of international public law. It is clear that the notion of international law as part of domestic law did not include

what we call international public law today. What was accepted as international law was not a different level of legal norms, but legal norms governing a different set of questions. It is only in that sense that international law did form part of domestic law in the UK and the US in 1906 (and even then the reference to Blackstone was erroneous[4]). The 1906 case was referring to the Roman concept of *ius gentium*, the rules applicable to foreigners, diplomats, relations between states, etc. but certainly not human rights (and even less relevant to domestic procedural law, family law, property law, succession law, personality rights, criminal law, administrative law, etc.). Insofar as those issues of an international nature were not governed by national statutes or ratified treaties, they were governed by a subsidiary transnational customary law called *ius gentium*. The subject matter concerned international private law rather than what is now called international public law. Further to this, the idea that those customary rules would have priority over (national) statutes was certainly not accepted.

In any case, during the course of the twentieth century, a general doctrine of monism had triumphed in Belgium: any rule that is binding upon Belgium in the international legal order forms part of domestic law (and has direct effect under the same conditions as national, legal, or constitutional provisions).

13.2.1.3 Direct and Indirect Effect

When international public law forms part of domestic law (through ratified treaties or international customary law), its rules have direct effect under the same conditions as any domestic rule. This depends on the formulation and content of the rule and not on its source or place in the hierarchy of norms. The question is basically the same question for international norms, for constitutional norms and for national statutes. When its wording is sufficiently clear and unconditional and thus capable of application, without requiring a further rule implementing it, the rule will have direct effect. According to Belgian doctrine and case law, this is equally true for rules on human rights or other fundamental rights. The effect may differ from rule to rule within the same document. Thus, certain fundamental rights in the Belgian Constitution have direct effect and while others do not, and the same is true for rights in, for example, the UN Convention on Civil and Political Rights.

When the conditions for direct effect of a rule (whether a rule of international law, a constitutional provision, etc.) are not fulfilled, the rule is nevertheless part of

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[4] In his *Commentaries*, Blackstone wrote on the 1709 Act of Queen Anne (7 Anne cap. 12) concerning the immunity of foreign diplomats that "*In consequence of this statute thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land*", which clearly means that these privileges became part of English law only by their incorporation by *statute* (comp. Adair 1928, 290 v). It is true that Lord Mansfield held the opposite opinion, namely that the *ius gentium* was part of English law even without statutory incorporation (in *Triquet v. Bath* (1764) 3 Burr. 1478).

the law and may have "indirect" effect. More specifically, it can and even has to be used in interpreting the rest of the law. Thus norms and reports of the World Health Organization have frequently been used to interpret applicable domestic health legislation.[5]

The way that the Constitutional Court refers to rules of international law is also remarkable, because it has no authority to review the conformity of statutes with international law, but only their conformity with the constitution. Nevertheless, the court uses rules of international public law as a mode of interpretation of the constitution whenever the rule is essentially similar or dealing with the same matter – in practice, this concerns rules on fundamental rights and freedoms in international instruments such as the European Convention of Human Rights and the UN Conventions on human rights.

13.2.1.4 Interpretation

Autonomous interpretation of international instruments is clearly a basic principle of Belgian law. This in itself does not ensure a uniform interpretation. In those cases where an international court is established with the authority to interpret an instrument, such as the ECtHR for the ECHR or the ECJ for the Charter of rights of the EU, the decisions of such courts are deemed to have authority and are used frequently. This does not mean that the Belgian courts will always follow them in practice; in a (small) minority of cases, the Belgian courts have refused to follow the case law of the ECtHR, usually not openly, but by giving that case law a very restrictive interpretation. Hot topics in this respect today are the extent of the right to be assisted by a lawyer during preliminary criminal investigations (doctrine of the *Salduz*-decision of the ECtHR 26 April 2007) and the rights to be granted to asylum seekers.[6]

13.2.2 Priority Over National Law?

13.2.2.1 In General

As to the second point, the priority of rules of international origin over rules of national origin is a rather recent development. Even in 1966, the Hof van Cassatie/

[5] For example, Cass. 1 October 1997, *Arr.Cass.* 1997, 378; Raad van State/Conseil d'Etat 10 July 2002, no. 109.145; Raad van State / Conseil d'Etat 25 October 2001, no. 100.331, *Coghe*.

Raad van State/Conseil d'Etat 17 September 1999, no. 82.291, *Mutualité libérale Centre-Charleroi-Mons*.

[6] See Bossuyt (2010, 189). Marc Bossuyt is the President of the Belgian Constitutional Court.

Cour de Cassation decided with regard to customary rules of public international law:

> Attendu que quelque éventuelle contradiction entre le droit interne (…) et les principes coutumiers du droit international public (…) qui gouvernent les relations entre Etats, encore serait-il que ces derniers principes ne sauraient faire échec à l'application du premier.[7]

Clearly, customary rules of international public law were seen as legal rules applicable by default, so long as there is no statutory rule or other national rule of the same ranking setting them aside. They were applicable *praeter legem* and not *contra legem*.

On 27 May 1971, the Hof van Cassatie/Cour de Cassation ruled in the case *Fromagerie Franco-Suisse Le Ski* on a conflict between European Community law and a later domestic statute. In conformity with the doctrine of Community law and given the modification of the Belgian Constitution in 1970,[8] it rightly came to the conclusion that Community law (enacted within the limits of the powers attributed to the EC[9]) has priority over national statues, even when these are more recently enacted.

This decision is generally seen as confirming the priority of any rule of the 'international legal order' over domestic law. Such a radical and far-reaching doctrine does not yet follow from that decision, but is certainly dominant today and was accepted by the Court of Cassation in more recent case law (s. infra). The 1971 decision already implies the priority of rules contained in ratified and approved treaties over domestic statutes; even this was all but evident, as the Court of Cassation has consistently refused to accept a judicial review of the constitutionality of statutes.[10] Several authors have suspected "political" motives behind the case law, more precisely on the side of the French-speaking minority which has, since the federal reform of the country in 1970, often tried to invoke arguments of international law (and more specifically human rights law) against the new constitutional order established in 1970 (more specifically against the "territoriality" of linguistic rights)[11] and tried to convince domestic judges to give priority to their interpretation of human rights over the Belgian Constitution.

13.2.2.2 Priority of International Law Instruments Over the Constitution?

The position of the Belgian Hof van Cassatie/Cour de Cassation is even more extreme: the court holds that international public law even has supremacy over the Constitution. The Constitution is, in its case law, thus no longer the supreme law of the land. The Belgian constitution-making powers have thus lost their control over

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[7] Cass. 26 May 1966, *Pittacos, Pas.* 1966, I 1211.

[8] Which allows transfers of power to international organisations.

[9] This was not disputed *in casu*.

[10] Cass. 23 July 1849, *Pasicrisie* 1849, I 443. Since the Court lost part of its powers to the Constitutional Court, it seems to love the Constitution even less …

[11] See the discussion by Vermeulen (1973, 554, 555 and 557 ff.)

the contents of their own legal system – which is very questionable from the perspective of democracy. Did the Founders of the US not declare in the Declaration of Independence that one of the reasons for the revolution was that "(*he) has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation*"? Would the same not apply today to most of our courts?

The Constitutional Court, on the other hand, has rightly accepted that it has authority to review the constitutionality of statutes of assent ratifying international treaties,[12] which necessarily implies a judicial review of the content of the treaty.[13] This logically implies the supremacy of the Constitution over such treaties. In practice the court will apply, as far as possible, a harmonious interpretation of both the Constitution and international law, but where really necessary, it will give priority to the Constitution.[14]

By the Constitutional Statute of 9 March 2003 amending the Constitutional Court Statute of 1989, the legislator has restricted judicial review by the Constitutional Court by excluding any review of statutes ratifying European Union treaties or the European Convention of Human Rights by way of preliminary ruling.[15] Since then, such statutes can only be reviewed within 60 days after their promulgation (for all statutes approving Treaties, the period is 60 days instead of 6 months, Art. 3 § 2). If, however, European Union institutions interpret a European treaty in an 'evolutionary' way, extending it beyond the original wording or intent,[16] especially to an interpretation which goes against the Belgian Constitution, there is no remedy. On the other hand, the modification of 2003 makes it clear that all treaties can be constitutionally reviewed by the Constitutional Court, and that there is no limitation period for a preliminary review for any treaties other than those mentioned, e.g. not other human rights treaties (even if the limitation period for an annulment is much shorter than for other statutes, 60 days instead of 6 months, Art. 3, 2 Constitutional Court Statute of 1989).

According to Article 26 § 2 of the Constitutional Court Statute, the Hof van Cassatie/Cour de Cassation is obliged to suspend proceedings and ask a preliminary question to the Constitutional Court as to the constitutionality of a statutory provision whenever such a question is raised. The Hof van Cassatie/Cour de Cassation uses all

[12] For example, Const.C. no. 26/91, 16 October 1991, no. 12/94, 3 February 1994, no. 33/94, 26 April 1994.

[13] Most recently: Const.C. no. 87/2010, July 8, 2010.

[14] For example, Decision no. 10/2008 of 23 January 2008 concerning the restriction of the professional privilege of the independent lawyer by the Statute implementing the European rules on money laundering.

[15] Art. 26 § 1 *bis* Constitutional Court Statute: "From the scope of this article shall be excluded the statutes, decrees and rules referred to in Article 134 of the Constitution which ratify a treaty establishing the European Union or the Convention of 4 November 1950 for the protection of human rights and fundamental freedoms or an Additional Protocol to this Convention".

[16] A clear example of a decision going beyond the intent of the Treaty-making parties was the decision of the ECtHR of 1 June 1979 in *Marckx/Belgium*.

possible tricks to circumvent this obligation. Thus, in some recent decisions, the excuse used was that the ECHR has priority over the Constitution; the Hof van Cassatie/Cour de Cassation held that the statutory provision at stake (a restriction of free speech) was not contrary to the ECHR and that it thus did not have to refer the question of constitutionality to the Constitutional Court.[17] In this way, constitutional liberties are eroded and their interpretation by the Constitutional Court, which is often less restrictive, is evaded.

In response to this evasive behaviour of the Court of Cassation, the Federal Parliament has enacted an additional rule in the Constitutional Statute on the Constitutional Court, Art. 26 § 2, 3. When at last instance, in addition to the violation of international law, a constitutional provision is also violated, the Court of Cassation is obliged to refer the constitutional question to the Constitutional Court before judging its conformity with international law, unless it is clear that the statute is unconstitutional. This does not exclude the fact that the Court may at the same time ask the ECJ about the interpretation of EU law if such a preliminary question is also required. However, two other evasion routes are left open in such a case: the Court of Cassation may still judge on its own (without referral for preliminary ruling) that the Constitution is manifestly not violated and/or that international law is manifestly violated.

13.3 Conflicting Fundamental Rights

13.3.1 Belgian Experiences

The opinion of the Court of Cassation is sometimes defended on the basis of the so-called maximalisation principle. It is stated that the priority of international law over the Constitution does not erode fundamental rights, as the ECHR itself provides in Art. 53 that priority is always given to the highest level of protection; where the Constitution provides for a higher level of protection, the ECHR would not diminish it. This, however, supposes that fundamental rights would never come into conflict with each other, and that the higher protection of one specific right would never imply a restriction of another.

This is clearly not the case, especially in relation to some of the newer generations of "human rights" (non-discrimination, some social economic or cultural rights).

Indeed, as to the classical fundamental rights, which consisted mainly of (a) fundamental freedoms towards public authorities and (b) procedural or similar

[17] Cass. 9 November 2004. Critical annotations *inter alia* by Meersschaut (2005, 49 ff), pleading in favour of a procedure of constitutional complaint against judicial decisions in last instance, as it exists in, for example, Germany and Spain, and in a different form in the US; also critical Gors (2005, 507 f.).

guarantees, conflicts were and are rare and thus rarely have to be "balanced" against each other. The main conflict between fundamental freedoms is the conflict between the right to privacy and other fundamental freedoms. But conflicts between freedom of speech and press, freedom of association, freedom of religion and freedom of education are very rare. They usually only occur when someone attempts to deduce a claim-right from one of these freedoms, e.g. people claiming that free speech must be restricted because of a duty to "respect" religion or religious feelings of others. Thus, for example, Belgian law did and does not know a crime of "blasphemy", but it does prohibit the interference by anyone with peaceful religious services. Most often, a conflict only arises when a right not to face discrimination from other people (horizontalisation of the non-discrimination rule) is introduced and granted the same level of importance as the classical fundamental rights.

Let me turn to the main examples of where the Belgian Constitution has granted rights or guarantees with direct effect, that have further reaching consequences than the main international law instruments:

(a) protection of property: according to Art. 16 of the Constitution, expropriation may only take place in the public interest and on condition of equitable and prior compensation;
(b) freedom of religion: the Constitution does not only guarantee freedom of religion and its public manifestation (Art. 19) but also the freedom of internal organisation of religious corporations (Art. 21 Constitution);
(c) freedom of education: according to Art. 24 of the Constitution, education is free and preventive measures are forbidden. In practice, the freedom is severely restricted for subsidized schools (and given the high tax level in Belgium, very few people can afford to send their children to a non-subsidized school). However, contrary to some other countries, parents are not obliged to send their children to school and can provide homeschooling. In recent years, tighter controls have been implemented;
(d) content of freedom of press: apart from the general freedom of speech in Art. 19 of the Constitution (interpreted in basically the same way as the corresponding article in the ECHR); there is a more specific protection of the freedom of press in Art. 25, consisting of the following additional guarantees:
    - strict prohibition of censorship or other "preventive" measures before publication. This means a judge cannot forbid publication beforehand, but merely stop further distribution after publication (and only in cases where the publication constitutes a crime, which presupposes that the restriction of freedom of speech is necessary and proportional);
    - immunity of the printer, publisher and distributors when the author is known and residing in Belgium; this is a measure against self-censorship by such persons (a measure authors needed in the past and very often still need even today to distribute their opinions);
    - right to a jury (Art. 150 Constitution); it must, however, be said that case law has eroded this guarantee significantly by giving a restrictive interpretation to "press delicts"; a further restriction was introduced in the Constitution in

1999 by abolishing the right to a jury for "racist and xenophobic" press delicts - a distinction which is, in my view, very doubtful in the light of Art. 6 ECHR and equality before the law;
– Belgium also made a reservation on freedom of speech when ratifying the UN Convention against racism;

(e) freedom of (unarmed) gatherings in private places: no permission is required (Art. 26);
(f) freedom of association: again, no preventive measures are allowed (Art. 27). An additional *décret* of 16 October 1830 adds that the law may only punish the tortious acts of the members of an association, but never the right to associate itself[18];
(g) freedom of language: the use of languages can only be regulated for administrative matters (use of language by the public authorities and in dealings with them, including legally prescribed documents of enterprises), public and subsidized schools and labour relations (see Art. 30 and 129 of the Constitution);
(h) right to sue the government or public officials without any prior permission (Art. 31 of the Constitution).

I have not included the social, economic and cultural rights more recently introduced in the Constitution, as only some aspects of them have direct effect, and as they are more or less corresponding to similar rights in international instruments.

The abovementioned rights guaranteed by the Belgian Constitution are fundamental in our legal order, but not universal. They even come into conflict with certain interpretations of human rights today. As previously mentioned, the main cause of conflict is the tendency to recognise a horizontal right of non-discrimination. Such a right necessarily and essentially conflicts with classic fundamental freedoms. Thus, freedom of speech, freedom of religion and freedom of association have been eroded strongly by recent antidiscrimination laws (e.g. a statutory provision in Art. 22 of the Antiracism Act punishing mere membership of, or cooperation with, a discriminating organisation; the Constitutional Court has given the provision a restrictive interpretation, but did not dare to annul it).

In my view it is important that a number of the abovementioned rules, which are missing in international instruments, are not so much additional "rights" but additional guarantees or institutions which make some of the fundamental rights more "self-executing". Rights are only really protected when their protection does not require a complex balancing act in each concrete case. At least certain forms of exercising a freedom must be free from any such balancing. Thus, any doctrine that balances free speech against other values, without very clearly establishing the limits of free speech, has a "chilling effect" on free speech. The Constitutional Court has understood this slightly better than the common courts (including the Court of Cassation).

[18] "*La loi ne pourra atteindre que les actes coupables de l'association ou des associés et non le droit d'association lui-même*".

The judicial protection of constitutionally entrenched fundamental rights is, generally speaking, well developed. Thus, differing from many other countries, every citizen has the right to go directly to the Constitutional Court to demand annulment of new Acts of Parliament within the first 6 months after their publication; the only requirement is that the Act contains rules to which a citizen is subjected. Further, without any time limit, the constitutionality of an Act of Parliament (other than ratification of EU Treaties or the ECHR) can always be challenged in the framework of a lawsuit, by formulating a constitutional question.

Nevertheless, a weak spot remains: there is no remedy when a common court refuses to refer such a constitutional question to the Constitutional Court, and the Court of Cassation in particular has invented many unlawful reasons to refuse to do so. In many other countries, there is recourse against the decision of a supreme civil or criminal court (constitutional complaint, *Verfassungsbeschwerde, recurso de amparo*, etc.), however, such a process does not exist in Belgium.

Another weakness resides in the fact that the Constitutional Court has no authority to judge the constitutionality of delegated legislation or of administrative decisions. In principle, every judge should set aside an act of delegated legislation or an administrative decision whenever it is contrary to either the Constitution or an Act of Parliament (Art. 159 of the Constitution), which is in itself a strong protection, but common courts thus tend to give a more restrictive interpretation to constitutional rights than the Constitutional Court.

A final weak point is the fact that courts refuse to refer a question to the Constitutional Court when a citizen invokes a self-executing constitutional provision which he considers violated (e.g. right to a jury trial). Requests to refer a case to a jury are systematically turned down by the common courts and there is no recourse before the Constitutional Court. As a practising lawyer, I have filed a series of complaints against Belgium before the European Court of Human Rights regarding this matter.[19]

13.3.2 General Evaluation

More generally, conflicts between human rights cannot be solved *in abstracto*: there is no universally valid hierarchy between human rights, even if some are more fundamental than others. But it seems that no human right has an absolute priority over all others. In cases of conflict, some balancing will be necessary, and that balancing cannot take place without taking into account concrete historical experiences.

The real questions deduced from the Belgian experience are therefore not so much whether we recognise human rights or whether we consider them universal or not, but who has the last word in interpreting them and how conflicts between human

[19] ECtHR, cases nos. 20019/09, 20022/09, 20024/09 and 20029/09.

rights or interpretations of human rights are solved. "*Who writes the unwritten laws of the Gods?*" as Claudio Magris put it.[20]

"Human rights" turns out to be an "*essentially contested concept*",[21] just like democracy, freedom or equality: everybody agrees on the idea, but not on its concrete meaning. It is in the concrete forms and guarantees associated with it that the universal human rights get flesh and blood, it is in a concrete political community that they become real; or, as Michael Walzer expressed it in his book *Thick and thin. Moral argument at home and abroad*: *"Societies are necessarily particular because they have members and memories, members with memories not only of their own but also of their common life. Humanity by contrast, has members but no memory, and so it has no history and no culture, no customary practices, no familiar life-ways, no festivals, no shared understanding of social goods"* (Walzer 1994, 8).

This is an argument in favour of a rather large "margin of appreciation" for the national political institutions (parliament, referenda where they exist) and national judiciary (especially Constitutional Courts where they exist) in interpreting and concretizing universal human rights. There is no single model which is perfect in this respect, and the most important thing is to have sufficient checks and balances rather than a single institution always having the final say.

The history of political ideas shows us that the founders of constitutionalism considered it essential to entrust to the judiciary the task of protecting existing rights, developed through history, against violations by political institutions; not, however, the task of setting aside historically grown fundamental rights on the basis of newly invented rights. The constitutional authority of the judge is given to maintain political power within certain limits, within the limits of constitutional rights and liberties, and not to adapt these rights to the "madness of the day": "*The Constitution is meant to protect against, rather than conform to, current "widespread belief"*".[22]

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[20] Essay reprinted in Magris (1999).

[21] The expression was, as far as I know, first used by Gallie (1956, 167 ff.).

[22] Judge Antonin Scalia in *Maryland v. Craig,* 497 U.S. 836 (1990). (http://supreme.justia.com/us/497/836/). See also Van Caenegem (2003, 19).

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Chapter 14
The Role of Human Rights in the Dutch Legal Order

Cedric Ryngaert

14.1 Introduction

After the Second World War human rights protection gained more and more prominence, as the long list of human rights treaties adopted over the last 50 years testifies to. Not all states have proved willing to sign and ratify these treaties, however. At the same time, states that have signed and ratified them may be unwilling to live up to their obligations, or may not grant the power to individuals to invoke international human rights provisions directly before domestic courts. This elicits the question as to whether human rights are really universal, *i.e.* the topic of this volume.

This chapter focuses on the situation of international human rights law in the Netherlands, and specifically on the effect of international human rights treaties in the Dutch legal order. In Sect. 14.1, the chapter will open with a brief discussion of the universality of human rights from an international law perspective. It is after all the international human rights regime that forms the starting point of the country-specific analysis. The chapter will in particular zoom in on the UN Human Rights Covenants, and on how these instruments are implemented in the Dutch legal order and interpreted by Dutch courts. Some attention will also be devoted to the tension between the universalist claims of international human rights law and the cultural particularity that states or sub-state groups sometimes claim in respect of human rights, and the effect this tension has had on the Dutch legal implementation discourse.

Section 14.2 shifts the focus from the international to the regional protection level. As the Netherlands is a party to the important European Convention on Human Rights (hereinafter: ECHR), this convention, which provides for a very high level of human

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rights protection, will be the focal point of the analysis. Again, in this Section issues of implementation and interpretation in the Dutch legal order will be examined.

Sources of human rights law are not necessarily international or regional, however. They could as well be purely national. Section 14.3 will discuss how Dutch (constitutional) law protects fundamental rights in the Netherlands. In this respect, some attention will be given to potential conflicts between fundamental rights as protected by Dutch law and particular cultural/traditional practices and values of minority groups present in the Netherlands.

14.2 International Protection Level

14.2.1 International Versus National Protection of Human Rights

The international law of human rights is seen as a distinct sub-discipline of general international law (examples of other sub-disciplines in international law are the law of the sea, environmental law and economic law) (Craven 2000, 492–493). Being a sub-discipline of international law, international law has shaped international human rights law in the sense that human rights are "a codification of the rule of law by [international] lawyers and draftsmen" (Smith 2005, 7) in conventions, a typical international law instrument. However, human rights also reach beyond the confines of international law, as they are ordinarily also protected by domestic (constitutional) law. The two layers of human rights protection – international and domestic – interact, with international law "allowing the international community to determine some limits to what a state may do to its nationals" (Smith 2005, 7), and constitutional practices feeding into international law, allowing for the clarification and delimitation of rather vague international law concepts (as is for instance evidenced by the margin of appreciation doctrine used by the European Court of Human Rights). The effect of international human rights norms in the Dutch legal order is discussed in Sect. 14.2.4, while the effect of European human rights norms is discussed in Sect. 14.3.2. The purely national (constitutional) perspective is the subject of Sect. 14.4.

14.2.2 Universality of Human Rights: The Report of the Dutch Advisory Council on International Affairs

Many human rights treaties are widely ratified. This creates the impression that international human rights are widely shared and in fact universal. It is no secret, however, that some states or sub-state entities, especially (in) non-Western states,

object to the assumption that human rights are universal (even if those states are parties to the relevant human rights conventions). Such states and entities point out that differences in culture make the universality of human rights a fiction. The Dutch Advisory Council on International Affairs has issued an interesting report on this tension between universality and 'cultural relativity' in November 2008. This report may be said to reflect the 'Dutch position' on the universality of human rights.

In the 2008 report, the Council observes that states typically do not cast doubt on the universality of human rights treaties as such. Indeed, when they invoke cultural traditions, they generally do so within the framework of the protection of universal human rights. The Council notes, however, that it is undeniable that some non-Western countries, often Muslim countries, take the view that their own values, beliefs, and practices are undermined by Western conceptions of human rights. But interestingly, rather than denouncing cultural practices, the Advisory Council on International Affairs is of the opinion that universality, in the sense of universal acceptance, will be reinforced in case cultural variation is recognized worldwide. If there is more room for culture-specific implementation of human rights, "cultures and States might be more willing to embrace the universal appeal of the international human rights framework" (Advisory Council on International Affairs 2008, 33–34).

Universality is indeed not the same as uniformity; it is not a 'one-size-fits-all' concept. Instead, it leaves room for interpretation, within the margins as set at the international level. This obviously elicits the question as to what latitude the universal (or regional) human rights framework allows for the expression of certain cultural ideas and interpretations. It is noted that this 'margin of appreciation' differs from right to right. Non-derogable rights, such as the right to life and the right not to be subjected to torture or inhuman or degrading treatment, are to be implemented strictly and must be applied uniformly. As far as other rights are concerned, the Advisory Council points out that states "can be allowed some latitude to make policy regarding application" (*Id.*, 34). They should however always explain the use of this latitude.

The Advisory Council admits that it is not easy to define the exact contours of permissible restrictions on freedoms that are often at the heart of cultural relativist arguments, but it notes approvingly the development of 'the margin of appreciation doctrine' by the European Court of Human Rights. This doctrine could help reconcile universality and diversity in the interpretation of human rights norms (*Id.*, 33–34).

14.2.3 The Effect of International/Universal Human Rights Instruments in the Dutch Legal Order

Like most Western States, the Netherlands has signed and ratified most international human rights treaties, and has not invoked cultural arguments so as to opt out of the universality of human rights. This does not mean that domestic implementation of

international human rights treaties is straightforward. Domestic law and international law remain separate orders, although content-wise they overlap (this specifically holds true for human rights and fundamental freedoms) and interact with each other. It is this interaction, and the domestic effect of international instruments in particular, that is the subject of this Section.

The Netherlands adheres to a monist system. In general, indeed, provisions of international law form part of the Dutch legal order without any further acts of the legislature being needed. As Besselink has noted in respect of the effect of international law in the Dutch legal order: "Norms of international law derive their force from international law, also when it is claimed within the [domestic] legal order" (Besselink 2007, p. 63). Norms of both written and unwritten international law need not be transformed before governmental bodies could enforce them. They take effect within the Dutch legal order as soon as they become internationally binding for the Netherlands (*Id.*).

The principle that all governmental bodies are required to give effect to international law was established by the Hoge Raad (*i.e.*, the Dutch Supreme Court) as early as 1919 in the *Grenstraktaat Aken* case (HR 3 March 1919, *NJ* 1919, 317). In this case, a Dutch farmer was fined because of transporting goods across the border without transportation documents. However, according to the Prussian-Dutch border treaty of 1816, farmers who had lands on both sides of the border were allowed to transport goods across the German-Dutch border without the need to show transportation papers. The Supreme Court held that the treaty in question governed not only the relationship between Germany and the Netherlands, but also the rights of certain land owners *vis-à-vis* the contracting parties. Therefore, in the Court's view, Dutch courts were obliged to give effect to the treaty in the domestic legal order, without transformation being required (Nollkaemper 2009, 451).

It is however one thing to state that international law need not be transformed into domestic law for it to take effect in the domestic legal order, but it is another to state that in case of conflict between an international norm and a domestic norm, the latter will always prevail. As far as the priority of international law over Dutch law is concerned, a distinction is made between on the one hand treaty law and resolutions of international organizations and on the other hand customary international law. Article 93 of the Constitution divides the first category into provisions that bind everyone and provisions that do not bind everyone:

> Provisions of treaties and of decisions by international organizations under public international law, which can bind everyone by virtue of their contents shall become binding after they have been published.

Article 94 of the Constitution adds to the previous article:

> Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone.

By virtue of those articles, the provisions of the ECHR, the ICCPR, and the ICESCR are considered to bind everyone (Vlemminx 1998, 219). Still, individuals can only invoke the said provisions to the extent that they are directly applicable

(or self-executing) in the Dutch legal order. The courts are constitutionally mandated to decide whether a provision is sufficiently clear and ambiguous and is intended to confer directly enforceable rights on individuals for it to be directly applicable in the Dutch legal order (Besselink 2004, 155).

Like in other states, the direct applicability of economic, social and cultural rights, as notably enshrined in the ICESCR, and which should be 'progressively realized', has not proved self-evident in the Netherlands. In a ground-breaking judgment of 1984, the public service tribunal (*Ambtenarengerecht)* of Amsterdam gave direct effect to Article 7 ICESCR (which enshrines the right of everyone to the enjoyment of just and favorable conditions of work) and eventually found a violation (Ambtenarengerecht Amsterdam 12 March 1984, NJCM Bulletin 1984, 245). But the Supreme Court (*Hoge Raad*) ruled in 1993, without further elaboration, that the principle of equal work, laid out in Article 7 ICESCR, is too general, and could therefore not be directly applicable in the Dutch legal order (HR 7 May 1993, NJ 1995, 259). In other cases, courts have usually refused to directly apply the ICESCR. However, courts may be less reluctant to apply the ICESCR in combination with Article 26 of the ICCPR (which enshrines the prohibition of discrimination), as most provisions of the ICCPR are considered to be directly applicable in the Netherlands (Van Walsum 1996, 45–46; Vlemminx 1998, 205). This method may make the ICESCR indirectly applicable in the Netherlands.

Having discussed the effect of written international human rights law (treaty law in particular) in the Dutch legal order, let us now turn briefly to sources of unwritten international human rights law. In the Dutch monist system, it is not contested that customary international law, the main source of unwritten international law, has a higher status than legal provisions of national origin. Such law becomes valid and effective in the Dutch legal order as soon as the Netherlands is internationally bound by it (Besselink and Wessel 2009, 55). However, that does not mean that Dutch courts are allowed to review domestic law in light of customary international law. Indeed, it follows from the Supreme Court's *Nyugat* (HR 6 maart 1959, NJ 1962, 2) and *Bouterse* (HR 18 September 2001, Strafkamer nr. 00749/01 (CW 2323), LJN AB1471) cases that courts are not allowed to cast aside domestic law on the grounds that it is incompatible with customary international law (Bovend'Eert et al. 2004, 146).

14.2.4 Sub-Conclusion

In this first Section, we have analyzed the universality of international human rights treaties, and their effect in the Dutch legal order. We noted that in some quarters, human rights are seen as purportedly the product of Western thinking, and thus alien to traditional cultures. The Dutch Advisory Council on International Affairs has addressed this issue in a 2008 report, in which in fact it celebrates cultural diversity within the bounds (margin of appreciation) set by international human rights law. Subsequently, we changed our perspective to the role of international human rights

law before Dutch courts. We observed that the Netherlands knows a monist system of giving effect to international law, which implies that international treaties become automatically part of the Dutch legal order upon approval by the Dutch Parliament. Treaty provisions – but not norms of customary international law – also prevail over inconsistent domestic law. It is observed, however, that individuals can only invoke provisions of international human rights treaties in domestic proceedings to the extent that those provisions are directly applicable / self-executing in the Dutch legal order. This has proved problematic for economic, social, and cultural rights.

14.3 Regional Protection Level

14.3.1 The Effect of the European Convention on Human Rights and the European Court's Decisions in the Dutch Legal Order

The Netherlands has been an original Contracting Party to the European Convention on Human Rights (ECHR). However, it took about 25 years before the ECHR had any noticeable effect in the Dutch legal order. Initially, the Dutch Supreme Court hardly ever found a violation of the ECHR, arguably on the grounds that "the Convention provision was not applicable or that the interference with the Convention right invoked was justified" (Klerk and Janse de Jonge 1997, 114). However, since the early 1980s, the ECHR has been invoked more successfully in Dutch courts, and violations of the ECHR have indeed been found (*Id.*, 114–116). One of the reasons for this change of attitude was that from 1976 onwards in several cases the European Court of Human Rights (hereinafter: ECtHR) found violations of the ECHR by the Netherlands (see Sect. 14.2.3).

It is the Dutch position that the ECHR must be applied as national law according to Articles 93 and 94 of the Dutch Constitution, and that, according to Articles 32 and 46 ECHR, the case law of the ECtHR has binding force in Dutch courts. This position has drastically changed the tasks and responsibilities of the Dutch courts: "In each single case the national courts have to establish the norm in the light of European law and they also have to review the norm itself as to whether it is permissible in the light of European law" (Thomassen 2008, 17).

The binding force of decisions of the ECtHR has been affirmed by the Government in a memorandum: "A decision of the Court has binding force. This binding force is established in article 53 of the present Treaty, in conjunction with article 92 of the Constitution. The judgements of the Court are decisions where this last article applies to" (MvA, *Kamerstukken I* 1995–1996, 23 936 (R 1523), nr. 247a, p. 3).

Nonetheless, the theoretical basis for the assumption that decisions of the ECtHR are binding in the Dutch legal order is not entirely clear. Two theories, both of them finding their basis in Article 93 of the Dutch Constitution, have been put forward to ground the direct effect of the ECtHR's judgments (Doorduijn,

De Invloed van het Europese Hof voor de Rechten van de Mens op de Nederlandse Rechtspraak, 1994, p. 2).

The first theory considers the decisions of the ECtHR as decisions of an international organization. Such decisions have binding force according to Article 93 of the Constitution, provided they are made by an organ that has the competence to take binding decisions under a treaty (Van Kempen 2003, 49; HR 23 November 1984, *NJ* 1985, 604). Formally speaking, the ECtHR is not an organ of an international organization, although it is institutionally linked to the Council of Europe (Doorduijn 1994, 2; Van Kempen 2003, 21). It could be argued, however, that the Court can be regarded as an international organisation in its own right (Doorduijn 1994, 2). The requirement as to the organ/organization's competence to take binding decisions also poses some theoretical problems. In principle, ECtHR judgments only apply to the parties to the dispute: the individual and the state within the jurisdiction of which the aggrieved individual falls. It is the state concerned in the particular case that ought to comply with the judgment (Artikel 46 paragraph 1 ECHR), by changing the laws and practices to led to the finding of a violation by the Court (Doorduijn 1994, 2; Van Kempen 2003, 38; ECtHR13 June 1979, *Marckx v Belgium*, *A* 31, § 58; ECtHR 26 October 1988, *Norris v Ireland*, *A* 142, § 50). Admittedly, it is undisputable that the Court's judgments are very authoritative, and that any Contracting Party to the ECHR is well-advised to comply with them if it is to avert a future condemnation by the Court. But legally speaking, at least under the first theory discussed here, only decisions in which the Netherlands was a defendant can have binding legal force in the Dutch legal order (Doorduijn 1994, 3).

A rival theory, the 'incorporation theory', posits that *all* decisions of the ECtHR are binding in the Dutch legal order, irrespective of whether or not the Netherlands was a defendant in the case (Doorduijn 1994, 4). Under this theory, which is, amongst others, adhered to by van der Velde, the interpretation and explanation by the Court "becomes part of the interpreted treaty provision and as such binds the states organs of the member states" (Van der Velde 1997, 77). Also, as van Kempen observed, decision and treaty are one (van Kempen 2003, 45).

Doorduijn's research shows that the incorporation theory is followed by the higher and lower courts in the Netherlands, which have explicitly indicated that they regard a judgement of the ECtHR as binding, although in some cases they require a clear statement of the ECtHR to that effect (Doorduijn 1994, p. 139–140). The Supreme Court upheld the binding effect of the ECtHR's case law by judgment of 10 November 1989 (HR 10 November 1989, NJ 1990, 450) in a case concerning the recognition of an illegitimate child. Under article 1:224 Dutch Civil Code it was impossible for a married man to recognize an illegitimate child. The applicant claimed that this was incompatible with Article 8 paragraph 2 ECHR. The Supreme Court drew explicitly on the ECtHR's interpretation of the article (and eventually ruled that the applicant was right):

> From settled judgment of the ECtHR follows […] that an interference as mentioned in article 8 paragraph 2 is 'only' necessary, in case it meets a pressing social need, and, in particular, proportionate to the legitimate aim that it pursues. (Berrehab v the Netherlands, 21 juni 1988, NJ 1988, 746)

The Supreme Court confirmed its 1989 judgment by judgment of 19 October 1990 (HR 19 oktober 1990, NJ 1992, 129). In this case the Supreme Court ruled that it was not at liberty to give a broader interpretation to an ECHR provision than the ECtHR had done in an earlier case, thereby assuming the binding interpretation of the ECtHR (Doorduijn 1994, pp. 124, 141).

Having shown that Dutch courts consider the ECtHR case law as binding in the Dutch legal order, it is observed that the effect of the ECHR in the Dutch legal order appears to be strongest in the higher courts (Klerk and Janse de Jonge 1997, p. 139–141). While it would be exaggerated to say that lower courts ignore the ECHR, it seems indeed that lower courts are not as accustomed to applying the ECHR as higher courts are; they might be not very familiar with all the 'ins' and 'outs' of the Convention and the case law of the Court.

14.3.2 Violations of the ECHR by the Netherlands

In several judgments, the ECtHR has found a violation of the ECHR by the Netherlands. The first of these judgments was handed down in 1976 in the case of *Engel and others v the Netherlands* (Judgment of 8 June 1976, Series A, No. 22 (1976) E.H.R.R. 647). The applicants in this case were conscript soldiers serving in different non-commissioned ranks in the Dutch armed forces. On separate occasions, various penalties had been passed on them by their respective commanding officers for offences against military discipline (*Id.*, para. 12). The applicants first appealed to the complaints officer (beklagmeerdere) and finally to the Supreme Military Court (Hoog Militair Gerechtshof) (*Id.*), complaining, amongst other things, that the *in camera* proceedings before the military authorities and the Supreme Military Court did not conform to the requirements of Article 6 ECHR (*Id.*, para. 52). The ECtHR eventually concluded that the Netherlands had indeed violated Article 6.1 the ECHR (*Id.*, para. 89). In 1984 this case was followed by other similar judgments concerning soldiers (De Jong, Baljet and Van den Brink, Series A, No. 77 (1984) 8 E.H.R.R. 20; Van der Sluijs, Zuiderveld and Klappe Series A, No. 78 (1984) 13 E.H.R.R. 461; Duinhof and Duiff, Series A, No. 79 (1984) 13 E.H.R.R. 478). All these cases concerned violations of Article 5 paragraph 3 ECHR (wrongful deprivation of liberty).

Also in more recent cases has the ECtHR found violations of the ECHR by the Netherlands. In the case of *Said v The Netherlands* (5 July 2005, No. 2345/02) for instance, the Netherlands had forced Mr Said, an Eritrean national who claimed to have deserted from the Eritrean army, to leave Dutch territory. Said claimed that he would be executed upon his return to Eritrea, and thus opposed his expulsion before the Dutch administration and the courts. The Minister, however, found Said's story unreliable, and the *Raad van State* (Council of State, the highest administrative court in the Netherlands) was of the opinion that examining the reliability of the story itself was not necessary (ABRvS 16 July 2001, LJN AE 7136). Said applied to the ECtHR and claimed that in case he were expelled from the Netherlands, he

would face treatment contrary to Article 3 of the ECHR (*Id.*, para. 36). The ECtHR ruled that by expelling Said, the Netherlands had indeed violated the Convention's protection against non-refoulement (Article 3), as Said's life was in real danger in Eritrea (*Id.*, para. 55). Former Dutch ECtHR judge Thomassen has interpreted this judgment as a strong warning to the Dutch administrative and judicial authorities. As far as the latter are concerned, Thomassen believes that the Court has instructed Dutch courts to "take a less deferential position vis-à-vis the administrative authorities where fundamental rights are concerned in the future" (Thomassen 2008, 21).

Another recent case in which the ECtHR came to the conclusion that the Netherlands had violated the ECHR is the case of *Bocos-Cuesta v The Netherlands* (10 November 2005, No. 54789/00). In this case a man was convicted for acts of indecency with some young children on a playground. The *Hoge Raad* (Dutch Supreme Court) upheld the conviction but the ECtHR did not, pointing out that the man had not had a fair trial because the questionings by the police could not be tested for reliability: the accused nor his legal representative had been able to attend the questionings, and his request to hear the children as witnesses was denied by the court because of the young age of the children, This judgment stands for the notion that national courts must deal more carefully with witness statements in case the witnesses could not be questioned by the defense (Thomassen 2008, 21).

14.3.3 Margin of Appreciation Doctrine

The ECHR is regarded as binding. However, Contracting States have a certain discretion to decide how fundamental rights will be protected, and to balance different interests. This 'margin of appreciation' doctrine cannot be found in the text of the ECHR, but has been jurisprudentially developed by the ECtHR (Hutchinson 1999, 639). The doctrine is founded on "the assumption that national authorities are best acquainted with the various forces and interests in their own society" (Thomassen 2008, 13), and that, compared to international courts, national courts are better placed to judge to what extent it is necessary to limit fundamental interests in favor of other important interests (*Id.*). It was in the *Handyside* case that the Court first explained the doctrine:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. (*Handyside v. United Kingdom*, Judgement of 7 December 1973, Series A, No. 24)

Whether the scope of the margin of appreciation will be broad or narrow depends on the nature of the rights in issue, but also on the balancing of opposing rights and interests (Ovey and White 2006, 233).

A seminal case that further developed, and set limits to, the margin of appreciation doctrine was a case against the Netherlands, decided by the Court in 1985. The *X and Y case* (*X and Y v. Netherlands*, Judgment of 26 March 1985, Series A, No. 91; (1986)

8 EHRR 235) concerned a young girl who was mentally handicapped and had been seriously sexually assaulted. Because no criminal proceedings could be instituted against the perpetrator in the Netherlands due to a lacuna in Dutch law, the case was brought before the ECtHR, which ruled that in this case the state could not be allowed broad discretion and in fact had exceeded its margin of appreciation in failing to provide a remedy:

> The Court, on this point agrees in substance with the opinion of the Commission , observes that the choice of the means calculated to secure compliance with Article 8 (art. 8) in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer. (*Id.*, para. 24)

Moreover, with regard to the protection afforded by the civil law the ECtHR stated the following:

> The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated. (*Id.*, para. 27)

It is noted that the margin of appreciation doctrine does not apply to all ECHR provisions. Some provisions, such as the Articles 2, 3 and 7, have an absolute character and are not liable to balancing of interests (Thomassen 2008, 15). In any event, a state's margin of appreciation is not unlimited. As is exemplified by the case of *X and Y* v. *The Netherlands*, it is always controlled by the ECtHR. Also in respect of restrictions of fundamental rights that are allowed by the ECHR (*e.g.*, restrictions on the freedom of expression) will the Court ascertain whether restrictions fall within the margin of appreciation left to states, and will it ensure that those restrictions do not encroach on the core of the right. In a relevant recent case, the Court stated in this respect:

> Under the Court's case-law, the adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10. (ECHR, Vgt Verein gegen Tierfabriken v. Switzerland, A. 24699/94, 28 June 2001, para. 67)

14.3.4 Subconclusion

In this Section, it was shown that the ECtHR's case law has affected the application of human rights in the Dutch legal order. The Convention as interpreted by the Court is now routinely invoked by Dutch courts. This is of course not to say that no cases

against the Netherlands reach the Court. They do, but typically in 'grey areas', in which the Court may be called on the draw the limits of the margin of appreciation doctrine in a given case.

14.4 National Protection Level

Fundamental rights are not only protected at the international or regional (European) level, but also at the national level. In this Section, it is examined to what extent *domestic* fundamental rights are guaranteed in the Dutch legal order.

14.4.1 Fundamental Rights Within the Dutch Legal Order: Liberal v. Social Rights

In the Dutch legal system, fundamental rights are called *grondrechten*. At the time of the preparation of the revision of the Constitution in 1983, the government described fundamental rights as "the basic principles of a decent society" (TK 1975–1976 13872 nr. 3, p. 10). The fundamental rights are set out in the first chapter of the Dutch Constitution. This place in the structure ensures that they pervade the whole Constitution, and that the authorities are always under the obligation to observe them. They apply to all individuals who fall within the jurisdiction of the Netherlands, although certain rights are only applicable to Dutch nationals. Article 4, for instance, provides that "every Dutch national shall have an equal right to elect the members of the general representative bodies and to stand for election as a member of those bodies, subject to the limitations and exceptions prescribed by Act of Parliament." This article specifically refers to 'every Dutch national' and not to 'all persons in the Netherlands' (compare Article 1 Constitution) or 'everyone' (compare Article 5).

The fundamental rights mentioned in chapter I of the Constitution can be divided into two groups. These two groups, which are broadly based on the well-known distinction between classic liberal rights and social rights, differ in character and legal force. The fundamental rights that are established in the Articles 1–18 of the Constitution are mainly ensured by negative obligations on the part of the government. They are binding on the legislature, the administration, and the courts. The Constitution makes it clear that they may only be restricted in case the restriction is based on an explicit constitutional restriction clause. With the exception of Articles 1–5, those clauses are mentioned clearly in the Constitution.

The socio-economic fundamental rights are established in the Articles 19–23 of the Constitution. While, like classic liberal rights, they also protect individual autonomy – in the case by guaranteeing social security (Van Hoof 1998, 7–8), unlike the classic liberal rights they are mainly seen as instruction norms which the government should progressively realize. They often resemble parts of the programs of political parties (Kortmann and Bovend'Eert 2000, 157). Ordinarily, they do not qualify as

subjective rights that can be invoked in court (Van Wissen 1992, p. 22–26), nor can one imagine them having horizontal effect (it is indeed the government that bears the responsibility for sufficient employment and public health). Nonetheless, there is no hierarchy of fundamental rights, in the sense of liberal rights somehow being more important than socio-economic rights (Kortmann and Bovend'Eert 2000, 150). Stating that there is no hierarchy does not mean that there is no relationship between both categories of rights; it is observed that they do relate to each other, *e.g.*, because the government, when taking measures to implement social rights, should take the classic liberal rights into account (*Id.*).

The question may arise whether it was a good decision to establish both groups of rights in one chapter of the Constitution. In any event, during the revision of the Constitution in 1983, the government tried to tone down the differences between both groups as much as possible by pointing out that both the classic rights and the social rights are seen as basic principles of a decent society, and that, while the classic fundamental rights may have more normative power, social rights do not lack legal force. Besides, social rights may lay the basis for legal provisions from which rights for individuals may result (Van Wissen 1992, 27–29; TK 1975–1976 13872 nr. 3, p. 7/8).

14.4.2 The Prohibition of Constitutional Review

The Constitution is a sober document. It is seen as the basic document of the Dutch form of government, and it only contains its essential principles. The basic character of the document ensures that, as values slightly change over the years, the Constitution need not be amended. At the same time, this illustrates its open character: it offers a framework where there is room for change as to the social situation and the ideas that are cherished by the people. All public authorities have the obligation to adhere to the Constitution, and all Dutch courts apply the Constitution in all fields of law in case this is relevant in a particular case. However, unlike courts in other countries, they are not allowed to review the constitutionality of Acts of Parliament and treaties, in accordance with Article 120 of the Constitution. They must assume that a formal law does not conflict with the Constitution. This obviously limits the role of the Constitution, and the fundamental rights protected by the Constitution, in the Dutch legal order (Besselink et al. 2002, 9; van Bijsterveld 1998, 353). However, the courts may review regulations of lower administrative bodies in light of the Constitution (Loonstra 2003, 47–48).

The Supreme Court has defended the prohibition of constitutional review on a number of occasions. In the *van den Bergh* case (HR 27 januari 1961, NJ 1961, 248), for instance, the Court implied that allowing constitutional review would amount to allowing the courts to review the procedure of legislation itself: "In rendering a verdict on whether an official document is indeed a valid piece of parliamentary legislation, the court would have to interpret the constitutional provisions governing the process of enacting legislation" (van Bijsterveld, p. 353). In another

case, the *Harmonisatiewet* case, the Court also rejected the review of parliamentary legislation with regard to unwritten fundamental principles of law (HR 14 April 1989, NJ 1989, 469).

The prohibition of constitutional review appears to be primarily grounded on the argument of legal certainty. A scholar has observed in this respect: "[I]t may take a long time before the court had the possibility to rule on the constitutionality of the law. Until then there is uncertainty about the force of law" (van Houten 1997, 136). It is also argued that the legislator can better interpret the Constitution than courts can. Against this background, it is asserted that granting courts the right of review may endanger their impartiality, and place them above the legislator. Finally, it is said that judicial review does not fall within the normal work of the courts, which are only called on to apply the law (*Id.*, 136–138).

Not surprisingly, Article 120 of the Constitution also has its detractors. The article is sometimes seen as unsound, in that in a system of separation of powers, one power, in the case the legislator, should never be allowed to review its own actions. Also, it is seen as inconsistent, in that acts of Parliament could be reviewed in light of treaties in force in the Netherlands (Loonstra 2003, 48). Moreover, the prohibition undermines the unity of legislation, and deprives the Constitution of all power, in that it allows the legislator to be above the Constitution. Lastly, constitutional review is arguably warranted because it may more strongly protect the rights and interests of individuals (van Houten 1997, 136). So far, however, Article 120 of the Dutch Constitution has not yet been repealed.

14.4.3 Subconclusion

In this Section we have discussed how fundamental rights are protected by Dutch law. The Constitution protects both classic liberal rights and socio-economic rights, without there being a hierarchy between the two. Importantly, acts of Parliament cannot be reviewed in light of the Constitution, including its fundamental rights provisions: Article 120 of the Constitution prohibits constitutional review. This severely limits the role of the Constitution, and affects the fundamental rights protection of individuals.

14.5 Fundamental Rights in a Multicultural Society

In a multicultural society such as the Netherlands, where different groups of people with their own deep-rooted cultural backgrounds live side by side (van Sasse van Ysselt 2004, 5), cultural tension and conflict may arise, also in relation to the protection of fundamental rights. Traditionally, Dutch constitutional freedom and cultural openness have prevented open clashes between different rights conceptions held by different groups. In recent years, post 9/11, however, more tensions developed, not

primarily as a result of the more charged international political situation (the situation in Iraq, Afghanistan, the Palestinian Territories), but mainly as a result of data concerning the integration, or lack thereof, of minority groups in Dutch society becoming public. Those developments have especially affected the interpretation of the ban on discrimination, the freedom of religion, the freedom of speech, the freedom of association, and the freedom of education (Nota Grondrechten in een pluriforme samenleving 2004, 2). Conflicts between fundamental rights conceptions have been stoked further by another social development: individuals' increased awareness of their fundamental rights – a list which has become longer over the years for that matter – and their attendant increased willingness to litigate (Mendelts 2004, 14–17).

14.5.1 Conflicts of Fundamental Rights

Statements about religion, religiously inspired statements about homosexuality and the status of women, the wearing of certain religious garments, and honour killings have epitomized the conflicts between fundamental rights conceptions over the last few years in the Netherlands. Fundamental rights can play a role in various ways in relation to those statements and practices (Nota Grondrechten in een pluriforme samenleving 2004, 9). First, rights can be abused, in the sense of being used with the aim to attack the rights and freedoms of others. In case a fundamental right is affected by another fundamental right, the holder of the latter right has nonetheless not necessarily abused his right. It is well possible that the legitimate exercise of a fundamental right by one violates the fundamental rights of another. In this case we speak of conflict of fundamental rights (van Wissen 1992, 56). An example of a conflict between fundamental rights is the conflict between the right to freedom of speech and the right to protection of private life when a gossip magazine publishes a story about the love life of a celebrity (Brems 2008, 7). In a multicultural society, conflicts between the prohibition of discrimination on the one hand, and the freedom of speech and religion on the other, will typically arise. One may think here of religious statements about homosexuality, and the wearing of the *niqab* (face-covering veil) and the headscarf as purportedly mandated by religious edicts (Nota Grondrechten in een pluriforme samenleving 2004, 9). In the Netherlands, like in other parts of Europe, a fierce debate is going on about the wearing of headscarves or other forms of religious clothing that give expression to Islam. In one instance, the Dutch Commission of Equal Treatment (Commissie Gelijke Behandeling) upheld a Dutch school's prohibition of the wearing of the *niqab* as proportional and necessary (CGB Oordeel 2003/40, 20 March 2003), thereby implying that the defendant school's indirect discrimination based on religion was objectively justified (van Sasse van Ysselt 2004, 9).

Another case involving a clash between fundamental rights and cultures is the case of claimed exemptions from swimming lessons for Muslim girls, heard by the Dutch Supreme Court (HR 26 May 1992, NJ 1992, 568). In this case, a Moroccan father kept his daughter home as he did not want her to participate in

the compulsory school swimming lessons for the reason that the lessons were given to both boys and girls. According to the father, the Quran forbids girls older than seven to play sports together with boys. A Dutch court, however, did not read the prohibition of mixed swimming lessons in the Quran (HR 26 May 1992, NJ 1992, 568, noot 't H, para. 5), and ruled that the father committed a violation of the Compulsory Education Act (*Leerplichtwet*) (Dommering 2003, 11). The Supreme Court concurred, and rejected the father's appeal on the grounds that he had failed to request an exemption from the mixed swimming lessons, or to look for another school where mixed swimming lessons were given (HR 26 May 1992, NJ 1992, 568, para. 6.2.3).

Conflicts of rights, *e.g.*, the freedom of speech/religion versus the right to be free from discrimination, rarely play out in criminal courts, and rarely lead to convictions. Imam El Moumni, for instance, who made controversial discriminatory comments about homosexuals in the television program Nova (stating that homosexuality is harmful to Dutch society, and is in fact an infectious disease), was acquitted by both the district court (Rb. Rotterdam, 8 April 2002, LJN: AE1154) and the higher court (Hof Den Haag, 18 February 2002, LJN: AF0667). Also the rightist 'anti-Islam' politician Geert Wilders, who was prosecuted for incitement to hate and discrimination, was acquitted by the district court, which held that his controversial statements were permitted in the context of a societal debate in which a politician is supposed to take position (Rb. Amsterdam, 23 June 2011, LJN: BQ9001).

14.5.2 Culture as a Defense in Criminal Cases

As could be gleaned from the case against El Moumni, in a multicultural society it is well possible that certain minority groups engage in cultural practices that are in tension with the values of a dominant culture as enforced by the criminal law. Traditional cultural practices that are considered as offences in the Netherlands include crimes of revenge by loss of honour or fear for sorcery, killing or wounding of partners, circumcising girls, and claiming respect by using a weapon.

The question arises as to whether judges could or should take into account the culture and ethnicity of the suspect in a criminal case, *e.g.*, for purposes of sentencing (Bovens 2006, 1). Could the suspect put forward as a defense that he had to act as he did according to his cultural norms (Siesling and Ten Voorde 2009, 18)?

Some lone voices have argued in favor of the cultural defense in criminal cases. Siesling and Ten Voorde, for instance, have submitted that individualized justice demands respect for the culture to which the suspect belongs. Arguably, in a multicultural society like the Netherlands, minority cultures should be accorded the same respect as the dominant culture. Empathy for other cultures could moreover lead to faster integration of immigrants, which can in turn help prevent intercultural conflicts. Finally, it is argued that accepting the cultural defense may contribute to a more accurate judicial opinion. The criminal law as traditionally conceived has a reductionist character in that it requires defenses to conform to the majority culture,

thus excluding from the hearings the real culture-based story of the accused. Allowing the accused to make a culturally impregnated defense would enrich the debate and put the judge in a position to render a more informed judgment (Siesling and Ten Voorde 2009, 19).

The majority opinion rejects the cultural defense, however. Bovens, for instance, has observed that most people share the view that the cultural background of suspects should not play a major role in criminal cases (Bovens 2006, 2). This stance is supported by Article 1 of the Dutch Constitution, by virtue of which "[a]ll persons in the Netherlands shall be treated equally in equal circumstances." This provision prohibits discrimination/distinction between people because of different backgrounds, religion, race, or culture.

Somewhat uncomfortably, however, the principle of equality – of cultures, instead of mere individuals – is also used to defend the cultural defense. In this respect, advocates of the cultural defense may also rely on Article 27 ICCPR ('In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'), although one should admit that this provision is not very clear, and therefore can probably not be used as an argument in favor of the cultural defense.

More fundamentally, the acceptance of the cultural defense and the attendant promise of impunity, may send the wrong signal in that they can incite potential perpetrators to commit crimes. It is, moreover, open to serious doubt whether the cultural defense furthers integration, as in fact it divides society into different groups living under their own laws. Such groups may also come under the sway of powerful conservative figures who might have special interpretation power within a particular cultural group and stifle open discussion within that group (Siesling and Ten Voorde 2009, 20). Apart from those concerns, one may wonder what standards are widely accepted and perceived as legitimate in a given cultural group. Also, what practices qualify as 'cultural' practices for purposes of the cultural defense? While honor killing has already been documented in several studies as a cultural phenomenon, it is more difficult to assess whether, for example, Winti magic or Voodoo are indeed cultural practices worthy of protection (Bovens 2006, 6).

14.5.3 Sub-Conclusion

In a multicultural society such as the Netherlands, conflict between fundamental rights is inevitable. Conflict typically takes the form of the prohibition of discrimination clashing with the freedom of speech and religion. Solving such conflicts requires careful balancing of rights by the courts. While law in a multicultural society such as the Netherlands may go some way to accommodate minority conceptions of fundamental rights, cultural practices that cannot be translated in fundamental

rights, but that are precisely in tension with such rights, cannot expect much clemency in the Netherlands. The Dutch general rejection of a 'cultural defense' in criminal matters may testify to this.

14.6 Conclusion

In this report we have discussed the role and effect of international and purportedly 'universal' human rights law in the Dutch legal order. It has been observed that the Dutch government is a strong advocate of the protection of international human rights. This is borne out by the long list of human rights treaties signed and ratified by the Netherlands, and the choice for a monist system of the effect of international law in the domestic legal order. Monism guarantees that international human rights treaties, including the important ECHR and the case law arising under it, become automatically part of the Dutch legal order upon approval by the Dutch Parliament, under Articles 93 and 94 of the Constitution. That being said, one should not fail to note that at the purely national level, not only human rights treaties provide for the protection of fundamental rights, but so does the Dutch Constitution in its first chapter: The importance of the constitutional protection of fundamental rights is diminished, however, by the unavailability of constitutional review: the courts cannot review acts of Parliament in light of constitutional fundamental rights, and a Constitutional Court does not even exist. In fact, this reinforces the role of *international* human rights law as a review standard.

This report has also shed light on the tensions between the universalist aspirations of human rights law and the particularities of the cultural practices of certain (immigrant) groups present in the Dutch multicultural society. To the extent that those groups, and individuals within those groups, can avail themselves of human rights to vindicate the performance of their practices, or to the extent that their human rights conceptions remain within the flexible bounds set by international human rights law, the Dutch legal order may tolerate, and even celebrate, such practices. This way, the universality of human rights may even be reinforced because it accommodates and includes minority groups with slightly differing rights conceptions within a universalist legal framework. However, Dutch judicial authorities see to it, and should continue to see to it, that accommodation does not go so far as to render universality an empty shell. Practices that manifestly run afoul of human rights standards, *e.g.*, female genital mutilation, will therefore not be tolerated.

Apart from harmful cultural practices, opinions that adversely affect human dignity, because they are defamatory or discriminatory, may similarly risk being censured (on the basis of clauses allowing for the restriction of human rights in carefully defined circumstances). Dutch prosecutors and courts will often be loath to go down this path, however, given the importance attached to the freedom of speech as a human right. It is noted that for a court to restrict the freedom of speech is not a matter of doubting the universality of human rights, but rather of seeking to define the limits of a freedom the exercise of which might well encroach on the

freedoms of others. Doubtless, finding a satisfactory solution to conflicts between rights is one of the greatest human rights challenges which Dutch authorities have to cope with as we write.

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Chapter 15
Rule of Law as a Basis for Effective Human Rights Protection: The German Perspective

Norman Weiß

15.1 Introduction[1]

Human rights can be understood as a multi-faceted concept requiring a strong legal basis. This legal basis is constructed by a set of legal guarantees, contained in human rights treaties and an increasing number of monitoring mechanisms. Altogether, they build the international system for the protection of human rights. This system requires the active support by states as the major subjects of international law and can profit highly from other stakeholders such as non-governmental organizations.

The main concept behind this system is the rule of law, which provides that each state activity must be based on the law and, therefore, can be reviewed by the courts. On the level of international law, there is no automatic judicial review by courts, but there are legal monitoring mechanisms.

15.2 The Protection of Human Rights at the International Level

During World War II, it became apparent that human rights and their international legal protection must be an integral part of the new world order, to be established at the end of the war.

[1] This Chapter is based on the national report which can be found in Weiß N. (2010), "Are Human Rights Universal and Binding?", in: J. Basedow, U. Kischel, U. Sieber, *German National Reports to the 18th International Congress of Comparative Law*, Tübingen: Mohr Siebeck, 561–572.

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Human rights are, therefore, accorded an important position in the Charter of the United Nations. Their universality is described in the preamble, and accentuated in the body of the Charter (Article 1 (3) and Article 55 (c)). The goals of the organization are defined in Article 1 and include the aim to promote and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. In fulfilment of this obligation, the Universal Declaration of Human Rights (UDHR) was passed as a Declaration of the General Assembly in 1948, only 3 years after the founding of the organization.

This achievement is all the more remarkable when one considers the conflicting positions of the member states, expressed during the debates. The UDHR seeks to reconcile these different positions in dealing with civil and political freedoms as well as with economic, social and cultural rights. Nevertheless, the declaration was not adopted under unanimous consensus, but with the communist states, South Africa and Saudi Arabia all abstaining.

Due to the increasing confrontation between the Eastern and the Western Blocs, the conclusion of a binding international convention on human rights slipped further and further out of reach. Only the International Convention on the Elimination of All Forms of Racial Discrimination – ICERD – was concluded in 1965 and entered into force in 1969.

The international human rights covenants (the International Covenant on Civil and Political Rights – CCPR – and the International Covenant on Economic, Social and Cultural Rights – CESCR) were, after extensive and lengthy debate, eventually concluded in 1966. However another 10 years passed before they were eventually ratified and entered into force.

Since then, many other multi-lateral treaties for the protection of human rights have been negotiated and have entered into force:

- Convention on the Elimination of All Forms of Discrimination against Women – CEDAW (1979/1981)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – CAT (1984/1987)
- Convention on the Rights of the Child – CRC (1989/1990)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families – CMW (1990/2003)
- International Convention for the Protection of All Persons from Enforced Disappearance (2006/2010)
- Convention on the Rights of Persons with Disabilities – CRPD (2006/2008)

These treaties refer to the principles of the UN Charter and to the UDHR and affirm the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms.

Nevertheless, the recognition of the universality of human rights has been challenged on various occasions. African, Asian, Islamic, and communist leaders hold that human rights are a western concept, aiming at cultural hegemony, and therefore not applicable to non-western societies with their own cultural and legal traditions. This conflict could only be settled in vague, ambiguous terms. The World

Conference on Human Rights, held in Vienna, Austria, on 14–25 June 1993, was a forum for representatives of 171 states. The conference adopted, by consensus, the Vienna Declaration and Programme of Action. These documents were meant to pave the way for a holistic approach to the promotion of human rights and involve actors on all levels**:** international, national and local. With regard to universality, the Vienna Declaration vaguely states: "The universal nature of these rights and freedoms is beyond question." (I.1) States are committed to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.

According to the Vienna Declaration, relativist arguments must not be decisive for the protection of human rights: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." (I.5)

The Vienna Declaration did not end the debate on the universal character of human rights but the controversy was superseded by a broader discussion about the export of democracy and neo-imperialism, especially after the terrorist attacks on September 11, 2001.

It is worth noting that it is often non-democratic regimes which rely on non-western cultural traditions in order to prevent their people from enjoying their human rights. These governments' arguments are aimed more at stabilizing their own power than protecting the cultural identity of their societies.

In my point of view, the universality of human rights can be supported by considering human rights law to be a reaction to a socio-economic modernization process. According to this view, human rights law offers a solution to the fact that the human species is vulnerable, a problem which becomes all the more evident in radical or extreme situations. Humans are confronted with such situations all over the world and for this reason require the protection of human rights law. Thus, the particularity of the historical formation and outward manifestation of human rights does not contradict the universality of its aim to guarantee human liberty.

Beyond this more political debate, the legal texts themselves are quite clear. The treaties aim for world-wide acceptance but are, of course, only binding *inter partes*. According to Article 19 of the Vienna Convention on the Law of Treaties, states may make a reservation upon ratification unless it is prohibited by that treaty or incompatible with the object and purpose of the treaty. Whilst few states have entered reservations to ICERD, many have done so with regard to CEDAW. Moreover, many of these reservations are directed to fundamental provisions of CEDAW.

Reservations are necessary to allow states to ratify treaties and respect their national constitutions at the same time. With regard to human rights treaties, however, a lesser commitment, such as that necessitated by a reservation, has detrimental effects on the protection of human rights. It may be said that such an openly exhibited

reluctance to agree to certain provisions may indicate a true commitment to the treaty as a whole. In these cases, the international community knows about the problems a state has with regard to a certain treaty provision and may offer support to overcome them.

The number of parties to these treaties ranges from 18 to 193 (as of 18.12.2009). The guarantees enshrined therein must be respected, protected and fulfilled by each state party to the fullest extent. Nevertheless, the treaties do not all follow the same technical approach. Generally, states undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" (Article 2 (1) ICCPR) or are obliged to carry out special measures, such as "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races" (Article 2 (1) ICERD) or to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (Article 2 (1) CAT).

On the contrary, Article 2 (1) ICESCR stipulates that state parties undertake "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". This specific approach is due to the special character of social, economic and cultural rights.

All of the relevant human rights treaties are intended to have an international legal effect. Thus, they are binding for the parties in international law. It depends on the national legal order, as to whether and under which conditions these treaties impose legal effects in the internal legal order, i.e. whether national judges and administrators will apply the norms of a treaty in a specific case. This issue will be dealt with below.

International law requires states to bring their domestic statutes into conformity with their international obligations. Failure to do so will result in an international delinquency but will not have an automatic effect on the national legal system.

The treaties are not only legally binding, but, additionally, they establish international control mechanisms. Each treaty has a specialized committee of independent experts. These committees meet two or three times per year for 10–12 weeks in total. Three types of control mechanisms are well-established: a compulsory reporting mechanism (1) can be understood as the basic way of monitoring, in a non-confrontational manner, whether state parties fulfil their obligations. A mandatory state-complaint mechanism (2) has no practical relevance as it has not yet been used. Individual-complaints mechanisms (3) are guided by the idea that the individual is the best guardian of his or her own rights. In fact, this mechanism only deals with human rights violations on a case-by-case basis and, therefore, does not contribute directly to the universal respect for human rights. In this respect, the state-reporting mechanism seems to be much more adequate. Here, state parties must report regularly, every 4 or 5 years, on the progress and problems with regard to the human rights guaranteed in the respective treaty. This mechanism does not need a violation of rights or even a critical situation to be initiated. Furthermore, every party has to undergo this reporting procedure.

The efficacy of these control mechanisms should be assessed with regard to international law, taking into account the heterogeneity of the international community. It must be borne in mind that international control mechanisms lead to a direct clash with the sovereignty of states, and that not all states are equally ready to compromise their sovereignty. In this context, fundamental political positions, expediency considerations and trust in the independence and impartiality of the control authority are all factors that must be taken into account.

Evaluating the efficiency of the control mechanisms fairly requires that one keeps in mind the number and differing nature of the state parties. In Europe, the 47 state parties to the European Convention on Human Rights have already had to accept differences in legal systems and moral ideals between the member states. This problem is magnified with regard to the two covenants, each of which has three times as many state parties, originating from very different cultures and legal backgrounds. Irrespective of the need for universal acceptance of human rights, governments must be given some discretion in order to take national moral ideals into consideration. In the long run, however, the application of human rights treaties by the treaty bodies leads to common standards of achievements ameliorating the protection of human rights.

Besides treaty law on human rights, there is, of course, also customary human rights law. Unfortunately, customary human rights law covers only some core rights and offers a lower level of protection compared to treaty law. On the other hand, customary law is not restricted to the parties of a treaty but binding on every state (which did not persistently object to the new rule). A small group of human rights protected by customary international human rights law is even regarded as *ius cogens,* for example the prohibition of slavery, the prohibition of torture and denial of justice.

From a German perspective, international human rights are universal. The German government supports the Vienna Declaration and actively promotes respect for human rights through its bilateral foreign policy and development co-operation, as well as through the European Union's Common Foreign and Security Policy.

The German academic debate holds that human rights may be realized within each culture but, at the same time, that they are not a natural element of any culture. With regard to their emancipatory notion, human rights pose a challenge for each tradition.

This section shall conclude by exploring the perspective of German constitutional law and asking how international human rights law enters the national legal sphere.

Article 59 (2) of the German constitution (Basic Law) requires the formal consent of the Federal Parliament (Bundestag) for all treaties which affect matters of legislation or concern the political relations of the Federal Republic. This formal consent is given by a specific statute which gives a treaty the status of federal law, ranking below the constitution.

International human rights treaties are, once they are transformed, federal law and, therefore, can be altered by a *lex posterior*. As the German legal order respects the obligations resulting from international law, the *lex posterior* will be interpreted in the light of the treaty.

Whether the treaty and its incorporating statute are directly applicable depends on the content of the treaty itself. This question of applicability is generally answered positively for self-executing treaties. Human rights guarantees fall into this category and thus can be invoked before courts and national authorities.

Customary international human rights law is incorporated by Article 25 Basic Law which reads: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."

Being part of the federal law, international human rights law is binding for the executive and the judiciary (Article 20 (3) Basic Law).

As Germany is a party to the European Convention on Human Rights (ECHR), this convention prevails in the discussion over international human rights law. The treaties dealt with in this section and their monitoring mechanisms are not very well-known, therefore courts only seldom refer to them. The Federal Constitutional Court sometimes makes reference to international human rights law when interpreting the fundamental freedoms guaranteed in the Basic Law (Basic Rights).

15.3 The Protection of Human Rights at the Regional Level

Germany signed the ECHR on November 4, 1950. After ratification on December 5, 1952, the convention entered into force on September 3, 1953. Germany ratified all protocols thereto, with the exception of Protocol 7. Germany ratified the European Social Charter (ESC) and several other human rights treaties such as the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Framework Convention for the Protection of National Minorities (FCNM).

These treaties are incorporated by statute under Article 59 (2) Basic Law (supra I.2) and have the rank of (basic) federal law. Therefore, an individual constitutional complaint (Verfassungsbeschwerde) cannot be brought before the Federal Constitutional Court claiming that the ECHR has been violated. Again, the Federal Constitutional Court only makes reference to the ECHR when interpreting the Basic Rights.

The ECHR provides an individual complaint mechanism, which has been compulsory for the contracting parties since 1998 (Article 34 ECHR). The European Court of Human Rights may only deal with a matter after all domestic remedies have been exhausted. The Convention's protection system therefore relies upon a functioning national judicial system. However, this has proven to not exist in every contracting party, for example, Italy has many structural problems within the judiciary and procedures take too long. Some of the new contracting parties from Middle and Eastern Europe, especially Russia, do not have the sort of judicial systems the Convention presupposes. Therefore, the national judiciary does not serve adequately as a filter and the Court has to carry a heavy workload. Every year, more than 30,000 new applications are lodged.

As a consequence, the monitoring system established by the ECHR faces the problem that the length of its own proceedings is no longer reasonable according to the Court's own criteria.

The Court's judgments have binding force, but only *inter partes* (Article 46 (1) ECHR). They are understood as an autonomous interpretation of the convention.

There had been some confusion about the effects of the judgments of the European Court of Human Rights in the so-called *Görgülü* Case. In this case regarding parental custody, which ultimately resulted in a decision to exclude the father's right to access, the Federal Republic was found to have violated Article 8 of the Convention. Following the European Court of Human Rights' judgment, the Naumburg Higher Regional Court held that only the Federal Republic of Germany, as a subject of public international law, was bound by that judgment, but not its bodies, authorities and the bodies responsible for the administration of justice, which are independent under Article 97 (1) of the Basic Law. According to the Naumburg Higher Regional Court, the effect of the European Court's judgment is therefore, subject to a change of domestic law, limited as a matter of law and as a matter of fact to establishing the sanctioning of what, in the opinion of the ECHR, was a past violation of law. The judgment of the ECHR remained a judgment that was not binding in all events for the domestic courts.

Mr. Görgülü initiated another constitutional complaint and the Federal Constitutional Court, in its order (14 October 2004–2 BvR 1481/04), held:

> In the German legal system, the European Convention on Human Rights has the status of a federal statute, and it must be taken into account in the interpretation of domestic law, including fundamental rights and constitutional guarantees.
>
> The binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention.
>
> The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are in all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law.
>
> A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law.
>
> The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the decisions of the European Court of Human Rights (ECtHR) as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECtHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

With this order the Federal Constitutional Court underlined the importance of the European Court of Human Rights' judgments and of the ECHR as a legally binding instrument for the protection of human rights. In 2006, Germany introduced a new possibility for re-opening civil procedures after the European Court of Human Rights had found Germany to be violating the Convention (§ 580 No. 8 ZPO); a similar provision for criminal procedures already existed.

The European Social Charter has a state reporting mechanism, which is not very effective and did not gain a favourable reputation outside a small circle of professionals working in this field. The ECHR system is much more popular with

the general public. During the last 10 years, the ECHR as a whole and the Court in particular reached the German law school curriculum. Compared to the international level, the Conventional system is better known and used more often than the international mechanisms.

As a contrast, CPT established a preventive mechanism. Here, an expert committee visits places of arrest in order to evaluate the situation and help to improve standards. The Framework Convention for the Protection of National Minorities provides for a monitoring system to evaluate how the treaty is implemented in state parties. It results in recommendations to improve minority protection in the states under review. The Advisory Committee (18 independent experts) is responsible for providing a detailed analysis on minority legislation and practice. The monitoring is political and involves the Council of Europe's Committee of Ministers.

The regional European human rights system under the auspices of the Council of Europe is relevant for 47 states. Member states of the Council of Europe are today obliged to ratify the ECHR once they join the Council. Therefore, the Convention's protection of human rights is valid for all 47 states, ranging from Reykjavik to Vladivostok, for more than 800 million people. Universality is to be seen with regard to the states, persons, and area concerned.

As the Court stated in the cases of Banković (12 December 2001, 52207/99, RJD 2001-XII) and Issa (16 November 2004, 31821/96, EHRLR 2005, 86–91):

> In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.

The Court respects that states have a margin of appreciation when making rules but insists that the ECHR must be respected as a common European standard. This standard has been developed over the decades, applying the Convention as a living instrument. The Court has, of course, been called upon to address issues that were not foreseeable when the Convention was signed in 1950. Over the past 50 years the Court has ruled on many issues of society such as abortion-related questions, assisted suicide, strip-searching, domestic slavery, the right not to be prevented from tracing one's origins as a result of mothers having the right to give birth anonymously, the wearing of the Islamic veil in schools and universities, the protection of journalists' sources, discrimination against Roma and environmental concerns.

15.4 The Protection of Human Rights at the National Level

In Germany, the so-called Basic Rights are enshrined in Article 1–19 of the Basic Law and also in other provisions concerning a fair hearing and habeas corpus rights (Article 103, 104 Basic Law). Human rights stemming from regional and international human rights treaties are incorporated as ordinary federal law.

Additionally, on the level of the Länder (states), there exist constitutional guarantees of Basic Rights (Landesgrundrechte) which are enforced by the constitutional courts of the Länder. Faced with an ever increasing workload, the Federal Constitutional

Court has recently called upon its fellow courts in the Länder to play a more active role in the protection of Basic Rights.

The guarantees of these Basic Rights are effectuated by all branches of government. The legislator is bound by the constitutional order including the Basic Rights, and the executive and the judicial branches are bound by law and justice (Article 20 (3) Basic Law). Therefore, statutes like the Code of Criminal Procedure effectuate Basic Rights. Furthermore, all statutes have to be interpreted and applied in the light of the Basic Rights (Federal Constitutional Court, Official Series: BVerfGE 7, 198 – *Lüth*). Public authorities and courts are therefore guided in their daily work and the enforcement of the law, by the protection of the Basic Rights.

A special procedure exists for the protection of Basic Rights. Any individual, including a non-national, is entitled to bring a constitutional complaint (Verfassungsbeschwerde) before the Federal Constitutional Court once all other remedies have been exhausted. If the Federal Constitutional Court holds that a statute is violating the Constitution, it will declare this statute void. The legislator is in charge of making a new law, following the Federal Constitutional Court's specifications.

If a constitutional complaint against a judgment of a court is successful, the Federal Constitutional Court will annul this judgment and remand the case to another court.

In this system, the role of international (universal and regional) human rights is rather limited, as they only have the rank of a federal statute, and therefore no constitutional complaint can be lodged. International human rights are to be applied as federal law, and the Federal Constitutional Court has, in its *Görgülü* decision, strengthened the role of the European Court of Human Rights' judgments.

Until now, the influence of human rights at the international and regional level has been small. Of course, some aspects have had a stronger impact, such as the European Court's judgments. In particular, the *Caroline* judgment (24 June 2004, 9320/00, RJD 2004-VI) lead to a new understanding of the relationship between privacy rights and freedom of expression.

15.5 Conclusion

The picture shows various facets: There is a strong, almost unanimous commitment to human rights and their universality by the United Nations and its member states. The protection of human rights at the UN level is characterized by a growing number of standards and monitoring mechanisms which are gaining competences. There is a continuous interaction between the UN organs, the member states and non-governmental organizations. This interaction has led to a growing consciousness about human rights and the need to protect them. We witness worldwide compassion for the victims of human rights violations.

But this is not a story of untroubled success. Governments have been known to abuse UN organs, as was the case with the former UN Commission on Human Rights and as it is to date with the UN Human Rights Council. Governments violate

human rights at home and abroad. Governments often fail to stand up for human rights. The protection of human rights is not the paramount objective of foreign policy or international relations. Nevertheless, following the end of the Cold War, there has been a growing acceptance of the concepts of humanity and cosmopolitanism suggesting transnational connections and affiliations.

The effective protection of human rights presupposes a functioning state, which is devoted to the rule of law, and has a working education system and an effective judiciary. In such states, the national protection of human rights will be more or less acceptable. Here, an additional – regional or universal – international protection is useful and can have a positive effect. If the national system fails, any international protection will not be successful. Newly developed concepts of post-conflict state-building and empowerment are, therefore, of major importance. They contribute to the setting necessary for a true commitment to human rights by both state officials and society as a whole.

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Chapter 16
From the Rights of Citizen to the Fundamental Rights of Man: The Italian Experience

Alessandro Pace

16.1 Aspects of the Italian Constitution

The Italian Constitution makes just one allusion to the rights of man, in Article 2, when it proclaims: "[t]he Republic recognises and guarantees the inviolable rights of man, both as an individual and in the social groups where his personality is expressed. The Republic expects that the intransgressible duties of political, economic and social solidarity be fulfilled". These rights are legally proclaimed to be "inviolable", but not "sacred" and least of all "natural". As a matter of fact, in their proclamation of the "inviolable rights of the person", the founding fathers did not have meta-positive rights in mind.[1]

In a similar vein, the Italian Constitution does not affirm that all men are equal, which would be admissible only on the basis of a natural law approach, explicitly rejected by the founding fathers (see *infra* par. 2). Instead, Article 3.1 stipulates that: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions," thus suggesting that the legislator might admit the possession of citizenship as a discriminating element in the norms regulating certain rights.

Consistent with this approach, in a special provision (Article 10.2) the Constitution specifies the competent legal basis for regulating the rights of foreigners, stating for this purpose that: "The legal status of foreigners is regulated by law in accordance with international provisions and treaties". On this aspect, however, the first

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[1] See the meeting of the first Subcommittee on 9 September 1946 and, in particular, the contributions of MPs Dossetti and Togliatti. On this aspect, see also A. Baldassarre's extensive article on *Diritti inviolabili* in Baldassarre (1989, 10 et seq.).

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paragraph of the same Article 10 is also significant: “[t]he Italian legal system conforms to the generally recognised principles of international law”. What this provision actually implies is the immediate general applicability of customary rules of international law that envisage universal entitlement to a *minimum* of guarantees in the Italian legal system.

The Italian Constitution, which came into effect on 1 January 1948, is a lengthy and complex document. This has important consequences for its interpretation. Every single word, precisely because it is embedded in detailed provisions that frequently consist of more than one paragraph, is – from a hermeneutic perspective – of a more binding nature than those constitutional provisions which contain mere enunciations “of principle”, such as “Congress shall make no law (…) abridging the freedom of speech, or of the press”[2] or “[t]he freedom of art is guaranteed”,[3] and so forth. *Vis à vis* statements “of principle”, the legislature and judicial authorities undoubtedly enjoy a greater degree of discretion.

It follows that, unlike in other judicial systems, interpreters of the Italian Constitution cannot escape the often neglected fact that Part I of the Constitution recites the “Rights and Duties of Citizens”, more like the Weimar Constitution of 11 August 1919 (did),[4] and less like the French *Déclaration* of 26 August 1789, entitled: “Declaration of the Rights of Man and of the Citizen”.

Having said this, while the rights proclaimed in Title IV of Part I (Political Rights Relations), are attributed always and only to citizens, those proclaimed in Title 1 (Civil Relations), Title II (Ethical and Social Relations) and Title III (Economic Relations) are “universally” recognised (such as, for example, the freedom of religion, expression of thought and the right to bring cases before a court of law: Articles 19, 21 and 24) or recognised impersonally (for example, in Article 13.1: “[p]ersonal liberty is inviolable”; Article 23: “[n]o obligation of a personal or financial nature may be imposed on any person except by law”, or Article 25: “[n]o case may be removed from the court seized with it as established by law”).

Title I (Civil Relations) grants exclusively to citizens the right to reside and travel freely in any part of the country (Article 16), to assemble (Article 17), to form associations (Article 18), and the right not to be extradited (Article 26). In the “Fundamental Principles” the right to work is granted to citizens only (the Constituent Assembly debated at length as to whether this right might even be configured as the right to obtain a job via state intervention), while in the sphere of “Economic Relations” only citizens are afforded the right to maintenance or to welfare support for disabled persons or those without the necessary means of subsistence (Article 38).

Having examined the relevant constitutional provisions, we shall now briefly assess some of the first interpretative solutions adopted. In fact, it was based on

[2] First Amendment, US Constitution (1791).

[3] Article 21, Swiss Constitution (2002).

[4] “Grundrechte und Grundpflichten der Deutschen”.

these scholarly contributions that the ensuing debate developed and the rulings of the Constitutional Court began to take shape.

16.2 Legal Theories Prior to Constitutional Decisions

In the collective volume *La Costituzione italiana. Commento analitico* (1949), the excellent work of three young magistrates (Baschieri et al. 1949), Judge Luigi Bianchi d'Espinosa pointed out that while Articles 2 and 3 of the Constitution appear to identify, in principle, the *sedes materiae* for citizens, Article 10.2 appears to be, again in principle, the *sedes materiae* for foreigners. Since then, he has emphasised how the failure of an Italian statute to observe the international norms and treaties governing the subject would determine its invalidity. Judge Bianchi d'Espinosa also stresses how the reference in Article 10.1 to "generally recognised principles of international law" implied, in any event, an obligation on the part of states to "recognise foreigners as subjects of law, and to grant them at least those rights that are the immediate consequence of their personality. Accordingly a state could not, without violating the right of peoples, consider foreigners as slaves; nor could it deny them the right to personal integrity, or the freedom of conscience or of religion, etc. International law therefore establishes a *minimum of rights* that national legislation is obliged to grant to foreigners…" At the same time, he points out how the explicit recognition of some rights exclusively to citizens precluded their extension to foreigners (Ibid., 41 et seq.).

For his part, one of the other authors of the same work, Judge Gastone Baschieri, does not dispute the accuracy of the delimitation of Part I to the: "Rights of Duties of Citizens". While pointing out that several of the provisions of Part I would also apply to foreigners "insofar as they were *iure soli* temporary subjects of Italian law", Baschieri underlines the political importance and judicial correctness of that title, inasmuch as it makes explicit the existence of a "National Covenant" between citizens (Ibid., cit., 48 et seq., 53), as implied by the Italian Constitution.

The essay *Eguaglianza e giustizia nell'art. 3 della Costituzione* (1953) by Professor Carlo Esposito, one of the most prominent Italian constitutional lawyers of the twentieth century, was included in the same author's volume *La Costituzione italiana. Saggi* (1954). In this essay, we immediately find a notable observation for the purposes of our discourse. The principle of equality refers, in Article 3, to citizens only, insofar as – Esposito stresses – Article 2 of the Italian Constitution does not "intend to recognise 'natural rights'". Only if the rights referred to in Article 2 had a basis in natural law could equality be proclaimed to be referring to all persons (as indeed occurs in several eighteenth century constitutions, and not only there).[5]

[5] Esposito (1954a, 23 et seq.). On p. 20 the author gives a list of constitutional enunciations based on natural law. Esposito viewed the justification for the reference to "men" in Article 49 GG in a similar vein, i.e. that the natural law basis of some of the rights recognised in the *Grundgesetz* appeared as given.

What is crucial, in this sense, is that the legal status of the foreigner is specifically dealt with, in the ways we have seen, in Article 10.2. This "precludes that the general proclamation on the equality of citizens and the accompanying proclamations on social justice for citizens also refer to foreigners" (Esposito 1954a, 24, note 19). On the other hand, "if foreigners were generally speaking by law and according to the judicial system equal to citizens, the legal category of citizens would cease to exist" (Ibid., *op. loc. ult. citt.)*.

Yet none of this leads Esposito to rule out that the rights constitutionally granted to "all" (or "impersonally"), or even "to citizens", could not also be extended to foreigners. In the first instance, the presumption is that the Constitution "desired to grant this right also to foreigners"; in the second case, the constitutional proclamation (where the reference, albeit implicit, is clearly to Articles 17, 18 and 38, that is the right to assembly, association and social welfare) appears, with regard to foreigners, to have "only supplementary and, in any event, deconstitutionalised power to fill the *lacunae* of ordinary laws" (Ibid., cit., 24, note 19; 33, note 36). The same, however, does not appear to hold true for political rights, which as such can be exercised by citizens only.[6]

In the same year, shortly after Esposito's essay appeared, Professor Paolo Barile, another distinguished Italian cosnstitutional lawyer, at that time a very young man, published a monograph concerning the private individual in the Italian constitution: a landmark in Italian constitutional literature because it was the first book to analyse the constitutional norms from the viewpoint of individual legal situations.

In his wide-ranging examination of the question, Barile takes as his starting point two of Esposito's affirmations mentioned above. First, the legal category of citizens would cease to exist if foreigners were, according to the legal order, equal to citizens. Secondly, Esposito underlines the expansive potentiality of constitutional proclamations regarding individual rights (Barile 1953, cit., 51 seq.). Nonetheless, after a careful reading of the laws and regulatory provisions in force at the time, Barile criticises Esposito's text for being overly categorical (Ibid., cit., 53 seq.). Having highlighted how Title IV (Political Relations) contemplates personal situations that can also involve foreigners – such as the obligation to contribute to public expenditure (Article 53) and the obligation of loyalty to the Republic (Article 54), to the extent that they must respect the State's penal laws and those on public security –, Barile suggests that foreigners could also be entitled to a number of political rights, such as: the right of petition (Article 50) and the right to freely associate in political parties (Article 49), even if, in this last respect, he acknowledges that a political party cannot be dominated by foreigners. Finally, with regard to Article 10.2 of the Constitution, referred to above, Barile reaches the opposite conclusion to that of the previous students – namely, that this provision invalidates the "reciprocity clause" (Article 16 of the "Preliminary Provisions" of the Civil Code).

In the 15 years that followed, the terms of the question did not change substantially among scholars. Proof of this can be found in the words of Professor

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[6] Ibid., cit., 24 (note 19). Esposito (1954a, 221 *et seq.*)

Costantino Mortati, an outstanding constitutional lawyer and a founding father of our Constitution, in the seventh edition (1967) of his *Istituzioni di diritto pubblico* – one of the most frequently recommended and studied books on constitutional law in Italian universities – published on the eve of the first judgement of the Constitutional Court on the rights of foreigners.

According to Mortati, the Constitution contemplates three scenarios in respect to foreigners. First, a scenario "of total exclusion of those rights inherent to the capacity of citizens: typically, all political rights". Second, one "of necessary recognition, in conditions of parity with citizens, of the other [rights] that concern the safeguarding of the essential needs of the human condition (and accordingly of those referred to in Articles 13, 14, 15, 19, 21.1, 32 and 33)". Finally, one "of discretionary power to grant residual rights [that is of those not constitutionally recognised], within any limits that may prove necessary for the protection of security and of public decency. The rights that can be conferred in exercising this discretionary power must be subordinate to the condition of 'reciprocity' and in accordance with the provisions laid down in Article 16 of the Preliminary Provisions" (Mortati 1967, 913 *et seq*.).

Regarding, instead, the generally recognised principles of international law referred to in Article 10.1, Mortati subscribes to the (then) dominant opinion of the inexistence of "international customs requiring the assimilation of foreigners' rights with those of citizens, while there subsists a general belief (confirmed in the United Nations Charter), in the necessity of guaranteeing foreigners only the enjoyment of the rights of the person, in other words the granting of a minimum of actionable claims, regarding not only their legal *status* and capacity but also the implementation of the capacity itself within a sphere below which the very dignity of person would be compromised" (Mortati 1967, cit., 913).

The difference between Esposito's approach and that of Barile and Mortati is clear. Setting aside the *minimum rights* to which persons are entitled by virtue of customary international law, Barile and Mortati believe that the extension of constitutional rights, afforded either explicitly to foreigners or impersonally to all, implies an entitlement *ope constitutionis* to foreigners too; Esposito disagrees. Given that there is a mere "presumption" that the foreigners are entitled to the same rights of citizens, then an ordinary law could overcome the presumption without being constitutionally challenged.

In the interests of completeness, and not without a certain reluctance, I have to mention that a few months prior to the publication of the seventh edition of Mortati's *Istituzioni*, a monograph of mine was published that dealt with the freedom of assembly, a right that the Constitution grants explicitly to citizens only (which initially led some authors to suggest that the only constitutional guaranteed assemblies were the political ones). The conclusions reached in my monograph at the time were very different to those recalled so far.

Given that the Constitution of the State is a political fact and not only a normative document, it appears to be foremost of relevance to citizens only (readers will recall what Judge Baschieri had to say about the Constitutional Covenant). This in turn seems to justify the formal recognition of *all the rights* of Part I to citizens only (hence the title "Rights and Duties of Citizens"). A point which, as has been

emphasised on several occasions, found confirmation both in the fact that the principle of equality refers, in Article 3.1, to citizens only, and in the fact that the *sedes materiae* of the legal *status* of the foreigner is contained in Article 10.2.

It follows that the granting of most civil liberties to "all" does not constitute a *juris tantum* presumption of general entitlement, as Professor Esposito believed, but is instead referred exclusively to all citizens.[7] Precisely for this reason, the fact that the freedoms of assembly and association are, quite like all the other rights, formally guaranteed to citizens only, would not explain any influence on the nature of both these rights. As with all the other rights, these rights could therefore be extended by ordinary legislation to foreigners. And this is actually what happened in the past, given that even the Fascist police laws never made a *formal* distinction between foreigners and citizens in the exercise of the freedom of assembly or association.[8] Indeed, if an ordinary law makes no distinction between foreigners and citizens, it is clear that this law also applies to the latter, all the more so in a liberal democratic system.

Not unlike Esposito's approach, the constitutional foundation of the rights of stateless persons and of foreigners, according to this theory, therefore appear to reside in the generally recognised principles of international law cited in Article 10.1 and in the international provisions and treaties, to which, in its laws, the Italian State is bound to conform by virtue of Article 10.2. Moreover, given the existence of numerous bilateral treaties signed by Italy which contain the most-favoured nation treatment clauses,[9] it is very difficult to find a state in respect of whose citizens the Italian Republic has not pledged to guarantee the same treatment as Italian citizens, on condition of reciprocity.[10]

All this, of course, – as we have seen earlier – does not prevent the Italian State, if it so desires, from extending by ordinary law the rights of citizens to foreigners (including political rights), even when this is not imposed by international norms or agreements.[11] It is, however, entirely clear that in the case of the extension of political rights, it is best to follow a legal solution that facilitates the acquisition of citizenship, giving greater weight on the one hand to the *jus soli*,[12] and on the other, to the criterion

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[7] Pace (1967, 38 *et seq.*) The thesis was later reprised and developed in Pace (1984, 133 *et seq.*); Pace (2003, 315 seq.) and in Pace and Manetti (2006, 296 *et seq.*).

[8] See Articles 18 *et seq*, 209 *et seq*., in the Consolidated Law on Public Order no. 773 of 18 June 1931.

[9] See the list reproduced in Calò (1994, 290 *et seq.*).

[10] In favour of this conclusion see also Paladin (1998, 564).

[11] In favour of this conclusion see also Luciani (1992a, 224 ss.); Luciani (1992b, 585); Grosso (2001, 106 ss.).

[12] As Onida recalls "…only for those who boast ancestors of Italian blood (Article 4.1 and Article 9.1.a), Law 91/1992] or for those who marry an Italian citizen (Article 1.11, Law 94/2009) is the process facilitated, while for other foreigners the acquisition of citizenship is nowadays conditional upon 10 years of legal residence (Article 9.2.f), (Law 91/1992) and on their having completed a lengthy bureaucratic process which de facto brings the time required to at least 12 years (Article 3 of Presidential Decree 362/1994)" (Onida 2010, 21).

of the stay for a certain period of time on national territory (along with, of course, other requirements such as knowledge of the Italian language, the absence of social dangerousness and of previous serious criminal offences etc.).

Indeed, the fact that an ordinary law is sufficient for granting Italian citizenship confirms, by contrast, that also for political rights it would not be strictly necessary to resort to constitutional laws to extend entitlement to foreigners. What matters most, according to this thesis, is that the granting of the rights of Italian citizens to foreigners must be a direct or indirect consequence of a decision by the ordinary legislation. This means that the "clause of reciprocity", where possible, is maintained as an instrument for safeguarding the conditions of Italian citizens abroad.

The fact that an ordinary law is sufficient for the legislation on citizenship rather confirms that it is not the formal exclusive constitutional granting of political rights to citizens that prevents their extension to foreigners, but the awareness, on the part of citizens of "being the State". Citizenship is in fact "something more than a legal condition, given that it is founded on previously defined traditions and predetermined cultural inclinations",[13] so that, when the feeling of belonging to an historical-cultural identity disappears, the result is the break-up of the political community itself. [14] It would therefore be of little consequence if the extension of political rights occurred through ordinary legislation.

16.3 Rulings of the Constitutional Court in the Period from 1967 to 1998

Judgment no. 120/1967 was the first to examine the problem of the legal *status* of the foreigner. The case concerned a foreigner under arrest, accused of contraband, who could not be freed without bail. While affirming that the principle of equality applies also to foreigners when the inviolable rights of persons recognised by Article 2 of the Constitution are at stake,[15] the Court nonetheless cautioned that "the acknowledged equality of individual situations in the field of entitlement to the rights of freedom in no way precludes that, in concrete situations, there cannot exist between the same persons *de facto* differences that the legislator can assess and rule

[13] For example Sandel, who admits the importance of ethnicity as an ontological *prius* of the concept of nation, even as it rightly affirms that the Nation-State does not constitute the faithful and uniform projection of ethnic origin (Sandel 1996, 117 cited by De Fiores, 2005, 371 et seq., 388 et seq.).

[14] For example Bilancia (2008, 224 *et seq*).

[15] Constitutional Court judgment no. 120/1967, followed by judgment no. 104/1969. The ordinary Courts confirmed this line of interpretation: see the Court of Cassation, Civil Division, Section I, judgment no. 2265 of 4 March 1988, which deemed that the foreign worker is entitled to the same salary "proportionate" to the work and "sufficient for a free and dignified existence", guaranteed to Italian workers.

on according to his discretion, which finds no other limit than in the rationality of his evaluation".[16]

In the following year, in judgment no. 11/1968, the Constitutional Court rejected, but only in part, a challenge to the constitutional legitimacy of a law conditioning the exercise of the profession of a journalist (and therefore his entitlement) to be entered in a special register, requiring for this purpose the possession of Italian citizenship or a treatment of reciprocity. Since this condition of reciprocity was not envisaged at the time under the national legislation of the petitioner, the Court rejected the challenge, deeming it "reasonable that the foreigner be admitted to a working activity when Italian citizens are guaranteed the same possibility in the State to which the former belongs". The Court added, however, that the same solution cannot be applied in the case "of the foreigner who is a citizen of a state that does not guarantee the actual exercise of democratic freedoms". In this instance, "the condition of reciprocity risks being translated into a serious infringement of the liberty of those persons to whom the Constitution, in Article 10.3, wanted to offer political asylum and who must be able to enjoy in Italy at least all of those fundamental democratic rights that are not strictly linked to the *status civitatis*".[17] Concerning this last aspect only, the Court declared, however, the unconstitutionality of Article 45 of Law 69/1963.

Faced with the violation of the constitutional rights declared in international agreements such as the right to defend oneself in a trial and the right to life, envisaged and guaranteed by the Universal Declaration of the Rights of Man and the International Covenant on Civil and Political Rights of 1966, the Court confirmed the entitlement of foreigners, and did so in two important concessionary judgments: no. 50/1972 and no. 54/1979. What is striking in this last pronouncement was the affirmation, in line with the previous judgment no. 25/1966, according to which equality is deemed to be a "general principle that preconditions the entire legal system in its objective structure", independent, therefore, of "the nature and qualification of the persons to whom these rights are attributed".

In this way, a new principle made headway in constitutional jurisprudence, – that of rationality/reasonableness – which, despite being a "rib" of the constitutional principle of equality referred to in Article 3.1, would progressively detach itself, as explicitly acknowledged in judgment no. 165/2000, in which paradoxically the Court did not examine a constitutional challenge from the viewpoint of the unreasonableness of the law, "given that the doubt as to its constitutionality was limited to the violation of the principle of equality" (*sic!*).

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[16] This interpretation was later confirmed in a series of rejections. See for example, judgements nos. 144/1970, 109/1974, 244/1974 and 46/1977.

[17] The Court's conclusion actually far exceeded its premises, and ends by favouring the journalist who comes from a totalitarian system over one from a democratic one. The disavowal, in the country of origin, of democratic liberties constitutes the objective premise for obtaining asylum, but does not guarantee the "refugee" greater rights than those recognised by Article 10.2 of the Constitution to other foreigners.

Again, it was the irrationality of the law examined by the Court that led to the declaration of unconstitutionality, in accordance with Article 3 of the Constitution, of a legislative provision that in an accusation of contraband, did not enable the foreigner to be freed, even when the offence only carried a pecuniary sanction, unless on condition of bail in an amount equal to the minimum set by law (judgment no. 215/1983).

Equally predictable was the declaration of unconstitutionality in judgment no. 199/1986, also primarily owing to the irrationality of the law, which precluded the application of the new norms on the adoption and fosterage of minors to a foreign minor who had been abandoned. The Court underscored that the "the inviolable duties of solidarity recalled by the same Article 2 of the Constitution" imposed on the "judicial authority appointed by the ordinary laws to safeguard and enable the effective exercise of human rights, amongst them, in particular, those of the abandoned and of the family to affection in the absence of blood kin". The declaration of unconstitutionality was pronounced in the light of the general provision of Article 2 and of the specific one referred to in Article 30.2 of the Constitution ("In the case of incapacity of the parents, the law provides for the fulfilment of their duties").

In judgment no. 10/1993 the Court – faced with a law that did not provide for court summons in a criminal trial to be translated into the native language of the foreign party concerned– rejected the challenge, while claiming that the law should be interpreted in line with the principle of reasonableness of the right to defence (Articles 3 and 24 of the Constitution; Article 6.3.a of the European Convention on Human Rights; Article 14.3.a of the International Covenant on Civil and Political Rights).

Subsequent declarations of unconstitutionality also took into consideration the irrationality of the contested laws. Such was the case in judgment no. 32/1995, which declared the unconstitutionality of a criminal law provision that, in envisaging the punishment of expulsion, lacked both clarity and specificity and infringed the principle of the legality of the punishment laid down in Article 25 of the Constitution (judgment no. 34/1995). The same can be said of judgment no. 58, also delivered in 1995, which declared the unconstitutionality of a provision that obliged the judge, "without having ascertained the concrete existence of social dangerousness, to issue, together with the conviction, the expulsion order, to be exercised with respect to a foreigner convicted for a crime related to drug dealing". Even if the Court recalled Article 13 of the Constitution (which recognises personal liberty as "inviolable" irrespective of whether the person is a citizen or foreigner), the irrationality of the law was crucial to declaring the unconstitutionality of the provision, because the law, on the one hand, identified the social dangerousness of the individual as a necessary condition for his expulsion, but, on the other hand, did not actually allow the Court to establish the social dangerousness of the defendant.

And it was the irrationality of the law that, yet again, led to the decision of unconstitutionality of a law which made no provision in favour of a non-EU parent regarding his/her right to reside in Italy, even if capable of enjoying adequate living conditions, "in order to be reunited with his child, considered a minor under Italian law, legally resident and living in Italy with the other parent, although not married

to the first". In this case, the Court took into consideration both "the fundamental right of the minor to be able to live, where possible, with both parents, who had the right-duty to maintain him, educate him and bring him up, and the consequent right of the parents to be reunited with their child" (Articles 10.2, 30 and 31 of the Constitution; Article 8 of the UN Declaration of the Rights of the Child of 20 November 1959) (judgment no. 203/1997).

16.4 The Inviolable Rights of Man as Inferred from Constitutional Rulings

There appears to be, therefore, no doubt that beyond some sporadic reference to the inviolable rights of man and to the international conventions, in the 30-year period from 1967 to 1997, it was primarily the principle of rationality/reasonableness that was employed by the Constitutional Court to guarantee foreigners the same constitutional rights as citizens.

It was scholars and observers who, in the early 1990s, began to indicate which of the inviolable rights of man should also be granted to foreigners. An attentive scholar, Professor Giustino D'Orazio, in a book specifically devoted to the issue, diligently listed the various rights that could be qualified as "inviolable", drawing on the pronouncements of the Constitutional Court (albeit relative to Italian citizens) and on international laws (D'Orazio 1992, 240 et seq., 284).[18]

This is his list: the right to life (judgment no. 54/1979), the right to health and to psychological and physical integrity (judgments nos. 88/1979, 561/1987, 455/1990); the related right to compensation for damage inflicted (judgment no. 132/1985), the right to decorum, respectability, confidentiality, intimacy and reputation (judgments nos. 38/1973 and 1150/1988), the right to freedom of expression also with regard to political opinions (judgments nos. 85/1965, 122/1970, 168/1971), the right to appear in Court and defend oneself in a trial (judgments nos. 11/1956, 29/1962, 98/1965, 37/1969, 122/1970, 11/1971, 177/1974, 125/1979, 18/1982, 50/1972 and 188/1980), the right to compensation for miscarriages of justice (judgment no. 1/1969), the right to review of a criminal judgment (judgment no. 28/1969), the right to respect of human dignity (judgment no. 159/1973), the right to presumption of innocence in a criminal trial (judgment no. 120/1977), the right to the freedom to marry (judgments nos. 27/1969 and 587/1988), family rights (including the right to reunification of the family) (judgments nos. 181/1976 and 132/1985), the right to personal liberty (judgment no. 766/1988), the right to the freedom and to the secrecy of correspondence and of every other form of private communication (judgments nos. 77/1982, 122/1970, 366/1991), the right to the freedom of travel as an extension of personal freedom (judgement no. 6/1962), the right of association (judgments nos. 40/1982,

[18] While brief, it is worth recalling the review of case law compiled by M. Luciani (1992a, 224 *et seq.*)

239/1984), the right to the freedom to profess one's faith (judgments nos. 14/1973, 188/1975 and 239/1984), the right to sexual liberty (judgment no. 561/1987), the social right to housing (judgment no. 404/1988).

To this list, based on constitutional jurisprudence, Professor D'Orazio added a second list based on the interpretation of international laws on which scholars substantially concurred (D'Orazio 1992, 284 et seq.). This second list includes: the inviolability of the home (Article 14 of the Constitution was not sufficient for this purpose?), the exercise of property rights, the right to the freedom of scientific research, of artistic expression, to promote a meeting, of assembly, of university teaching, of trade union meetings, the right to hospital assistance, the enjoyment of rights governed by economic relations.

Before turning to the rulings of the last 20 years, it is important to make two comments. Firstly, in judgment no. 215/1997, the Constitutional Court went beyond the interpretations adopted up to that point, suggesting that the "inviolable rights of man" guaranteed by Article 2 of the Constitution constituted a "synthetic clause" of the rights explicitly foreseen in the subsequent provisions of the Constitution, and embracing the opposite theory of the "open clause" (Barbera 1975, 80) with a view to including the so-called "new rights".[19] Subsequent case law would confirm, however, that barring universally agreed exceptions (for example, the right to a name, the right to one's own image, the right to register a sex change), the "new rights" were merely faculties that could be inferred from the "old rights" (such as the right of disabled persons to be guaranteed the possibility of attending secondary schools, easily inferred from Articles 34 and 38 of the Constitution; or entitlement to a war pension for victims of sexual violence during the war, easily inferable from Article 13.4 of the Constitution; the right of the partner *more uxorio* to succeed to a rental contract, also easily inferred from the combined provisions of Articles 3 and 42 of the Constitution).

From an overall assessment of the subsequent jurisprudence, however, it emerges that the Court made quite limited use of this new interpretation. Above all, the Court referred to Article 2 to "strengthen" – from a rhetorical point of view - interpretative choices that already had an independent basis in the Constitution.

Secondly, already in the 1980s, if not beforehand, legal scholars and the Courts began to use the adjective "fundamental", instead of "inviolable", to such an extent that by the end of the 1990s the two expressions appeared to be fully interchangeable.[20]

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[19] In favour of the thesis see Modugno (1995).

[20] In reality there are those who still support the restrictive interpretation of the phrase "fundamental rights" (for example, Grossi 2008, 1 *et seq.*), but the thesis identifying fundamentality with inviolability and vice versa prevails (in this sense, see for all Baldassarre (1996, 63 *et seq.*); Caretti 2005, XIX) or those who claim that the fundamentality of the rights of freedom derive from this, that they are like a "legal foundation at once of the civil society, the political society and of the State" (see again Baldassarre (1976, 295)). Finally, there are those scholars who say that the fundamentality of a right presupposes its universality, for example, Ferrajoli (2001, 6), and that accordingly this qualification should be restricted only to the classic personal rights of liberty.

16.5 The Consolidated Legislative Text of Provisions Governing Immigration and the Conditions of Foreign Citizens (Legislative Decree No. 286 of 25 July 1998)

At the end of the 1990s, when a clear – albeit not unanimous – majority of legal scholars favoured the full extension to foreigners of most of the rights of Part I (but with the exclusion of political rights), Law no. 40 of 6 March 1998 was approved (called the Turco-Napolitano Law after the Ministers who proposed it). This was followed a short time afterwards by Legislative Decree no. 286/1998 ("The consolidated text of measures governing immigration and norms on the conditions of foreign citizens"; hereinafter, "Decree 286"), professedly issued in accordance with Article 10.2 of the Constitution. A few years later, when the centre-right won the elections, Decree 286 was restrictively amended in a series of provisions by Law no. 189/2002, called the Bossi-Fini law after the Ministers who proposed it.

While safeguarding in some cases the applicability of the "clause of reciprocity", the amended Decree 286 grants in Article 2.1 "to the foreigner present at the border or within the territory of the State (…) the fundamental rights of human beings established by the national laws, by the international conventions in force and by the generally recognised principles of international law"; in Article 2.2, guarantees the enjoyment of the same "civil rights granted to Italian citizens", except in cases where the international conventions in force in Italy and in Decree 286 itself provides otherwise; in Article 2.3, guarantees to all foreign workers with regular permits of stay in the Italian territory and to their families "parity of treatment and full equality of rights with respect to Italian workers", in conformity with the provisions of the ILO Convention no. 143 of 24 June 1975; in Article 2.4, guarantees to foreigners with regular permits of stay "participation in local public life" (this provision, relative to the participation of foreigners in the administrative elections, has not had any sequel); in Article 2.5 grants foreigners "parity of treatment with citizens relative to the legal protection of rights and legitimate interests, in dealings with the public administration and in access to public services, within the limits and in the ways provided for by law"; in Article 2.6 guarantees that measures concerning the entry, stay and expulsion of foreigners "are to be translated also in summary form in a language comprehensible to the recipient, or, when this is not possible, into French, English or Spanish, with preference for the language indicated by the concerned party".

In other words, Decree 286 assigns to the Constitutional Court and to ordinary courts the task of identifying, case by case, the rights that are liable to be qualified as "fundamental", going beyond just civil liberties. The same Decree 286, in Articles

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Revelatory of the gradual overcoming of the category of "inviolability" is that already in 1976 the Annual Conference of the Catholic Jurists' Union was entitled *Fundamental Human Rights*, Giuffrè, Milan, 1977, despite the fact that the reference in the Constitution to the inviolable rights of man were due to the efforts in the Constituent Assembly of the Catholic jurists. Equally significant, in the same sense, is P. Costa's article on fundamental rights which makes no allusion whatsoever to inviolable rights (Costa 2008, 365).

35 *et seq.*, actually makes specific provision for health assistance to be provided both to foreigners who are registered in the National Health Service and to those who are not, the obligation to attend school for foreign minors, the right to education, the right to the access to universities, the right to exercise a profession, the right of access to housing, and the right to free medical care for the poor (Article 38 of the Constitution).

According to Article 3 of the Charter of Values of Citizenship and Integration (Ministerial Decree of 23 April, 2007), the "[r]ights of freedom, and the social rights, which our legal system has matured over time must be extended to all immigrants…"[21]

16.6 Rulings of the Constitutional Court After Legislative Decree 286/1998

Following the explicit legislative intervention of Decree 286, which assigns to the judge – whether in the Constitutional or ordinary courts – the task of verifying on a case by case basis the entitlement of the foreigner to the "fundamental rights of human persons"", the Constitutional Court no longer hesitated, after 1988, to apply the provisions of Part I of the Constitution to non-EU foreigners, and did so frequently by explicitly invoking precisely this Decree 286/1988.

This is the precise origin of the declarations of constitutional illegitimacy in the name of safeguarding the principles of family unity (judgment no. 376/2000), personal liberty (judgments nos. 222 and 223/2004), the intrinsic reasonableness of the laws (judgments nos. 78 and 466/2005, 278/2008), the non-discrimination in social welfare (judgment no. 432/2005), the principle of reasonableness in addition to the right to the safeguarding of health and social assistance (judgment no. 306/2008) and so far.

To these must be added several important decisions of the Constitutional Court, which, while not overruling the provision in question, imposed on the judge *a quo* to deliver a given interpretation in line with the Constitution (known as the "interpretative" judgments of rejection). This was the case of judgment no. 454/1998 which deemed that non-EU workers "who are entitled to accede to permanent subordinate employment in Italy in conditions of parity with the citizens, and who meet the requirements" are entitled to be enrolled in the lists for the purposes of mandatory hiring. Similarly judgment no. 198/2000 confirmed the right of foreigners, including those without a regular permit of stay, upon whom a measure restricting their freedom to self-determination is imposed, to have its content and meaning made clear to them.[22]

[21] The position of the commas, however, means that it is not entirely clear whether the phrase "over time" refers to the clause that precedes it ("Rights of freedom, and the social rights, which our legal system has matured over time …") or is instead linked to the final phrase ("…over time must be extended to all immigrants.").

[22] In a similar vein, see judgment no. 10/1993, mentioned earlier.

Various other decisions should then be recalled, which while not upholding the question raised by the judge *a quo*, nonetheless confirmed the foreigner's entitlement to a given fundamental right. This was the case in judgment no. 252/2001, according to which a foreigner who entered Italian territory illegally to replace a prosthesis on an amputated leg could not be expelled, insofar as "the guarantee of the nucleus of the right to health safeguarded by the Constitution as an inviolable area of human dignity, (…) obliges not to constitute situations without safeguards, which could prejudice the implementation of that right (compare, *ex plurimis,* judgments nos. 509/2000, 309/1999 and 267/1998)". In the same direction, but in more general terms, went judgment no. 19393 of 9 September 2009 of the Court of Cassation, Civil Division, Section I (which was important also because it rejected the jurisdiction of the administrative courts insofar as humanitarian protection cannot be subjected to discretional assessments by public administration bodies).

16.7 Irregular Foreigners

The primarily jurisprudential approach adopted so far shows us how, even as the different status of foreigners to citizens has been consistently affirmed, there has been, thanks first of all to jurisprudence, and secondly to Legislative Decree 286/1998, parity between foreigners and citizens in relation to the fundamental rights of the person, the family, work and social welfare.

Before reaching our conclusion, we must, however, ask ourselves whether this acknowledgement can be said to be of general application with respect to non-EU foreigners who live in Italy.

The answer is yes. Indeed Article 1.1 of Legislative Decree 286/1998 provides that: "foreigners who are at the border or in the State's territory are granted the fundamental rights of humans envisaged by national laws, by the international laws in force and by the generally recognised principles of international law". There is a difference, of course, between the "rights with associated costs" (health assistance and social welfare, education, professional activities), to which only legally resident foreigners are entitled (Articles 34 *et seq.* of Decree 286), and "civil rights" (in other words the rights set out in the Civil Code and by private law), which, in accordance with Article 1.2 are granted, to foreigners provided they are "regularly resident in the territory of the State (…) and unless the international conventions in force in Italy and the present combined text dispose otherwise."

According to the official data of the Central Statistics Institute collected in early 2009, at that time the (regularly resident) foreign population in Italy amounted to a little under four million. The data on irregular foreigners in Italy varies from survey to survey. According to the OECD, there are between 500,000 and 750,000 irregular foreigners in Italy; one million according to Caritas. Again, based on OECD data, of these irregular foreigners 60/65% are "overstayers", in other words persons who enter Italy legally, and who then remain beyond the terms of their entry visa. A further 25% of immigrants enter Italy illegally from other countries that have

adhered to the Schengen Treaty, exploiting the abolition of border controls. Only 15% of irregular immigrants come from via the sea and the Mediterranean routes.[23]

Foreigners who are casually stopped by a police officer, and who are unable to justify their irregular residence on Italian soil, are kept in custody for 24 h by the police authorities, after which, following an expulsion order issued by the Prefect (Article 13 of Decree 286), they are ordered by the Police Superintendent («*Questore*») to leave the country within 5 days (Article 14 *ibidem*). This means that the foreigner, generally lacking in economic resources, must leave within 5 days at his or her own cost (not infrequently for another continent and therefore even by plane!). Given that this provision is merely obligatory, however, and not coercive, foreigners generally ignore the order and trust in their luck, also because, in addition to not having the necessary means, they have no desire to return to their home country.

If the foreigner is stopped again, he or she will be accused of having violated the order to leave the national territory (punishable by detention of 1–4 years) and his or her case will be decided in summary proceedings (*per direttissima*). In any event, unless the foreigner is detained in prison, the Police Superintendent will adopt a new expulsion order with accompaniment to the border by the police force.

This is so in the case of the "overstayers" and of those who enter Italy illegally from Schengen area countries.

The third case is that of the "boat people", those who cannot be "turned back" to the high sea, since they are in need of assistance or for other reasons (for example, to ascertain whether they meet the conditions for the right of asylum). Once the "boat people" have reached Italy, the Police Superintendent orders that the foreigners be detained, for the time strictly necessary, in a "Centre of Identification and Expulsion" (Article 9 of Legislative Decree no. 92 of 23 May, 2008) with a view to carrying out the necessary controls.

While paragraph 2 of Article 14 of Decree 286 provides that the foreigner shall be "detained in the centre according to procedures that ensure all necessary assistance and the full respect of his dignity" and that he or she "is guaranteed in every event the freedom to correspond, including by telephone, with the outside world", in essence what we are looking at is a grave coercive measure restricting the physical liberty of foreigners, which can be extended for further controls for up to 180 days, after which, in the event of a negative outcome, he or she will be expelled.

Given that this is a restriction of physical liberty guaranteed by Article 13.3 of the Constitution, the order of the Police Superintendent must be adopted within 48 h of the detention in the "Centre of Identification and Expulsion" and must be approved, on pain of nullity, by a magistrate ("*Giudice di pace*") within the following 48 h, following a hearing in chambers with the assistance of a counsel for the defence.

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[23] Reported in the *Corriere delle Sera*, on 10 August 2009. This last group of immigrants from the sea and Mediterranean routes appears to have increased in recent months, owing to demographic pressures in sub-Saharan Africa and from the southern shores of the Mediterranean, in addition to the worsening food and economic crisis.

These rules have been heavily criticised.[24] Account must be taken, however, that while it is undoubtedly true that asylum is a genuine individual right to which any foreigner is entitled so long as he can demonstrate that in his home country he is denied the "actual exercise of the democratic freedoms guaranteed by the Italian Constitution" (Article 10.3 of the Constitution), the same cannot be said of the case in which it is the "masses" that petition to be accepted into the national territory[25] even when the "actual exercise of the democratic freedoms guaranteed by the Italian Constitution" are denied them in their countries of origin (which is by no means uncommon).

In this instance, the problem cannot be resolved by permitting continuous and unlimited flows of immigrants, but rather by addressing it in the competent diplomatic and international forums and by working to change the political conditions in the migrants' home countries.

Many years ago, in the first lines of an important comment to Articles 10 and 11 of the Constitution, a prominent Italian international lawyer, Professor Antonio Cassese, wrote that the Italian Constitution has been rightly included amongst the most ambitious ones, *inter alia* "as regards the definition of the Italian State's attitude to the international community". Unlike the Constitution of Sardinian State of 1848 (the "*Statuto albertino*") "our Constitution actually contains some fifteen internationalist precepts. This greater 'attention' paid to international relations is not the automatic result of the enlargement of the 'area' covered by the modern constitutions: it is, in general, the result of a new awareness that the State is wholly part of the international reality, which also conditions directly and to a great extent its internal conditions" (Cassese 1975, 461).

However, while this is beyond doubt, it follows that the indication inferable from the Constitution is that the problems of international law must be addressed and resolved together with the other States. Therefore, while on the one hand it appears somewhat far-fetched to believe that "mass migration" constitutes "the exercise by millions of human beings of a freedom (the freedom of emigration) that the international conventions acknowledge as a fundamental right" (Onida 2010, 18) and that mass movements could be assimilated to the exercise of the right of travel and

[24] See, most recently Pugiotto (2010, 333). Pugiotto advances the following proposals: (1) the fixing of more realistic entry quotas to be planned obligatorily each year (while today, after the Bossi-Fini law, the government can decide to annul any inflow) rather than periodic amnesties (which only fuel more irregularity, affecting those who are excluded from the amnesty provision); (2) the abrogation of the crime of illegal immigration which (in addition to classifying irregular and clandestine immigration in the same category as foreigners who commit crime) is destined to trigger a surge in the number of persons to be expelled; (3) the possibility of regularizing *in itinere* the foreigner's irregular status at previously established legal conditions (thereby avoiding the current compression of the irregular immigrant with the clandestine one); (4) the extension of the agreements of readmission with the home countries (making them conditional upon the respect of the fundamental rights of the repatriated foreigner)" (Pugiotto 2010, 393 *et seq*.).

[25] In this sense, see Esposito, writing well before the present phenomenon exploded, Esposito (1959, 225).

sojourn (Ibid., 15) (firstly, because the freedom to emigrate -which differs from expatriation – is a “regulated” and “safeguarded” phenomenon in the legal systems of both the home and destination country (Pace 1992, 269 et seq.); secondly, because the right to freedom of travel and sojourn is an individual right, that could never be extended to include mass movements), on the other hand it must be admitted, given these mass phenomena, that stable and effective legal solutions on emigration can only be found in international treaties and accords involving not only all the European States but also the same States from which these flows originate.

Even planning for these flows on an annual basis, as has been suggested (Pugiotto 2010, 393 et seq.), would in no way prevent the “merchants of death” from taking on board multitudes of desperate individuals in pursuit of a better life.

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Chapter 17
Le juge en tant que défendeur des droits de l'homme: les observations grecques

Michael Vrontakis

17.1 Observations liminaires

En Grèce, les droits de l'homme sont consacrés et protégés à l'encontre du pouvoir étatique par un ensemble de règles tant du droit interne que du droit international.

17.1.1 Des règles du droit interne consacrant des droits de l'homme sont posées par les dispositions constitutionnelles qui garantissent ceux-ci, ainsi que par les lois portant exécution de ces dispositions constitutionnelles, qui, en précisant le cadre des garanties constitutionnelles, introduisent des dispositions complémentaires. Les dispositions constitutionnelles déjà évoquées, ainsi que les dispositions des lois portant exécution des dispositions constitutionnelles en question, contiennent des règles de droit et établissent, dès lors, des droits qui sont opposables au pouvoir étatique et peuvent être invoqués devant le juge. Les droits consacrés par les dispositions constitutionnelles sont universels et peuvent être invoqués par toute personne qui se trouve sur le territoire hellénique, à l'exception de la liberté de réunion et de la liberté d'association qui sont, elles, réservées, selon les articles 11 et 12 de la Constitution, aux seuls ressortissants grecs. Il faut, toutefois, noter que ces libertés sont consacrées, en ce qui concerne les étrangers qui résident en Grèce, par des textes législatifs.

17.1.2 Des règles du droit international consacrant des droits de l'homme sont posées par les traités internationaux ratifiés par des lois votées par le Parlement hellénique. Ces règles, dès leur transposition à l'ordre juridique interne, établissent des droits qui sont opposables au pouvoir étatique et peuvent être invoqués devant les juridictions helléniques. Par contre, des déclarations de droits de l'homme, faites dans des chartes qui ne sont pas incluses dans des traités internationaux, n'établissent pas des droits justiciables et ont le caractère de simples déclarations politiques. C'est ce qu'à jugé le Conseil d'Etat hellénique par rapport

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à la Déclaration Universelle des droits de l'homme, adoptée dans le cadre de l'O.N.U. en 1948 (C.E.H. [=arrêt du Conseil d'Etat hellénique] 2798-2800/2009, 1242/2007, 761/2000, 2905/1999, 2183/1991, 4039/1988). Il en va de même pour la Charte des droits fondamentaux, qui, bien qu'adoptée dans le cadre de l'Union Européenne en 2000, n'a pas été incluse dans le Traité de Nice (C.E.H. 1242/2007). Notons, cependant, que cette Charte est dorénavant incluse dans le Traité de Lisbonne.

17.2 La protection des droits de l'homme sur la base de traités internationaux au niveau mondial

17.2.1 La Grèce a ratifié par la loi 2462/1997 le Pacte International relatif aux droits civils et politiques, adopté dans le cadre de l'O.N.U. en 1966. Elle a également ratifié un grand nombre de traités internationaux portant sur la protection de droits humains spécifiques, comme, par exemple, la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, adoptée en 1984 (loi 1782/1988) ou encore la Convention relative aux droits de l'enfant, adoptée en 1990 (loi 2101/1992).

Les traités internationaux, dès leur ratification selon les prévisions de l'article 28 de la Constitution, sont incorporés à l'ordre juridique interne et acquièrent un rang supérieur à celui des lois. Ceci implique que les lois sont soumises à un contrôle incident de leur validité, exercé par tous les tribunaux, qui examinent la validité des dispositions législatives tant du point de vue de leur conformité à la Constitution que du point de vue de leur conformité aux traités internationaux.

17.2.2 Un certain nombre de traités internationaux prévoient des mécanismes de censure de violations éventuelles, de la part des Etats contractants ou adhérents, des droits consacrés par ces traités, en mettant en place à cet égard un organe spécial. Cet organe se prononce soit sur des recours formés par des personnes qui font valoir que leurs droits ont été violés soit sur des plaintes de portée analogue déposées par d'autres Etats contractants ou adhérents ou, enfin, agit d'office afin d'examiner d'éventuelles violations des droits en question. C'est notamment le cas du Pacte International relatif aux droits civils et politiques (article 41) et de son premier Protocole additionnel ainsi que de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (articles 20-22).

Des dispositions de cette nature annoncent explicitement que les traités concernés établissent en faveur de toute personne qui se trouve sur le territoire d'un Etat contractant ou adhérent des droits justiciables. Cela est encore plus clair lorsque le traité dispose que le mécanisme de contrôle n'est mis en œuvre que si tous les recours internes disponibles ont été épuisés. C'est, par exemple, le cas de la disposition de l'article 41 paragraphe 1 alinéa c) du Pacte International relatif aux droits civils et politiques ainsi que des dispositions des articles 2 et 5 paragraphe 2 alinéa b) de son premier Protocole additionnel.

La prévision, dans un traité international, d'un mécanisme de contrôle des violations éventuelles des droits que ce traité consacre, assure l'uniformité d'interprétation du traité sur toute l'étendue territoriale de son application, indépendamment des perceptions et des conditions sociales et politiques, éventuellement dissemblables, qui prévalent dans chaque Etat contractant ou adhérent. Ceci est d'autant plus vrai si l'on considère que l'interprétation d'un traité international par un organe institué par celui-ci, à l'occasion du contrôle des violations éventuelles des droits que ce traité consacre, constitue à l'évidence un guide précieux pour l'interprétation uniforme des dispositions pertinentes du traité de la part des juridictions des Etats contractants ou adhérents.

Certes, on peut se poser la question de savoir jusqu' à quel point le mécanisme de contrôle des violations éventuelles d'un traité international, prévu par ce même traité, est en mesure d'assurer la protection effective des droits que le traité consacre. Le degré d'efficacité dépend, assurément, de la présence ou non dans un traité des dispositions qui rendent contraignant, pour les Etats contractants et adhérents, le jugement prononcé par l'organe de contrôle lorsque ce dernier constate qu'un Etat a violé, dans un cas précis, des droits consacrés par le traité en question, ainsi que des dispositions qui imposent à un Etat de prendre des mesures de réparation à l'égard de la personne dont les droits ont été violés par ses organes. Une disposition prévoyant la possibilité d'instaurer un organe ad hoc de conciliation, visant à assurer l'efficacité du mécanisme de contrôle, constituerait sans aucun doute un pas dans cette direction. C'est le cas de la disposition de l'article 42 du Pacte International relatif aux droits civils et politiques.

17.2.3 En ce qui concerne la Grèce, les tribunaux et parmi eux, par excellence, le Conseil d'Etat, examinent, lorsqu'ils contrôlent la légalité de l'activité administrative, si cette activité viole des dispositions de traités internationaux ou des dispositions de la législation interne interprétée à la lumière des traités internationaux (à titre d' exemple, v., en ce qui concerne le Pacte International relatif aux droits civils et politiques, C.E.H. 4276/2009, 2050/2009, 1423/2009, 3340/2008, 2903/2008, 2718/2008, 768/2007, 1041/2004, 1798/2003, 3037/2001, 521/2000, 3327/1999, 2905/1999; en ce qui concerne la Convention contre la torture et autres peines et traitements cruels, inhumains et dégradants, C.E.H. 1452/2009, 1241/2007 ; en ce qui concerne, enfin, la Convention relative aux droits de l'enfant, C.E.H. 4055-4056/2008, 1636/2002). Lors de l'interprétation des dispositions d'un traité international, les tribunaux grecs tiennent compte, en y faisant expressément référence, de la jurisprudence produite par l'organe que ce traité a instauré afin d'examiner des violations éventuelles des droits que le traité consacre (v., par exemple, C.E.H. 4276/2009, qui cite la jurisprudence du Comité des Droits de l'Homme institué par le Pacte International relatif aux droits civils et politiques).

Il convient, toutefois, d'avouer qu'en raison de la protection plus efficace des droits de l' homme assurée par la Convention Européenne des Droits de l'Homme à travers la mise en place d'un mécanisme sophistiqué de contrôle des violations des droits que cette Convention consacre et le rôle central qui remplit, au cœur de ce mécanisme, la Cour Européenne des Droits de l' Homme, c'est la Convention

Européenne des Droits de l' Homme plutôt que le Pacte International relatif aux droits civils et politiques qui est le traité international le plus souvent invoqué par les justiciables devant les tribunaux et appliqué par ces derniers lorsqu'ils connaissent une affaire de violation de droits de l'homme par l'Administration.

17.3 La protection de droits de l'homme sur la base de traités internationaux au niveau européen

17.3.1 La Grèce est membre du Conseil de l'Europe. Dans le cadre du Conseil de l'Europe on a adopté, en 1950, la Convention Européenne de sauvegarde des Droits de l'Homme et des Libertés fondamentales, qui a été ratifiée par la Grèce, dans un premier temps, en 1953 (loi 2329/1953), puis de nouveau en 1974 (décret législatif 53/1974). Dans le cadre, également, du Conseil de l'Europe, on a adopté d'autres traités internationaux de caractère spécifique, comme la Convention Européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants de 1987, ratifiée par la Grèce en 1991 (loi 1949/1991) ou la Convention pour la protection à l'égard du traitement automatisé des données à caractère personnel de 1981, ratifiée par la Grèce en 1992 (loi 2068/1992). Dès leur ratification, tous ces traités ont été incorporés à l'ordre juridique interne et ont acquis, en application de l'article 28 de la Constitution, un rang supérieur à celui des lois.

La Grèce est, par ailleurs, membre de l'Union Européenne. Il est vrai que le Traité de 1957 instituant la Communauté Européenne ne comprenait pas, dans sa version initiale, de dispositions portant sur la protection de droits de l'homme, qui lieraient, en tant que règles du droit communautaire primaire, le législateur communautaire lors de l'adoption des règles du droit communautaire dérivé, la Commission dans ses fonctions administratives et les administrations des états membres lorsqu'elles appliquent des règles du droit communautaire. Malgré l'absence de telles dispositions, la Cour de Justice des Communautés Européennes considère, selon une jurisprudence constante, que les droits fondamentaux font partie intégrante des principes généraux du droit dont elle assure le respect et qu'en assurant la sauvegarde se ces droits, la Cour est tenue de s'inspirer des traditions constitutionnelles communes aux états membres ainsi que de la Convention Européenne des Droits de l'Homme. Le Traité de Maastricht de 1992 sur l'Union Européenne a, pour la première fois, consacré expressément les droits de l'homme, en disposant dans son article F paragraphe 2 ce qui suit: « L'Union respecte les droits fondamentaux, tels qu'ils sont garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950, et tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres, en tant que principes généraux du droit communautaire». Le Traité de Nice de 2001 n'a pas inclus dans son texte la Charte des droits fondamentaux de l'Union Européenne qui a été entre-temps rédigée. Celle-ci n'a donc pas acquis de force juridique contraignante, en demeurant une déclaration à caractère

politique. Or, la Charte a été par la suite jointe, sous forme de protocole additionnel, au Traité de Lisbonne de 2007 et a donc pris le caractère d'un texte juridiquement contraignant.

Le droit communautaire (dorénavant droit de l'Union) primaire, à travers la ratification par la Grèce de tous les textes (traités et protocoles additionnels) qui le composent, a été incorporé à l'ordre juridique interne et a acquis, en application de l'article 28 de la Constitution, un rang supérieur à celui des lois. Ce rang supérieur à celui des lois est également partagé, selon la jurisprudence constante du Conseil d'Etat, par l'ensemble des règles du droit communautaire dérivé qui sont introduites, en conformité avec le droit communautaire primaire, par le législateur communautaire. De cette manière, le Conseil d'Etat est en mesure de contrôler la compatibilité de la législation interne avec les règles du droit communautaire dérivé.

17.3.2 Tant la Convention Européenne de sauvegarde des Droits de l'Homme et des Libertés fondamentales (articles 27-40 comme ils ont été modifiés par l'article 1 du Protocole additionnel no 11) que la Convention Européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (articles 7-10) prévoient un mécanisme de contrôle des violations éventuelles des droits consacrés par ces Conventions. En ce qui concerne, plus particulièrement, la Convention Européenne des Droits de l'Homme, le contrôle des violations éventuelles et la protection effective des droits consacrés par la Convention ont été confiés à la Cour Européenne des Droits de l'Homme. La Cour se prononce soit sur des recours formés par des Etats (article 34 de la Convention) soit sur des recours formés par des particuliers qui font valoir que leurs droits ont été violés (article 35 de la Convention). Ces derniers recours ont, toutefois, un caractère subsidiaire et présupposent l'épuisement de tous les recours prévus par l'ordre juridique interne de l'Etat concerné. Un état membre du Conseil de l'Europe qui a été partie défenderesse à un litige porté devant la Cour Européenne des Droits de l'Homme est lié par l'arrêt rendu par la Cour sur le litige en question et il est donc obligé de se conformer pleinement à cet arrêt. Afin d'assurer au niveau les plus élevé l'efficacité de la protection des droits consacrés par la Convention, l'article 46 de celle-ci confie par ailleurs la surveillance de l'exécution des arrêts de la Cour au Comité des ministres des états membres.

Le rôle de la Cour Européenne des Droits de l'Homme en tant que juridiction assurant l'uniformité d'interprétation de la Convention est capital. Comme la Cour l'a souligné à plusieurs reprises, son approche interprétative est dictée par sa conception de la Convention comme un texte établissant un ordre juridique spécifique, distinct par rapport aux ordres juridiques internes des états membres. Sa jurisprudence remplit par ailleurs la fonction de guide des juridictions nationales lors de l'application par celles-ci de la Convention. Les juridictions nationales, quant à elles, tiennent constamment compte de cette jurisprudence en y faisant régulièrement référence.

D'un autre côté, lorsque l'Administration d'un état membre de l'Union Européenne, agit dans un domaine qui tombe dans le champ d'application du droit communautaire et applique, dès lors, des règles du droit communautaire, les juridictions nationales contrôlent si l'Administration a respecté les droits de l'homme

consacrés par le droit communautaire primaire, en tenant compte, à cet égard, de la jurisprudence de la Cour de Justice des Communautés Européennes (dorénavant Cour de l' Union Européenne) qu'elles citent expressément.

Par conséquent, la jurisprudence, tant de la Cour Européenne des Droits de l'Homme que de la Cour de Justice des Communautés Européennes assure, respectivement, sur toute l'étendue du Conseil de l'Europe et de l'Union Européenne, l'uniformité de l'interprétation et de l'application de la Convention Européenne de sauvegarde des Droits de l'Homme et du droit communautaire primaire en matière de protection des droits de l'homme consacrés par ces deux ordres juridiques.

17.4 La protection de droits de l'homme au niveau national

17.4.1 La Constitution hellénique comprend (Partie Deuxième, articles 4-25) une série de dispositions qui composent un système de règles ayant pour objet la protection des droits de l'homme. Ces dispositions ont, à l'instar de l'ensemble des dispositions constitutionnelles, un rang supérieur à celui des lois.

Selon la Constitution hellénique (article 93 paragraphe 4), tous les tribunaux ont le pouvoir mais aussi l'obligation de contrôler de manière incidente la constitutionnalité des lois qu'ils sont appelés à appliquer dans le cadre des litiges dont ils sont saisis et sont donc tenus de ne pas appliquer une loi contraire à la Constitution. Il va de soi que la question de la constitutionnalité des lois (et, par conséquent, la question de la conformité des lois aux dispositions constitutionnelles portant sur la protection des droits de l'homme) peut être en dernier ressort portée devant les hautes juridictions, à savoir le Conseil d'Etat, placé au sommet de la juridiction administrative, et la Cour de Cassation, placée au sommet de la juridiction civile et pénale. La jurisprudence des ces hautes juridictions, qui exercent un contrôle incident de la constitutionnalité des lois avant de les appliquer et refusent d'appliquer une loi qu'elles jugent contraire à la Constitution, crée la sécurité juridique sur la question de la conformité d'une loi à la Constitution. Pour faire face à une éventuelle divergence entre la jurisprudence du Conseil d'Etat et de la Cour de Cassation quant à la constitutionnalité d'une disposition législative précise, la Constitution a institué (article 100) une « Cour Suprême Spéciale», composée de membres du Conseil d'Etat et de la Cour de Cassation. La Constitution confère à la Cour Suprême Spéciale, au-delà de ses autres fonctions (comme celles d'un Tribunal des Conflits), l'autorité de prononcer *erga omnes* l'invalidité de la loi qu'elle juge non conforme à la Constitution, ce qui entraîne l'inapplicabilité générale de cette loi.

17.4.2 Devant le Conseil d'Etat et les tribunaux administratifs, la question de la conformité des lois aux dispositions constitutionnelles qui consacrent des droits de l'homme peut se poser à l'occasion de l'examen, soit d'office soit en raison des moyens invoqués par le requérant, de la question de la constitutionnalité de la loi qui constitue la base légale de l'acte administratif dont le requérant demande l'annulation. La même question peut également se poser à l'occasion d'un recours en indemnité, introduit en application des dispositions régissant la responsabilité civile de l'Etat;

dans le cadre d'un tel recours le juge est en effet appelé à examiner de manière incidente la légalité de l'acte administratif dont procède le préjudice allégué du requérant. Si une juridiction administrative juge qu'une loi n'est pas conforme à la Constitution, elle déclare cette loi comme inapplicable en l'espèce, statue que, puisque cette loi ne contient pas de règle de droit valide, c'est à tort que l'Administration l'a appliquée et annule par la suite l'acte administratif attaqué, en statuant que cet acte est privé de base légale valide et, dès lors, illégal. Dans le cas, par ailleurs, d'un recours en indemnité, la juridiction administrative saisie de ce recours, après avoir jugé de manière incidente que l'acte administratif contesté est privé de base légale, fait droit au recours qui vise à la réparation du dommage engendré par cet acte administratif illégal.

17.4.3 Tant les règles de droit contenues dans des dispositions constitutionnelles que les règles de droit contenues dans des traités internationaux ratifiés par la Grèce et portant sur la protection des droits de l'homme au niveau mondial ou européen, s'appliquent, dans l'ordre juridique interne, de manière parallèle. Par conséquent, pour que les lois introduisent des règles valides, il faut que leur contenu soit conforme tant aux dispositions constitutionnelles qu'aux dispositions de tous les traités internationaux mentionnés ci haut. De même, l'Administration est tenue de respecter lors de son action tant les dispositions constitutionnelles que les dispositions de tous les traités internationaux ratifiés par la Grèce et garantissant la protection des droits de l'homme. Ceci implique que les droits de l'homme sont protégés, à l'encontre du législateur et de l'Administration, au niveau assuré par celle, parmi les dispositions pertinentes, parallèlement applicables, qui accorde à l'individu la protection maximale. Ce principe est confirmé par la jurisprudence, celle du Conseil d'Etat en particulier. En effet, pour que le Conseil d'Etat arrive à la conclusion que la disposition d'une loi ne viole pas les droits de l'homme, il exerce un examen cumulatif du contenu de cette loi tant à la lumière des dispositions constitutionnelles qu'à la lumière des dispositions des traités internationaux ratifiés par la Grèce; dans le cadre de cet examen, le Conseil d'Etat exerce un contrôle minutieux de la conformité de la loi aux dispositions de la Convention Européenne des Droits de l'Homme mais aussi, le cas échéant, aux dispositions des traités internationaux à caractère spécifique. Notons à cet égard l'arrêt 1632/2002 du Conseil d'Etat. Dans le cadre de cette affaire, la Haute Juridiction Administrative a annulé, après examen de sa légalité, l'acte par lequel un organe de la Police d'une ville proche de la frontière a interdit l'entrée en Grèce de deux mineurs de nationalité bulgare qui rentraient d'un voyage en Bulgarie et dont les parents résident et travaillent en Grèce. Cette interdiction a été imposée au motif que les deux mineurs bulgares ont séjourné à l'étranger plus de deux mois. La législation hellénique prévoit, en effet, qu'un ressortissant d'un Etat qui ne fait pas partie des Etats membres de l'Union Européenne, et qui détient une carte de séjour de durée limitée a le droit de sortir du territoire hellénique et d'y retourner sous condition que son absence à l'étranger ne dépasse pas, par année, deux mois au total. Ce droit est également accordé, sous la même condition, aux membres de la famille du détenteur d'une telle carte de séjour. En cas de violation de la condition précitée par le détenteur de la carte de séjour, celle-ci est révoquée; en cas de violation de cette condition de la part d'un membre de la famille du

détenteur de la carte, ce membre est privé du droit de rentrer en Grèce. Le Conseil d'Etat, en interprétant les dispositions pertinentes de la législation hellénique à la lumière de l'article 8 paragraphe 1 de la Convention Européenne des Droits de l'Homme ainsi que des articles 3 paragraphe 1 et 4 de la Convention relative aux droits de l'enfant, a jugé que ces dispositions ne concernent pas les enfants mineurs d'un ressortissant étranger qui font partie, d'après la carte de séjour de celui-ci, de sa famille.

Notons toutefois que, lorsque le Conseil d'Etat se trouve confronté à la question de la conformité d'une loi à la Convention Européenne des Droits de l'Homme, il se contente, en règle générale, de l'examen de cette question, sans procéder à un contrôle ultérieur portant sur la conformité de la loi au Pacte International relatif aux droits civils et politiques. Le Conseil d'Etat estime, apparemment, que la protection des droits de l'homme assurée par le Pacte précité est moins complète que la protection assurée par la Convention Européenne des Droits de l'Homme. Par ailleurs, en examinant la légalité de l'activité administrative, le Conseil d'Etat contrôle le respect, de la part de l'Administration, tant des dispositions constitutionnelles que des dispositions de la Convention Européenne des Droits de l'Homme ou des traités internationaux ratifiés à caractère spécifique, en interprétant les lois, lors de ce contrôle, de manière compatible avec les dispositions précitées qui ont, elles, un rang supérieur à celui des lois.

D'un autre côté, lorsque le législateur et l'Administration agissent dans un domaine régi par le droit communautaire, le Conseil d'Etat vérifie également, lors de l'examen de la légalité de l'activité administrative, le respect, de la part du législateur et de l'Administration, des règles du droit communautaire primaire qui consacrent des droits de l'homme, en suivant sur les questions soulevées la jurisprudence pertinente de la Cour de Justice des Communautés Européennes (v., par exemple, C.E.H. 606/2008).

17.4.4 L'examen de la jurisprudence du Conseil d' Etat révèle une tendance générale qui consiste à attribuer, par voie interprétative, un sens semblable aux dispositions constitutionnelles et aux dispositions de la Convention Européenne des Droits de l'Homme. Et ceci non seulement en ce qui concerne l'étendu et le contenu des droits consacrés par ces textes, mais aussi en ce qui concerne l'étendu et l'intensité des entraves que le législateur peut apporter à l'exercice de ces droits en invoquant des raisons d'intérêt général. Ainsi, quand une disposition constitutionnelle reconnaissant un droit fondamental prévoit, en même temps, de manière générale que le législateur peut poser des limites à l'exercice de ce droit, le Conseil d' Etat considère (v. C.E.H. 248/2009, 113/2009, 3367/2007, 2544/1999, 2601/1998, 3841/1997, 1802/1986) que cette disposition constitutionnelle autorise le législateur à poser des limites imposées uniquement pour des raisons d'intérêt général reconnues dans une société démocratique, comme ces raisons sont décrites dans les dispositions correspondantes de la Convention Européenne des Droits de l'Homme (articles 8 paragraphe 2, 9 paragraphe 2, 10 paragraphe 2, 11 paragraphe 2).

Le droit de propriété constitue un cas particulier, à cause du fait que la jurisprudence persiste à considérer que l'article 17 de la Constitution qui consacre ce droit ne couvre que les droits réels. Par conséquent, en ce qui concerne le reste des droits

à caractère pécuniaire, la validité des dispositions législatives qui y portent atteinte est appréciée par le Conseil d'Etat (v. C.E.H. 3818/1997) à la lumière de l'article 1 du Premier Protocole additionnel de la Convention Européenne des Droits de l'Homme.

17.5 Conclusion

Seul l'énoncé, par les règles constitutionnelles ou les règles de traités internationaux ratifiés par le Parlement, de la protection parallèle des droits de l'homme sur des niveaux multiples ne suffit pas à les faire respecter dans les faits par le pouvoir législatif ou le pouvoir exécutif. Pour que ce but soit atteint (et il s'agit là d'une constatation qui vaut pour l'application de tous les principes qui composent l'état de droit), il est indispensable que le pouvoir judiciaire assure d'une manière effective la protection de ces droits. Ce qui implique que le juge doit être en mesure de procéder à un examen intensif de la conformité aux dispositions pertinentes de la Constitution ou des traités internationaux des lois qui entravent l'exercice des droits de l'homme.

Selon l'exposé ci-dessus, le système juridictionnel grec, dont les traits principaux sont définis par la Constitution, remplit cette condition. Le contrôle incident et diffus de la constitutionnalité des lois, qui entraîne l'autorité (mais aussi l'obligation) de tous les tribunaux de refuser l'application des lois qui entravent un droit fondamental et sont jugés comme contraires aux dispositions constitutionnelles ou aux dispositions de la Convention Européenne des Droits de l'Homme, s'est avéré particulièrement efficace à cet égard. Le refus du juge d'appliquer une telle loi peut se fonder soit sur la constatation que l'objectif d'intérêt général, invoqué par le législateur pour justifier l'entrave imposée à l'exercice d'un droit fondamental, n'est pas licite soit sur la constatation que cette entrave ne constitue pas, d'après les perceptions communes, un moyen propre à garantir la réalisation de l'objectif énoncé par la législateur ou nécessaire à cet effet soit, enfin, sur la constatation que l'entrave en question est un moyen manifestement disproportionné par rapport à l'objectif à atteindre. Ainsi, lors de l'examen par le juge du respect du principe de la proportionnalité de la part du législateur, le contrôle juridictionnel de la constitutionnalité des lois s'étend jusqu'aux appréciations du législateur puisque le juge cherche à vérifier si ces appréciations sont soutenables d'après les règles de la logique et de l'expérience commune.

Chapter 18
Universality and Binding Effect of Human Rights from a Portuguese Perspective

Ana Maria Guerra Martins and Miguel Prata Roque

18.1 Introductory Remarks

18.1.1 Purpose of This Chapter

The purpose of this chapter is to study the question of 'universality' and 'normativity' (binding effect) of human rights from a Portuguese perspective.

For a state, like Portugal, which is a member state of both the European Union and the Council of Europe, as well as a member of the United Nations and their specialized agencies, the legal research into human rights is rather complex, since it can only be approached from a multidimensional or multilevel point of view:

- the international level;
- the European Union level;
- the national level.

These three levels of protection are highly influenced by each other.

The universal international level constitutes all international instruments adopted by the United Nations and their specialized agencies and other international universal organizations, which have been ratified by Portugal,[1] as well as international

[1] Among the international universal covenants on human rights, one can mention the International Covenant on Civil and Political Rights (ICCPR); the Optional Protocol to the ICCPR; the Second Optional Protocol to the ICCPR aimed at the abolition of the death penalty; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Optional Protocol to the CEDAW;

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customary law concerning human rights. Above all, we must mention the Universal Declaration on Human Rights (UDHR). The international regional level comprises international instruments that have been adopted within European international organizations, such as the Council of Europe.[2]

In our opinion, the study of the European Union level shall be individualized, given that it can be included neither in regional international law *tout court* nor in constitutional law. As a matter of fact, on the one hand, the European Union cannot be deemed a traditional international organization and, on the other hand, constitutional law categories, such as the state or the federal state, are also not appropriate to explain the European Union juridical nature (Guerra Martins 2004, 189 et seq.). Indeed, fundamental rights rules foreseen by the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFREU)[3] possess special features – primacy, direct applicability, direct effect (Quadros 2008, 359 et seq;

the Convention on the Rights of the Child (CRC); the Convention on Forced Labor, 1930 (No 29 of the International Labor Organization (ILO)); the Convention on the Abolition of Forced Labor, 1957 (No 105 of the ILO); the Convention relating to the Status of Refugees; the Convention for the Prevention and Punishment of the Crime of Genocide; the Geneva Convention relative to the Treatment of Prisoners of War; the Geneva Convention relative to the Protection of Civilian Persons in Time of War; the Convention on the Prohibition or Limitation of the Use of Certain Conventional Weapons; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of Persons with Disabilities (CRPD).

[2] Portugal, as a member of the Council of Europe, is a contracting party, *inter alia*, of the following conventions:

- Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14 (Portugal is also bound by the Additional Protocols No 1, 4, 6, 7, 12, 13);
- European Convention on the Legal Status of Migrant Workers;
- European Social Charter (adopted in 1961 and reviewed on 3 May 1996);
- Additional Protocol to the European Social Charter (Reviewed);
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- European Charter of Local Self-Government;
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data;
- Framework Convention for the Protection of National Minorities;
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine);
- Additional Protocol to the Convention for the Protection of Human Rights and of the Dignity of the Human Being with regard the Application of Biology and Medicine (on the Prohibition of Cloning of Human Beings).

[3] After the entry into force of the Lisbon Treaty (published in [2007] OJ C 306/1, consolidated versions of the TEU, the TFEU and the Charter of Fundamental Rights published in [2010] OJ C 83/1), which occurred on 1 December, 2010, the European Union level is dominated by the Charter of Fundamental Rights of the European Union (its first version was published in [2000] OJ 364/1. This version was amended by the IGC 2004, and was incorporated into the Part II of the Treaty establishing a Constitution for Europe, which was published in [2004] OJ C 310/1. Currently, it is published in [2010] OJ C 83/1).

Craig and De Búrca 2007, 344 et seq.; Lenaerts et al. 2005, 665 et seq.; Quadros 2004, 398 et seq.; Guerra Martins 2004, 427 et seq.) – that are rather rare in international law.

In our view, a new category must be created in order to explain the EU's legal nature and this category shall be denominated a union of states and peoples in a process of constitutionalization (Guerra Martins 2000, 329 et seq.).

18.1.2 Terminology

In regard to terminology, in this chapter the term 'fundamental rights' will mainly be applied when it concerns Portuguese constitutional law and European Union law and the expression 'human rights' will be used in a strict sense restricted to both universal and regional international levels of protection. Human rights in a broader sense, comprising both fundamental rights and human rights *stricto sensu*, will rarely be used.

18.1.3 Plan

This chapter will be divided into four parts. Firstly, we will focus on the universal international level (Sect. 18.2). Secondly, we will draw attention to the regional international level (Sect. 18.3). Thirdly, we will turn to the European Union level (18.4.) and finally, we will consider the Portuguese law, particularly constitutional law (18.5).

18.2 Universal International Level

18.2.1 Point of Departure: Human Dignity as a Universal Value

First of all, one has to emphasise that the respect for human dignity and for equal rights of all human beings – men and women – represents the point of departure of international human rights law in general. In fact, the preamble of the UN Charter, the preamble and Article 1 of the UDHR (Dicke 2002, 114), the preamble of the ICCPR and the preamble of the ICESCR expressly confirm this statement.

In other words, there is a universal recognition of respect for human dignity. Nevertheless, both the legal nature and the content of respect for human dignity are somewhat controversial.[4] For many scholars, respect for human dignity is the basis

[4] See, *inter alia*, Guerra Martins (2010, 500 et seq.); Luther (2008, 306 et seq.); Herdegen (2007, §§ 30 et seq.); Ingber (2000, 905); Borella (1999, 30 et seq.); Hofmann (1993, 355 et seq).

or the foundations (Etxeberria 2003, 67 et seq.) of international human rights law. For others, it is the main value of respect for human rights in general (Benchikh 1999, 38; Rabkin 2003, 146; Andorno 2001, 154) or a general principle of law (Frowein 2002, 124 et seq.).

The international texts on human rights aim to guarantee a wide range of human rights that represent the core of the universally accepted rights. This tends to assure that all people and countries may recognize themselves and their cultures in these international texts. Even when they do not express a binding character in any provision, one can accept that it is implicitly recognized as a result of the respect for human dignity and for equality.

18.2.1.1 Universality Versus Cultural Relativism

Besides the aspiration to universalism, there are advocates of "cultural relativism", meaning that the content and the scope of human rights vary according to regional, religious, social and political backgrounds. As a matter of fact, views differ on fundamental issues, such as the rights of women, children, and religious minorities. The fact is that international human rights conventions shall also respect the idea of diversity and specific aspirations of all peoples. This is the only successful strategy to assure the observance of universal international law by all of the states of the world (Cançado Trindade 2003, 37 et seq.).

Honestly speaking, it seems rather difficult to achieve an adequate balance between universalism and cultural relativism (Rehman 2010, 8–9; Steiner et al. 2007, 517 et seq.; Blanc Altemir 2001, 21; Cohen-Jonathan 2000, 25); "[h]uman rights instruments (…) are surely on the 'universalist' side of this debate" (Steiner et al. 2007, 518).

18.2.1.2 Means to Improve the Universality of International Human Rights Law

As universality is a goal pursued by the United Nations, the international covenants on human rights negotiated under its auspices or within this organization usually provide the following means to improve it:

(a) Clauses of accession;
(b) Reservations (Articles 19–23 of the VCLT (1969)) and interpretative statements – although they are very often incompatible with the object and the purpose of the Treaty.[5, 6] The non-application of a certain provision by a state is frequently

[5] This kind of reservation is prohibited by article 19 (c) of the VCLT (1969).

[6] The ICCPR-HRC has adopted several decisions, in which it has stated its own power to determine the compatibility of the reservations with the scope and purpose of international human rights conventions. See, for instance, Communication No 845/99, *Rawle Kennedy c/Trinidade e Tobago,* 31/12/1999, par. 6.7. (CCPR/C/67/D/845/99). In this case, the ICCPR-HRC considered that a reservation that leads to discrimination is incompatible with the object and purpose of the treaty.

the only means to overcome its reluctance to participate as a party in a universal human rights convention. This practice weakens the binding force of international human rights (De Schutter 2010, 96–122; Moeckli et al. 2010, 134–140; Guerra Martins 2006a, 131–133). Therefore, in November 1994, the ICCPR Committee of Human Rights (CHR) decided that the provisions limiting themselves to receive international customary human rights law shall not be subjected to reservations[7];

(c) Clauses of limitation and derogation – they assure a degree of flexibility, which is rather significant for many states (De Schutter 2010, 257–364 and 513–559; Moeckli et al. 2010, 140–144). There are some covenants that do not authorize any derogation from some of their provisions. Such is the case with Article 4 (2) of the ICCPR of 1966.[8] Moreover, the ICCPR-CHR has already stated that the utilization of the clauses of derogation shall not be unlimited, as its abuse may constitute a breach of the referred Covenant.[9]

18.2.2 Binding Effect

Above all, one has to mention that the main universal international treaties do not provide appropriate enforcement mechanisms, which indeed diminishes the binding effect of the rules recognizing human rights. In fact, they rarely provide for "judicial enforcement" and, when they do, they seldom foresee specific rules on execution of judgments. By contrast, the settlement of disputes over human rights by non-jurisdictional mechanisms, such as the presentation of periodical reports by the national authorities on the measures they took to give effect to their undertakings,[10] the states' communications[11] and the communications from individuals claiming to be victims of any of the rights set forth in the covenant,[12] are rather common. The UN-CAT adds two other mechanisms: the confidential inquiry[13] and the periodical visit[14] (Smith 2010, 149 et seq.; Guerra Martins 2006a, 180–188).

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[7] See paragraph 18 of the General Commentary No 24 on reservations, which was adopted by the 52nd session [CCPR/C/21/REV1/ADD6].

[8] This international covenant does not authorize any derogation of Articles 6, 7, 8 (1) and (2), 11, 15, 16 and 18.

[9] See General Commentary No 29 on state of emergency (Article 4), adopted by the session of 24/07/2001 [CPPR/C/21/Rev.1/ADD11].

[10] See, for instance, Article 40 ICCPR, Articles 16–22 ICESCR, Article 9 ICERD, Article 18 CEDAW and Article 19 UN-CAT.

[11] See Article 41 ICCPR, Article 11 ICERD and Article 21 UN-CAT.

[12] See Optional Protocol (OP1) ICCPR, and Article 22 UN-CAT.

[13] See Article 20 (2) of the UN-CAT.

[14] See Article 20 (3) of the UN-CAT.

18.2.3 Gap Between Normative and Substantive Universality

The problem relating to the gap between normative and substantive universality shall be approached differently if we refer to political and civil rights or if we refer to economic, social and cultural rights. As the implementation of the latter depends much more on political choices, which are considered *domaine reservé* of the states, and implies higher financial costs – when compared to civil rights – the above-mentioned gap further increases and is somewhat more relevant.
However, the full implementation of political and civil rights has a long way to go before it is fully achieved. If, formally, most countries tend to adopt laws that receive human rights recognized by international law, in practical terms, not all of them assure their exercise on an individual level. That means the "law in action" does not correspond with the "law in books".

Accordingly, the only way to reduce the gap between normative and substantive universality is to endow the international organizations and every single state with the necessary tools to implement international human rights. The reinforcement of international and national judicial and administrative bodies is imperative.

18.3 Regional International Level

18.3.1 Preliminary Remarks

The majority of the human rights guaranteed by universal international conventions, which are applicable worldwide, are also pursued by regional conventions that bind the Portuguese Republic.

The ECHR has a specific status among European regional instruments, since it is the only human rights convention that foresees an effective and workable model of judicial enforcement (De Schutter 2010, 897–920; Rehman 2010, 215–228; Moeckli et al. 2010, 464–473; Guerra Martins 2006a, 256–265), which we will expand on in the following item.

18.3.2 Binding Effect of the ECHR

According to Article 1 ECHR, all contracting parties accept the binding effect of the human rights guaranteed therein over all institutions of the national states. Furthermore, Article 19 ECHR sets out the provisions relating to the European Court of Human Rights (ECtHR) for the settlement of any dispute between an individual and a member state. This mechanism was not included in the first version of the ECHR. It was introduced by Protocol No 11 (Sudre 2008, 629 et seq.; Grabenwarter 2003, 54 et seq.;

Renucci 2002, 573 et seq.; Makarczyik 1999; 439 et seq.; Alvarez-Ossorio Micheo 1999, 135 et seq.; Cabral Barreto 2010, 28–32).

According to Article 46 (1) of the same Convention, the decisions of the ECtHR are binding for all member states. In any case, the ECHR is the only human rights treaty that guarantees, on the one hand, a permanent judicial system (Article 19) that may decide on the basis of individual applications (Article 34) and, on the other hand, the binding force of the decisions held by the ECtHR and a mechanism to supervise its execution (Article 46 (2)). This binding effect includes the adoption of pecuniary sanctions, provided that the Court decides that the state has indeed violated a human right.

The ECHR mechanisms for the protection of human rights are stronger and much more efficient than the ones pursued by other international treaties, including the regional ones.[15] However, this success comes at a high price – the number of individual applications before the ECtHR has increased in a way that prevents it from giving its decision within a reasonable time (Guerra Martins 2006b, 117–136; Cabral Barreto 2010, 31). In order to overcome this issue, the member states of the Council of Europe adopted Protocol No 14, which modified the system of judicial control of the ECHR (Guerra Martins 2006b, 117 et seq.; idem 2006a, 265; Lagoutte 2005, 127 et seq.; Greer 2005, 93 et seq.; Beernaert 2004, 544 et seq.).

18.3.3 Lack of Binding Effect of the European Social Charter

As the ECHR mainly recognizes civil and political rights, economic and social rights needed additional protection within the Council of Europe. Therefore, the member states approved the European Social Charter (ESC) in 1961. Nevertheless, the states have always been rather skeptical and reluctant to recognize these kinds of rights. As a consequence, the human rights guaranteed in the ESC are not directly binding. On the contrary, they depend on legislative and administrative implementation. In addition, the ESC does not provide for any jurisdictional enforcement system, but only an administrative one, in some aspects similar to the universal conventions.

The European Committee of Social Rights (ECSR) is the body responsible for monitoring compliance in state parties. This Committee makes a legal assessment of the conformity of national situations with the ESC, the Additional Protocol of 1988 and the Revised European Social Charter of 1996. It adopts *“conclusions”* in the framework of the reporting procedure and *“decisions”* under the collective complaint procedure (Rehman 2010, 232–262; Bonet Perez and Bondía García 2003, 441 et seq.; Brillat 2001, 45 et seq.; Vandamme 2001, 11 et seq.).

[15] Neither the Inter-American Convention on Human Rights nor the Charter of Banjul preview a judicial mechanism of settlement of disputes as sophisticated as the European one.

18.4 European Union Level After the Treaty of Lisbon

In this chapter we will solely focus on two innovations introduced by the Treaty of Lisbon – the CFREU, which includes a rather extensive catalog of fundamental rights, and the Union's accession to the ECHR.[16]

18.4.1 Charter of Fundamental Rights of the European Union

The Charter was solemnly proclaimed by the Commission, Parliament, and Council and was politically approved by the member states at the Nice European Council Summit in December 2000.[17] Thereafter, its binding effect was subjected to a strong discussion, its lack of legal effect being supported by a large majority of scholars[18] and judicial actors.[19] Submitted to several amendments,[20] the Charter was proclaimed once again on 12 December 2007, in Strasbourg – a day before the signature of the Treaty of Lisbon.

According to Article 6 (1) TEU, European Union law must give the same respect to the Charter as it does the Treaties. However, the binding character of the Charter is submitted to some limitations. Firstly, according to Article 6 (1) TEU, it shall not extend the competences of the Union as defined in the Treaties, and the rights, freedoms and principles it contains shall be interpreted in accordance with the general provisions comprised in Title VII and with regard to the explanations referred to in the Charter. Otherwise, as regards Article 51 (1), the Charter only binds the EU institutions in their relations with the European citizens and member states when they implement EU law.

Furthermore, the binding force of the Charter was not accepted without any concessions to the member states, which were opposed to it (United Kingdom and Poland). They required a Protocol (which became Protocol No 30) to the Charter

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[16] For the evolution of the protection of fundamental rights in the European Union, cf. Guerra Martins (2009, 56–75); Guerra Martins (2007, 68–90).

[17] The first version of the Charter was published in [2000] OJ C 364/1.

[18] Inter alia: Lebaut-Ferrarese and Karpenshif 2004, 136 et seq.; Bribosia 2005, 117; Jacqué 2002, 107 et seq.

[19] See, among others, ECJ case C-540/03 *EP v. Council* [2006] ECR I-5769, par. 38; case C-435/06 *Laval* [2007] ECR I-10141, par. 91. See Court of First Instance (CFI) Case T-54/99, *Max.mobil Telekommunikation Service* [2002] II-313, par. 48, 57. See Conclusions of the Advocate-General Tizzano, ECJ, Case C-173/99 *BECTU* [2001] ECR I-4881, par. 27–28; Jacobs, ECJ, Case C-270/99P *Z./PE* [2001] ECR I-9197, par. 40; Leger, ECJ, Case C-353/99P *Hautala* [2001] ECR I- 9565, par. 82–83; Misho, ECJ, Case C-20/00 and C-64/00 *Booker* [2003] ECR I-7411, par. 26; Poiares Maduro, ECJ, Case C-181/03 *Nardone* [2005] ECR I-199; Kokott, ECJ, Case 540/03 *EP v. Council* [2006] ECR p. I-5769, par. 58.

[20] See, for example, Article 52 (4) to (7), which were added by the 2004 IGC.

and a third state (the Czech Republic) even required the accession to this Protocol after the signature and the approval of the Treaty but before its ratification.

This protocol does not imply that Poland and the United Kingdom (and also the Czech Republic) benefit from an "opt-out" concerning the application of the CFREU. The theory of fundamental rights could hardly admit such an interpretation.

By contrast, the real meaning of the Protocol is the clarification of the content of the Charter (Rohmer 2009, 155 et seq.; Lefèvre 2009, 165 et seq.; Baratta 2008, 39 et seq.; Dougan 2008, 665 et seq.; Moriceau 2008, 362 et seq.; Mayer 2007, 88). This opinion finds support in the preamble that expressly reaffirms the binding effect of the protection of fundamental rights in general and the Charter in particular and states the interpretative character of the Protocol, and in Articles 1 and 2, which limit themselves to confirm some provisions of the Charter (Guerra Martins 2010, 167 et seq; Dellavalle 2009; Pernice 2008, 245 et seq.; Barnard 2008, 277).

The Charter starts with a provision that states "human dignity is inviolable. It must be respected and protected" (Article 1). Considering the explanations relating to the Charter, the dignity of the human person assumes a double function in the European fundamental rights legal system. It is not only a fundamental right in itself, but it also constitutes the real core of fundamental rights. Accordingly, the rights laid down in the Charter may not be used to harm the dignity of another person and the dignity of the human person is part of the substance of the rights set out in the Charter. This means that all rights recognized by the Charter shall be interpreted and applied regarding the respect for human dignity (Guerra Martins 2010 530 et seq.).

In comparison to international law, respect for human dignity plays a more significant role in EU law, due to the fact that it is considered by the Charter as a fundamental right in itself. In any case, before the entry into force of the Charter, the Court of Justice had already held that a fundamental right to human dignity is part of the EU law.[21]

The personal scope of the fundamental rights in the European Union law constitutes, in certain cases, every person,[22] and in other cases, solely the citizens of the Union or certain categories of persons, for example, workers (Articles 27, 30, 31), elderly persons (Article 24), children (Articles 25, 32), persons with disabilities (Article 26) and citizens of the Union (so it is the case with the right to vote and to stand as a candidate at elections to the EP and the right to vote and to stand as a candidate at municipal elections (Articles 39 and 40, respectively) and the freedom of movement and of residence (Article 45) that are reserved for the citizens of the Union).

[21] See mainly ECJ, case C-377/98 *Netherlands/EP and Council* [2001] ECR I-7079, par. 70–77. See also ECJ, case C- 13/94 *P. contra S.* [1998] ECR I-2143 and case C-36/02 *Omega* [2004] ECR I-9609.

[22] It is the case with the fundamental rights recognized by Title I on Dignity (right to respect for human dignity, right to life, right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labor) and Title VI on Justice (right to an effective remedy and a fair trial, presumption of innocence and right to defense, principles of legality and proportionality of criminal offences and penalties, right not to be tried or punished twice in criminal proceedings for the same criminal offence).

18.4.2 Accession of the European Union to the ECHR

The Treaty of Lisbon introduced a legal basis into the TEU empowering the European Union to accede to the ECHR. However, the difficulties associated with this accession are innumerable (Rangel de Mesquita 2010, 83 et seq.). As a consequence, the Treaty of Lisbon could not confer to the Union the competence to accede to the ECHR without providing for certain conditions. Article 6 (2) TEU and Protocol No 8 relating to that provision seek to overcome the potential difficulties of connection between the different legal orders, which will be applied in the Union, concerning fundamental rights. In fact, the ECHR will compete, on the one hand, with the Treaties and the Charter, and, on the other hand, with the constitutional traditions common to the member states.

Accordingly, the accession shall not affect the Union's competences or the powers of its institutions, as they are defined in the Treaties (Article 6 (2) TEU and Article 2 of the Protocol). The agreement of accession shall make provisions preserving the specific characteristics of the Union and of EU law, assuring the participation of the Union in the control bodies of the Conventions and the constitution of the mechanisms necessary to ensure that proceedings by non-member states and individuals are correctly addressed to member states and/or to the Union (Article 1 of the Protocol). Furthermore, the agreement of accession shall ensure that nothing will affect the situation of the member states in relation to the ECHR (Article 2 of the Protocol), as well as the fact that nothing shall affect Article 344 TFEU, which provides that member states undertake to submit the disputes concerning the interpretation or the application of the Treaties to the methods of settlement provided therein.

Finally, one has to underline that, independent of its accession, the ECHR already plays an important role as a frame of reference where the protection of fundamental rights in the Union is concerned.[23]

18.4.2.1 Judicial Enforcement of Fundamental Rights in the EU

Above all, one has to highlight that EU law contains adequate mechanisms to ensure the observance of fundamental rights both by the institutions, organs and agencies of the Union and by the member states. Although these means have existed since the very beginning of the European integration, the Treaty of Lisbon reinforces some of these.

In fact, the European Union has at its disposal a strong judicial power, which is exercised by the Court of Justice of the European Union (CJEU), which includes the Court of Justice, the General Court and specialized courts (Article 19 (1) TEU).

[23] See ECJ, case 4/73 *Nold* [1974] ECR 491; case 36/75 *Rutili* [1975] ECR 1219; case 44/79 *Hauer* [1979] ECR 2727; case 222/84 *Johnston* [1986] ECR 1651. The Court even held that community measures contrary to the ECHR are inadmissible – case C-299/95 *Kremzow* [1997] ECR I-2629.

Furthermore, according to Article 344 TFEU, “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than provided for therein”. The term “Treaties” shall be read in a wide sense, meaning, binding European Union law and, therefore, including the Charter.

To sum up, in the EU, independent of the source of EU law by which they are guaranteed, the fundamental rights benefit from judicial enforcement.

The CJEU plays the most important role in the enforcement of fundamental rights in EU law. However, due to the primacy, direct effect and direct applicability of this law, the courts of the member states are the normal courts to hear and determine all cases, which do not fall within the jurisdiction of the Court of Justice (Lenaerts et al. 2006, 3). As common courts, they shall also apply the provisions on fundamental rights.

The jurisdiction of the CJEU embraces many proceedings that prove to be fully adequate to supervise and develop the protection of fundamental rights.[24] This is one of the most important tasks of the Court as the guardian of the objectives and rules of law laid down in the Treaties (Lenaerts et al. 2006, 10). When the Court exercises this power, it acts as a real constitutional court (Quadros and Guerra Martins 2007, 24–25; Lenaerts et al. 2006, 33 et seq.).

In this Chapter, it is impossible to go further in the study of the competence of the Court concerning the protection of fundamental rights. We would like only to note that under the terms of Article 260 (2) TFEU, the CJEU is empowered to impose a lump sum or a penalty payment on a member state, in the case of disrespect of fundamental rights.

18.5 National Level

18.5.1 Portuguese Constitutional Law on International Relations

The Constitution of the Portuguese Republic (CPR) of 1976,[25] last revised in 2005,[26] is deeply committed to a “friendship” with fundamental rights. Firstly, it recognizes a large catalog of rights, freedoms and guarantees (civil and political rights), which

[24] Infringement actions (Articles 259–260 TFUE), preliminary references (Article 267 TFUE), actions for annulment (Articles 263–264 TFUE), actions for failure to act (Article 265 TFUE), actions relating to compensation for non-contractual damage brought against the Union (Articles 268 and 340 TFUE).

[25] An English version of the Constitution is available at the website http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf.

[26] Constitutional Law No 1/2005 is available at the website http://debates.parlamento.pt/catalog.aspx?cid=r3.dar_s2rc.

are jurisdictionally enforceable. Secondly, it provides an extensive bill of social, economic and cultural rights, which are also submitted to judicial enforcement. However, in practical terms, due to our structural economic fragility, it is harder to implement the latter than the civil and political rights. Thirdly, the CPR also conveys several signs of friendship towards international human rights law and the protection of fundamental rights by European Union law.

Starting with Article 7 CPR, which concerns international relations, the Constitution implicitly contains a principle of respect for international law (Gomes Canotilho and Moreira 2007, 240), with a special reference to human rights and the rights of the peoples. The first and the third paragraphs of this provision incorporate into the Constitution the principles contained in the Charter of the United Nations (Miranda 2010a, 152). Paragraph (1) states: "Portugal shall be governed by the principles of (…), respect for human rights, the rights of peoples, (…)" and paragraph (3) reinforces the principle of the rights of peoples.

Article 7 (2) CPR contains the guidelines of Portuguese external policy. One has to note that some of these guidelines hold less relevance nowadays (Miranda 2010a, 154). Article 7 (4) CPR stresses, with accordance to our history, that "Portugal shall maintain privileged ties of friendship and cooperation with Portuguese speaking countries". Moreover, Article 7 (5) and (6) CPR comprise a constitutional clause of engagement to the construction and deepening of European integration (Otero 2010, 132; Gomes Canotilho and Moreira 2007, 243). These two paragraphs shall be read together with Article 8 (4) CPR, which will be studied below.

Finally, Article 7 (7) CPR constitutes a general clause of acceptance of the Rome Statute into the Portuguese constitutional order (Gomes Canotilho and Moreira 2007, 248), including the jurisdiction of the International Criminal Court. This provision must be interpreted in the context of the protection of human rights and the rights of the peoples. It was added by the constitutional revision of 2001, in order to overcome the constitutional difficulties of ratification of the Rome Statute (Miranda 2010a, 157).

18.5.2 Reception and Position of International Law in the Portuguese Legal Order

As regards international customary law, in accordance with Article 8 (1) CPR, "the rules and principles of general or common international law shall form an integral part of Portuguese law". This includes human rights resulting from universal international customary law, such as the equal dignity of every person, the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labor, the right to self-determination of the peoples, freedom of speech, freedom of thought, conscience and religion, etc.

A significant number of Portuguese scholars (Miranda 2009, 152–153; Gomes Canotilho and Moreira 2007, 256; Guerra Martins 2006a 110 et seq.; Gonçalves

Pereira and Quadros 2005, 283–284; Otero 1990, 613) argue that these rules and principles are directly binding to the Portuguese state and, consequently, they do not need any internal specific procedure of reception.

Furthermore, Article 16 (1) CPR states that "the fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law" and Article 16 (2) CPR confers a supra-constitutional value to the UDHR, given that "the provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights". In other words, Article 16 (1) CPR foresees an "open clause" in matters of fundamental rights, meaning that our Constitution receives all human rights contained in other sources of law (including in international law), as if they were part of the written Portuguese Constitution and Article 16 (2) CPR expressly guarantees that all constitutional principles and norms shall be interpreted and applied in the light of the UDHR.

As for the position of the human rights that derive from the rules and principles of general or common international law within the hierarchy of the Portuguese sources of law, Article 8 (1) of the Constitution just states that they are considered "an integral part of Portuguese law", without responding to the question of whether they prevail or not over national law, including the Constitution. Therefore, scholars are divided concerning the solution to this problem.

On the one hand, there are some scholars who distinguish between the human rights integrated in the peremptory norms of international law (*jus cogens*)[27] and the human rights that merely belong to international customary law, considering that only the first prevail over national law, including constitutional law (Miranda 2009, 152). The rules and principles of general or common international law, which cannot be assessed as *jus cogens*, only prevail over national legislative acts, but they shall respect the constitutional law (Miranda 2009, 153).

On the other hand, there are also some supporters of the complete supremacy of these rules and principles over national law, including constitutional law (Gomes Canotilho and Moreira 2007, 261).

As regards international covenants, Article 8 (2) CPR states that all international conventions are binding on the Portuguese Republic, when duly ratified[28] or signed[29] by the Head of State, as long as they remain in force at the international level. The ratification or the signature of the Head of State depends on the documents being deemed as "treaties" or "agreements". In order to prevent eventual conflicts with

[27] According to Articles 53 and 64 of the Vienna Convention on the Law of Treaties, some provisions of the universal international human rights law are qualified as peremptory norms of international law (*jus cogens*), for instance, the prohibition of torture, the prohibition of genocide, the right to self-determination. They prevail over every single rule and they do not allow their removal through any kind of corrective interpretation. On the problem of the relationship between *jus cogens* and human rights in general, see De Schutter (2010, 64–89); Rehman (2010, 25–26); Moeckli et al. (2010, 113–114).

[28] Article 135 (b) CPR.

[29] Article 134 (b) CPR.

constitutional law, Article 278 (1) CPR provides an abstract preventive control (or prior review of constitutionality): “[t]he President of the Republic may ask the Constitutional Court to conduct a prior review of the constitutionality of any rule laid down by an international treaty that is submitted to him for ratification, […], or by any international agreement, the decree passing which is sent to him for signature”.

However, the fact is that conflicts can emerge and Article 8 (2) CPR does not give any clear solution to this problem. As a consequence, Portuguese academics and judicial authorities have been expressing different points of view. The mainstream opinion supports the position that international sources of law – including European conventions on human rights – prevail over ordinary law but they do not prevail over the Constitution (Gomes Canotilho and Moreira 2007, 261). By contrast, they must respect it, mainly basing this opinion on the following arguments:

- Article 204 CPR concerning compliance with the Constitution reads: “[i]n matters that are brought to trial, the courts shall not apply rules that contravene the provisions of this Constitution or the principles enshrined therein”. As the provision does not distinguish between internal sources of law and international ones, this school considers that the courts shall not apply any source, including international sources, that contravene the Constitution;
- Article 277 CPR allows the Portuguese Constitutional Court to control the compatibility of any rule – including international rules – with the principles and rules guaranteed by Fundamental Law;
- Article 278 CPR permits an abstract preventive control of constitutionality.

In spite of the strength of these arguments, there are also some scholars that maintain the primacy of the international conventions over the Constitution in matters concerning human rights, due to the friendship of the Portuguese Constitution towards international law, mainly expressed in Article 7 (Quadros 1998, 531), mentioned above.

18.5.3 Reception of EU Law and Its Supremacy over Portuguese Legal Order

According to Article 8 (3) CPR “rules issued by the competent bodies of international organizations to which Portugal belongs shall come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties”. This provision was introduced by the constitutional revision of 1982, due to the Portuguese accession to the European Communities.[30] Its purpose was to automatically receive EU secondary law and to integrate it into the national legal order without any procedure of reception (Gomes Canotilho and Moreira 2007, 263). However, due to the wording of the provision – “rules issues by the

[30] The Portuguese Republic has been a member of the EU since 1 January, 1986.

competent bodies of international organizations" – it can also be applied outside the European Union law context (Gomes Canotilho and Moreira 2007, 263). In fact, the evolution of international law in the last two decades has led to the emergence of a normative power before the states within some international organizations. According to Article 8 (3) CPR, provided they have this power, their mandatory rules come directly into force in the Portuguese legal order.

Article 8 (4) of the CPR stipulates, "the provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law". Historically, this paragraph was introduced in the Constitution by the revision of 2004, in order to assure the compatibility of our constitutional law with the new Treaty establishing a Constitution for Europe, which provided in Articles 1–6 the principle that EU law prevails over the law of member states. In spite of the failure of this Treaty, due to the negative *referenda* in France and in the Netherlands, the provision remains in force and shall be interpreted and applied according to the Treaty of Lisbon. That means "the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions [well settled by the case law of the CJEU]", as the Declaration concerning primacy recalls.

On the one hand, the solution of the conflicts between EU law and national law results from a constituent decision indirectly taken by the Portuguese citizens, through their representatives, and, on the other hand, the Constitution recognizes that the solution of the conflicts between primary and the secondary EU law adopted by European institutions within their competencies belongs to EU law. Therefore, it prevails over every single internal rule, including constitutional norms (Otero 2010, 133; Gomes Canotilho and Moreira 2007, 265). However, the supremacy of EU law over domestic law does not lead to the invalidity of the national rule, but only to its inapplicability (Otero 2010, 133–134; Gomes Canotilho and Moreira 2007, 266). Actually, there is no replacement mechanism of the national rule by the EU law rule.

The introduction of this paragraph into Article 8 CPR has been strongly criticized by the most nationalist scholars (Miranda 2010b, 172 et seq.), given that it represents a loss of sovereignty. In our opinion, EU law prevails over the national legal order, including the Constitution, except when it violates the fundamental principles of a democratic state based on the rule of law. The question of which jurisdiction is competent to declare whether such a violation exists or not is disputable. On the one hand, the Constitutional Court (and the national courts in general) is the guardian of the principles of a democratic state based on the rule of law according to Portuguese law. On the other hand, the CJEU is the guardian of EU law. Taking into account the fact that no judicial hierarchy exists between the national courts and the European courts, but that their relationship is governed by a system of cooperation, the solution for this issue must be based on the principle of primacy of EU law over domestic law (Gomes Canotilho and Moreira 2007, 270). According to this principle, EU law cannot be declared unconstitutional and the national courts shall not apply domestic

law that contravenes EU law. In cases where doubt remains, it may or shall make a preliminary reference to the CJEU, under the terms of Article 267 TFEU (including the Constitutional Court).

18.5.4 Protection of Fundamental Rights by Portuguese Constitutional Law

The Portuguese Constitution of 1976 follows a long historical period of dictatorship. As a result, its text is specifically focused towards the protection of fundamental rights. Therefore, Part One of the Constitution is dedicated to fundamental rights, indicating that the human being is the first priority of the Portuguese Republic, above the economic and the political powers' organization of the state (Otero 2010, 31 et seq.; Otero 2007, 545–574; Miranda 2008b, 16–17 and 55–63; Gomes Canotilho 2003, 377–380).

The Constitution contains a formal division between rights, freedoms and guarantees (civil and political rights)[31] and economic, social and cultural rights[32] that has some substantive consequences, given that the legal regime of both groups of fundamental rights is rather different. Regarding the legal regime of rights, freedoms and guarantees, and their binding force, Article 18 CPR states:

1. This Constitution's provisions with regard to rights, freedoms and guarantees shall be directly applicable to and binding on public and private persons and bodies.
2. The law may only restrict rights, freedoms and guarantees in cases expressly provided for in this Constitution, and such restrictions shall be limited to those needed to safeguard other rights and interests protected by this Constitution.
3. Laws that restrict rights, freedoms and guarantees shall possess an abstract and general nature and shall not possess a retroactive effect or reduce the extent or scope of the essential content of the provisions of this Constitution.

Generally speaking, Article 18 (1) CPR concerns direct applicability of the provisions that contain rights, freedoms and guarantees and their binding effect on public and private persons and bodies. This means that all political and civil rights have binding effect over all public and private entities. Article 18 (1) CPR also imposes the duty of defending those rights in the legislative institutions and the national courts.

[31] Articles 24–57 CPR.

[32] Articles 58–79 CPR:

Article 18 (2) and (3) of the Portuguese Constitution govern the legal regime of the restrictions of rights, freedoms and guarantees, which shall respect the following cumulative prerequisites:

- express provision by law;
- in order to safeguard other rights and interests protected by the Constitution;
- abstract and general nature of the law;
- prohibition of retroactive effect of the law;
- prohibition of reduction of the extent or scope of the essential content of the provision.

According to our constitutional law, the rights, freedoms and guarantees benefit from a "privileged" regime in comparison with the economic, social and cultural rights. As a matter of fact, Article 18 CPR does not apply to economic, social and cultural rights. Therefore, scholars still dispute the real effects of the provisions of the Constitution that contain this category of rights, since they usually depend on the adoption of ordinary laws that develop their constitutional contents.

There are, indeed, some Portuguese scholars (Vieira de Andrade 2009, 172–184) that argue that these fundamental rights are only binding when special conditions are met (for instance, sufficient administrative and finance resources provided by the government). Despite these opinions, it is agreed that the Constitution establishes a duty to pursue the full implementation of these fundamental rights within a reasonable period of time, depending on public choices and resources (Miranda 2008b, 426 et seq.; Gomes Canotilho 2003, 473–476).

However, other scholars (Reis Novais 2010, 251 et seq.; Miranda 2008b, 433–444; Gomes Canotilho 2003, 480–482) counter-argue that the economic, social and cultural rights have the same binding effect as the rights, freedoms and guarantees. Therefore, these fundamental rights are binding for the legislator, the courts and the executive. The main difference resides in direct applicability and not in a binding effect. Summing up, for the latter, all fundamental rights have a binding effect.

Article 17 CPR, which concerns the rules governing rights, freedoms and guarantees, states that "the set of rules governing rights, freedoms and guarantees shall apply to those set out in Title II and to fundamental rights of a similar nature". That means that some provisions that are situated outside the mentioned Title are subjected to the "privileged constitutional regime" of these rights, freedoms and guarantees, provided that they fulfill the following conditions[33]: (i) they must grant to the individual a stand-alone right to be respected by public powers; (ii) they must guarantee a subjective position immediately identified with the idea of dignity of the human being; (iii) their content must be fully foreseen by the Constitution and must not be subordinated to any legislative measure or development.

[33] An attempt to draw the conditions for the identification of a fundamental right of similar nature, see Vieira de Andrade (2009, 172–189).

As examples of fundamental rights of similar nature, we can mention – among several others[34] – the right to access to a court (Article 20 CPR), the right to be compensated in case of expropriation of private property (Article 62 CPR), the right to democratic opposition (Article 114 CPR) or the right to be informed by the public administration of matters concerning the individual (Article 268 (1) CPR).

Furthermore, as we have already mentioned, Article 16 (1) CPR states that the fundamental rights pursued by the Portuguese legal system cannot be limited to the ones inserted in the Constitution, but must also include any fundamental rights secured by international rules applicable in the national order and by ordinary law. This clause expresses the openness of the Constitution to the international human rights law. However, one should draw attention to the fact that the constitutional catalog of fundamental rights is rather broad. Accordingly, and practically speaking, this provision does not apply very often.

As a matter of fact, with regard to its scope, the Portuguese system relies on an extremely wide catalog of fundamental rights that has been constantly reviewed and amplified. The Portuguese Constitution was amended several times[35] and some changes were introduced in matters like fair trial rights and criminal guarantees, due to the influence of the regional and international systems of human rights.

As regards the content of each fundamental right, it is necessary to distinguish between two different situations. Firstly, the general overlap between the content of some fundamental rights guaranteed or recognized by the Portuguese Constitution and international human rights law. Secondly, one can also find a considerable difference between international human rights law and the Portuguese Constitution, especially concerning economic, social and cultural rights. However, the main difference relates to the enforcement of the rules, as we will study in the next item.

18.5.5 Interpretation and Application of Fundamental Rights by Portuguese Courts

Although there are no official figures or statistics about the use of international human rights law or of international both universal and regional bodies' decisions by the national judicial system, the Portuguese judicial institutions – predominantly the Constitutional Court and the Supreme Courts – are bound to take international human rights law into account, when they interpret and apply constitutional or legal fundamental rights' provisions, notably in lawsuits concerning criminal procedure and the status of foreigners. The other courts do not usually refer, on a regular basis, to the interpretation effectuated by international courts, except when they apply EU law. In this case, Article 267 TFEU grants to the CJEU the power to interpret EU law and to impose its decisions on the national courts.

[34] For a more complete list, see Miranda (2008b, 158–160).

[35] Since its approval, there were seven revisions, successively performed by Constitutional Law No 1/1982, No 1/1989, No 1/1992, No 1/1997, No 1/2001, No 1/2004 and No 1/2005. All the referred constitutional laws are available at the website http://debates.parlamento.pt/catalog.aspx?cid=r3.dar_s2rc.

The recognition of a wide scope of fundamental rights by the Portuguese Constitution certainly explains the reaction of the Portuguese courts. As a matter of fact, they prevent the immediate application of international rules. This means that the Portuguese courts tend to directly apply the national constitutional provisions, referring to the international rules that guarantee human rights as an additional argument for their judicial decisions. In other words, the national courts do not directly apply the interpretations formulated by the international institutions, including the international courts. By contrast, they use the international human rights provisions, as well as their judicial or administrative interpretation, to complement and confirm the national rules. In fact, nowadays, one can hardly deny that every single court (national, international and European) is strongly and reciprocally influenced by the decisions of the other national, international and European courts. Actually, there is even a tendency of convergence, in particular in the jurisprudence, of the national fundamental rights systems with the regional and universal human rights. However, it is impossible to establish a full equivalence between the national systems and the regional and universal international systems.

In the European territory, above all between the EU member states, this trend of convergence is more visible among the national systems with the ECHR and the EU protection of the fundamental rights system. Generally speaking, there is Europeanization of the national legal systems, which is achieved through binding instruments of convergence and harmonization. As an example to illustrate Europeanization, one can draw attention to the case law of the CJEU. Firstly, its jurisprudence concerning the protection of fundamental rights was clearly inspired by the common constitutional traditions of the member states, and secondly, in the mid-1970s, the Court started taking the ECHR and other international instruments of human rights, such as the ICCPR, into consideration. And one has to note that this is still the current approach of the Court of Justice concerning matters of fundamental rights.

It is undeniable that there is more convergence between the Portuguese legal system and the European conventions rather than with the universal human rights conventions.

In order to illustrate the abovementioned statements, we will summarily analyze some decisions of the Portuguese Constitutional Court and of the Supreme Courts (Supreme Court of Justice and Supreme Administrative Court). Starting with the Portuguese Constitutional Court, one has to point out that the Portuguese control system of constitutionality is rather complex.[36] The Constitutional Court is empowered to control constitutionality[37] in the following cases:

– Abstract preventive control (prior review of constitutionality – Article 278 CPR);

[36] For further developments in the Portuguese control system of constitutionality see, among many others, Gomes Canotilho and Moreira (2010, 895–993); Otero (2010, 434–462); Miranda (2008a, 164–318); Miranda (2007, 701–737); Guerra Martins and Prata Roque (2008, 1245–1247, 1250, 1254); Medeiros (2007, 738–889); Blanco de Morais (2006, 15–502); Idem (2005, 309–516); Gomes Canotilho (2003, 909 et seq.).

[37] In this chapter we will not use the terminology applied by the translation of the Constitution available at the website of the Parliament, but we will follow the one contained in Guerra Martins and Prata Roque (2008, 1245–1247).

– Control of constitutionality and legality in judicial cases (Article 280 CPR);
– Abstract successive control of constitutionality and legality (abstract review of constitutionality and legality – Article 281 CPR);
– Unconstitutionality by omission (Article 283 CPR).

These appeals are restricted to the question of constitutionality (or illegality), as appropriate (Article 280 (6) CPR). Moreover, if the violation of fundamental rights occurs through an act of public administration, the wronged citizen has the right to obtain a judicial order to cease the injury and can claim reparation for damages, through a due lawsuit (Article 22 CPR).

First of all, one has to point out that the Portuguese Constitutional Court usually takes international human rights law into consideration, even if it neither directly applies it nor the case law of international bodies. However, there are cases where the Constitutional Court has had to change its case law in order to give decisions in conformity with international human rights law.

Beginning with the cases in which the Constitutional Court has taken the ECHR into account, it also analyzes the case law of the ECtHR on the human rights recognized by the ECHR. However, in the majority of the procedures, the Court only uses the international jurisprudence as a complement to its own judgment. That means that the case law of the ECtHR is not directly applied.

In most cases, the Portuguese Constitutional Court does not control the respect of the ECHR provisions, due to the fact that these provisions are similar to those guaranteed by our Constitution. In this sense, one can mention Decision No 160/95[38] (Judge Fonseca) that held that Article 27 (5) of the Portuguese Constitution, concerning the right to redress for illegal arrest, coincided with Article 5 (5) ECHR. Accordingly, the Court did not consider the alleged violation of the latter. More recently, Decision No 185/10 (Judge Amaral)[39] followed the same rationale. Furthermore, Decision No 342/09 (Judge Amaral) did not consider the alleged breach of Article 6 (1) ECHR, due to its similarity to Article 20 (4) of the Portuguese Constitution.[40]

In other cases, the Constitutional Court held that an appeal to consider constitutionality (Article 70 (b) of the Constitutional Court Procedure Act – CCPA) is an inadequate procedure to consider the direct breach of a rule contained in the ECHR, unless the Portuguese Constitution has recognized and adopted this international rule. Instead, it would be necessary to pledge an appeal in order to consider the breach of the ECHR by the national legal act (according to a special procedure foreseen by Article 70 of (i) CCPA).[41]

[38] This decision concerns compensation for illegal arrest and it is available at www.tribunalconstitucional.pt/tc/acordaos/.

[39] Also available at www.tribunalconstitucional.pt/tc/acordaos/.

[40] This decision concerns the duty of notification of the Public Attorney opinion during an administrative lawsuit and it is available at www.tribunalconstitucional.pt/tc/acordaos/.

[41] Decision No 192/08 (Judge Ana Guerra Martins) on transcription and translation of wiretapping, available at www.tribunalconstitucional.pt/tc/acordaos/.

In an example of a case where the Constitutional Court had to change its case law in order to accommodate a decision of the ECtHR, Decision No 345/99 (Judge Brito) states that the constitutional legislator has expressed its commitment to the jurisprudence of the ECtHR, in order to extend the scope of protection of the human rights guaranteed by the Portuguese Constitution. Accordingly, in order to accommodate the Decision *"Lobo Machado c/Portugal"* of the ECtHR, the Court changed its previous case law and ruled that a norm that allowed the Public Attorney to express its view before the administrative courts without any possibility of reply by the counter-party was unconstitutional.[42]

Besides the ECHR, the Constitutional Court states that the Portuguese control of constitutionality is grounded in the fulfilment of national constitutional rules. International rules are only an indirect legal standard, as long as they have been recognized by the Portuguese Constitution (Decision No 101/09 (Judge Cadilha)[43] on medically assisted procreation).

The Constitutional Court creates its own restraints on its competence concerning the protection of international conventional norms. According to its case law, it can only consider a decision taken by an appeal court that had refused the application of a national rule, on the grounds of incompatibility with an international convention. On the contrary, the Court cannot consider a decision that has applied a national norm, even if one party alleges that this norm contravenes an international convention, unless the court decision counteracts a prior decision from the Constitutional Court (Decision No 829/96 (Judge Almeida)[44] on legitimacy in eviction procedure).

Furthermore, the Constitutional Court also accepts the international standards of human rights in its case law. For example Decision No 416/07 (Judge Guerra Martins)[45] recognised that the Portuguese constitutional concept of "private property" benefits from international and European standards, notably, from the definition extracted from Article 17 of the UDHR and Article 1 (1) of the Additional Protocol to the ECHR and from Article 17 of the CFREU. Moreover, it stressed that the Portuguese legislator and the Constitutional Court are bound by these international standards, due to Articles 8 (2) and 16 (1) CPR.

Specifically, extending the scope of application of the abovementioned Article 16 (2) of the Portuguese Constitution concerning the interpretation and application of the fundamental rights with reference to the UDHR, one can mention Decision No 121/10 (Judge Gomes) on same-sex marriage. In this decision, the Court held that in the case of undetermined constitutional concepts, the interpreter can adopt the legal concepts contained in the UDHR, in order to achieve an adequate interpretation of the national constitutional provisions. However, this practice is only admissible if it will not imply a restriction or limitation of the fundamental rights recognized by the

[42] This decision relates to the right to reply to a Public Attorney opinion before the administrative courts.

[43] Available at www.tribunalconstitucional.pt/tc/acordaos/.

[44] Also available at www.tribunalconstitucional.pt/tc/acordaos/.

[45] This decision concerns expropriation of private property.

Portuguese Constitution. In other words, the UDHR can be used to enlarge the bill of rights recognized by the Constitution, but not to diminish it.

Turning to the Supreme Court of Justice,[46] it usually refers to international human rights law as a complement to the national norms, but it does not directly apply the international rules. For example, in the Decision of 19 October, 2010 (1st section, Proc. No 565/99.L1.S1)[47] the Court referred to the principle of human dignity and the right to personal inviolability as a complement to the national rules (*in casu*, the Portuguese Civil Code). The same rationale was taken in Decision of 9 June, 2010 (5th section, Proc. No 862/09.6TBFAR.E1.S1),[48] in which the applicant invoked Article 11 (1) UDHR, and Article 6 (1) and (3) ECHR. However, the Court decided that these rules were similar to the national constitutional norms and, accordingly, it made no statement about the alleged breach of the referred international instruments.

In other decisions, the Supreme Court takes the international conventions into consideration as an interpretative instrument, but it decides on the basis of the national rules. Such was the case in Decision of 4 March, 2010 (7th section, Proc. No 677/09.1YFLSB)[49] where, although the Court referred to the ECHR rules on the collision between the freedom of expression and the right to reputation afterwards it ended by directly applying the Portuguese Civil Code.

The Supreme Court of Justice also quotes the case law of the ECtHR. In a case concerning impeachment of a judge and suspicion, the Decision of 9 June, 2010 (3rd Section, Proc. No2290/07.9TABRG.G1-A.S1) quotes the abovementioned case law on "fair trial procedure".

Finally, one has to note that some decisions of the Supreme Court of Justice are less friendly towards international human rights law. For instance, in Decision of 15 April, 2010 (5th section, Proc. No 154/01.9JACBR.C1.S1), the Court argued for the supremacy of the Portuguese Constitution over the ECHR rules and stressed that the national legal rules are only directly bound by the Constitution. Nevertheless, this decision analyzes the ECHR provisions on criminal procedure and wiretapping and concludes that the Portuguese criminal procedure rules are not contrary to the abovementioned convention.

The case law of the Supreme Administrative Court[50] does not deviate from the previously mentioned jurisprudence of the other Supreme Courts. As a matter of fact, it also follows the trend of an indirect applicability of international human rights law, even when a case concerns an alleged breach of the ECHR. For instance, the Decision of 26 May, 2010 (Plenary, Proc. No 044846)[51] assessed an alleged breach of the *"right to a fair trial"* contained within the ECHR, but it gave primacy

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[46] The decisions of the Portuguese Supreme Court of Justice are available, in Portuguese, at www.dgsi.pt.

[47] This decision concerns the right to silence in criminal procedures.

[48] This decision concerned a case of murder.

[49] The decision assesses the rights of freedom of press, freedom of speech and the right to reputation.

[50] Also available, in Portuguese language, at www.dgsi.pt.

[51] This decision concerns the judges' impediment and suspicion regime.

to the assessment of the alleged breach of the Portuguese Constitution and of the ordinary procedural rules. The ECHR is merely mentioned as an additional argument and not as the primary motivation of the decision. In the same sense, the Decision of 5 May, 2010 (2nd Section, Proc. No 0122/10) granted compensation for excessive procedural delay grounded in Article 20 (4) of the Portuguese Constitution. The acknowledgment of the right to a decision within a reasonable period of time, as provided by Article 6 (1) ECHR, was merely accessory.

There are other cases,[52] in which, in spite of the invocation of a breach of a right comprised in the ECHR, the Court did not assess the alleged breach.

18.5.6 Relevance of International Human Rights Law in Legislative and Executive Acts

Apart from the judiciary, the other powers of the state are also bound by international human rights law. As we have already mentioned, Portugal is an international-friendly state. Actually, the Portuguese authorities (beginning with the government) usually justify their political decisions through the international political environment and through the desire to accomplish the obligations internationally assumed by the Portuguese Republic. Furthermore, the Administration – that means any public authority – is also committed to respecting fundamental rights, according to Article 266 (2) CPR.

As far as national legislation is concerned, it is also common for the preparatory legislative works of the Portuguese Parliament ("Assembleia da República")[53] to quote and deliberate the international texts on human rights, in order to sustain their legislative decisions.

[52] See Decision of 19 November 2010 (1st section, Proc. No 553/09), relative to a compensation for excessive delay in jurisdictional decisions, and Decision of 8 October 2010 (1st section, Proc. No 304/09), relative to a disciplinary sanction.

[53] For instance, the approval of Law No 112/09, relative to the protection of the victims of domestic violence, was preceded by a governmental legislative proposal (Proposal No 248/X) that expressly mentioned the Portuguese commitment to the rules foreseen by the CEDAW of 1980 and its Additional Protocol of 2002, such as to the EU decisions on protection of women (Decision 293/2000/EC, concerning the Daphne Program 2000–2003, Decision 803/2004/EC, concerning the Daphne Program II 2004–2006, and Decision 779/2007/EC, concerning the Daphne Program III 2007–2013). All the referred law and proposals are available at http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=34254.

Another example of the weight of international rules for purposes of adopting legislative acts is given by Law No 21/2007 that provided a criminal mediation mechanism. In this case, the legislative procedure was initiated by a governmental legislative proposal (Proposal No 107/X) that expressly invoked the Portuguese commitment to international rules and resolutions, notably to the Council Framework Decision 2001/22/JAI of 15 March 2001, concerning the criminal victim statute, and the Recommendation 99 (19), adopted by the Committee of Ministers of the Council of Europe, relative to criminal mediation mechanisms. This legislative procedure is available at http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=33326.

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Chapter 19
Human Rights in Times of Global Inequalities: A View from Slovakia

Darina Macková

In a world of immense diversity, human rights constitute "a common language of humanity"[1]. What can possibly make it so? What gives human rights a moral foundation to be invoked by millions all over the world?

19.1 Human Rights as an Ideal and Promise

> The universality of human rights symbolizes the universality of the collective human aspiration to make power increasingly accountable, governance progressively just, and the state incrementally more ethical. I know of no "relativist" strand of thought that contests this desideratum. Upendra Baxi[2]

Human rights contest power, the power of ideological and repressive apparatuses of the state and other formations, including global ones. They contest "the notion of politics as *fate*; that is, the power of the few becoming the *destiny* of millions of human beings" (Baxi 2002, xiv). They represent promise and high hopes of a better world, promise and determination face to face the realities of human suffering. And yet, the former overcome the latter; vision and hope provide energy, strength and inspiration to challenge the realities and to get closer to the ideal of human dignity.

The journey, at least in modern times, started in 1948 with the Universal Declaration of Human Rights. It is not by chance that it has become the most

[1] Boutros Boutros Ghali (1993) "The Common Language of Humanity", United Nations World Conference on Human Rights: The Vienna Declaration and Program of Action.

[2] Baxi (2002, 105).

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frequently translated text in human history, to date available in 750 languages. Solemnly adopted by the United Nations General Assembly on 10 December 1948, its adoption was a response to the horrors of the Second World War and the outcome of efforts of the newly established United Nations Organisation. This, in its Charter, recognised that the main prerequisite for the peaceful coexistence of nations is the protection of the human dignity of each and every individual through the protection of human rights. The drafting engaged a commission of experts from 17 countries representing various legal systems, including the First Lady of the United States of America, Eleanor Roosevelt, the French philosopher Jacques Maritain and professor of law René Cassin, Lebanese philosopher and diplomat Charles Malik, philosopher and playwright P. C. Chang from China and distinguished lawyer John Peters Humphrey from Canada, to name a few. Despite this, the voting in the UN General Assembly is remembered for the reserved attitude of countries from the so-called Soviet block, which along with South Africa and Saudi Arabia disrupted the absolute consensus. However, the fact that all of the socialist countries formally included the catalogue of human rights of the Universal Declaration in its integrity in their national constitutions was the best proof of recognition of the content and value of the document. The attitude of the Western states, for instance the U.K. and Canada, was, especially at preparatory stages, also far from supportive. The listing of the economic, social and cultural rights in a document of such a worldwide nature was perceived as too ambitious (Jolly et al. 2005, 21–24). The codification of human rights on an international level was therefore, as is usually the case with any progressive project, a test of courage and determination. In the end, governments of the UN member states at the time supported the adoption of the Declaration. Nevertheless, they failed in one important dimension – by limiting the declared rights to citizens of the so-called free world. A vast majority of the world population at the time - peoples living under colonial rule, were not included. And even though the shadow of "limited universalism" was later overcome, the simple fact that human rights, as a concept and meta-narrative, were formally promoted by Western democracies but also by former colonial powers, would, across the second half of the twentieth century, be frequently invoked by opponents of the universalist human rights doctrine as Euro-centrism and an ideological extension and domination of the West. Moreover, or precisely because of the abovementioned *reservatio mentalis* that countries displayed in relation to this relatively wide package of rights, the first universal *post*-World-War-II document was adopted as a declaration, not a convention. Despite the non-binding nature and omission of rights of peoples under colonial rule, the Declaration had the positive feature of going beyond individual rights. It posed a systematic call for an international and social order in which the human rights of all shall be realized (Article 28 of the Universal Declaration of Human Rights). A few decades later, this goal would be reiterated by advocates of solidarity rights (Alston and Steiner 1996, 1111) and most recently by thinkers of modern cosmopolitanism.

Since 1948, but even up until then, the list and complexity of rights have been evolving. The journey was neither short nor easy. Almost six centuries passed from the Magna Charta of 1215 to the American Declaration of Independence and on to

the 1789 Declaration of the Rights of Man and another one and a half – abundant in wars and revolutions – from the Bastille to the Universal Declaration. The indivisibility of the civil and political, and the economic, social and cultural rights, and especially the principle of the universality of rights – i.e. the fact that *rights belong to all*, in equal scope and quality, without distinction based on race, sex, nationality, ethnic and social origin, religious thought and other identity traits – was first proclaimed in the Universal Declaration. The gradual recognition of the rights of free men but not slaves, of men of property but not those without it, of men but not women, of Europeans but not people of other colour or continents, of the physically fit but not those with disability, of adults but not children, became history. "Everyone", as the Declaration repeats more than twenty times and as than appears in all texts of the international human rights law. "Everyone has a right…"

And yet, according to the statistics of the United Nations Children's Fund (UNICEF), 30 000 children die each day as a result of malnutrition, lack of drinking water and poor hygienic conditions. An additional ten million people die every year as a result of non-existent or inaccessible healthcare (Alston and Robinson 2005, 25–26). It is as if a country the size of Sweden, Belgium, Greece, Portugal, the Czech Republic, Slovakia or Croatia, for example, disappeared from the map of Europe. At least 150 million children all over the world are working[3] – the size of the population of the entire Russian Federation. More than ten million people, two thirds of them being women and children, are uprooted from their homes because of various forms of persecution[4]. These people have rights too. And still, when faced with their suffering, we feel powerless. It is enough, however, to have a closer look at other dimensions of our social and international reality. Twelve billion euros a year are spent on alcohol in Europe. It is a sum ten times higher than the resources needed to provide access to drinking water and basic hygiene for all people around the world. At the same time, world purchases of arms represent ten times the amount that could eliminate extreme poverty. The annual amount of paper used for advertising and marketing print in Great Britain alone would suffice for basic textbooks for the children in the developing world. 1% of the gross domestic product (GDP) of countries of the Organisation of Economic Cooperation and Development (OECD) that includes Slovakia, or 4% of the wealth of the 225 richest families in the world, could provide sufficient resources to secure basic needs, including education and healthcare, for all of humanity.[5] The world population is constantly growing. While in 1960 the Earth was inhabited by three billion people, today it is seven, and in 2050 it could easily be nine billion. The destiny of humanity is vastly in our hands. It is dependent on our values, choices and engagement. Human rights are all around us. The fulfilment of the text of the Universal Declaration also often fails in the so-called developed states. It took precisely a quarter of a century since its adoption for women in Switzerland to obtain the right to vote. The feudal practices of torture, the trafficking of people, unemployment, discrimination

[3] http://www.ilo.org/ipec/lang--en/index.htm

[4] http://www.unhcr.org/pages/49c3646c1d.html

[5] UNDP Reports 1998 and 1999, in: Pogge (2002, 99)

of individuals and groups, abused children – the list is longer than we like to admit.

Pope John Paul II called the Universal Declaration of Human Rights “the Conscience of Humanity”. Human rights are not a panacea. But they can serve as a mirror. What used to be a socially acceptable reality becomes a question, a topic for discussion, a criterion for re-evaluation, a new path, such as that from slavery to the prohibition of child labour and the guaranteed minimum annual leave or that from the physical elimination of political opponents to the erasure of death penalty from the map of Europe. The protection of life in an era of modern science extends to the protection of the human genome. The right to privacy in the age of information technologies must include the protection of personal data. Parental leave, the right to education in a minority or indigenous language – the catalogue and scope of rights extends as fast as the circle of entitled subjects. The procedural aspect of enforcement has also undergone development. The unprecedented possibility of an individual to turn to the international bodies for protection of their rights has opened a qualitatively new era of international law – an era of not only equally sovereign states but also of equally protected individuals.

From the perspective of international law, the universality of the international texts is explicit – given the reiteration of the subject of the rights by the clear expression of “everyone” or in negative terms, of “no one”, as in the case of the prohibition of torture. The binding effect of human rights obligations is then more implicit; it is inherent to states’ membership in the international organizations such as the UN and Council of Europe, Organization of the American States or the African Union, and obligations stemming from the establishing treaties such as the Preamble and Articles 1.3, 55 and the 103 of the UN Charter, in combination with Article 27 of the Vienna Convention on the Law of the Treaties, according to which provisions of internal law cannot be invoked to justify a failure to perform obligations undertaken under international law. Explicit and actual undertaking of binding obligations then comes with the acceptance of enforcement mechanisms through respective Optional Protocols providing for individual complaint procedure and acceptance of jurisdiction of regional human rights courts or *quasi*-jurisdiction of the UN Committees such as the Committee for Human Rights, Committee against Torture, Committee for Elimination of All Forms of Racial Discrimination, Committee for Elimination of All Forms of Discrimination against Women etc. (Jolly et al. 2005, 21–24). The universality and binding effect are in fact *raison d’être* of existence of the international human rights institutions, especially judicial and *quasi*-judicial bodies. Without the two characteristics, the existence of these would not be justified. In more practical terms, the accepting of individual applications confirms universality in a sense that anyone under the jurisdiction of the respective state can file an application. Issued decisions then confirm the binding effect, as without the normative force these would not be termed nor respected as “decisions”. Despite the above, the various mechanisms differ when it comes to their adequacy for realisation and maintenance of universality and binding effect. Generally, there is a spectrum on both proxies – concerning universality and level of normativity, or in other words, instruments that are truly universal such as the UN Convention on the

Rights of the Child as well as those more sparsely ratified such as the Convention for the Protection of the Migrant Workers. At the same time, we have those that are substantially binding and practically enforceable, such as the International Covenant on Civil and Political Rights when taken with its 1st Optional Protocol, and those that are binding in a doctrinal sense, through principles of Public International Law, the International Human Rights Law and the general principles of law. On both the qualitative and quantitative scale, there is potential for improvement, be it by development of new enforcement mechanisms such as the drafting and consequent adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights or ratification of already established international human rights instruments by more state parties, for instance.

19.1.1 The Case of the Slovak Republic

Slovakia belongs to the group of countries open to joining both the universal and regional human rights frameworks. These include both International Covenants and key universal human rights conventions, most recently the UN Convention on the Rights of Persons with Disabilities, conventions of the UNESCO as well as 69 of the ILO Conventions. As a member of the Council of Europe, Slovakia is a signatory party to the European Convention on Human Rights which automatically includes the adoption of jurisdiction of the European Court of Human Rights in Strasbourg on matters dealing with human rights issues covered by the Convention. Being home to Czech, Hungarian and other minorities, Slovakia also signed the Framework Convention for the Protection of the National Minorities and the European Charter for Regional or Minority Languages guaranteeing use of regional or minority languages in public life including education, judicial proceedings, administrative and public services, culture, media and economic and social activities. Having been signatory to the European Social Charter for over a decade, in 2009 Slovakia ratified also the Revised European Social Charter but not yet the system of collective complaints to be filed in case of violation of listed social or economic rights by accredited NGOs or trade unions to the Social and Economic Committee of the Council of Europe. In addition, the Slovak Republic has been a member of the European Union since 2005, which means that the EU law or *acquis communitaire,* including all EU instruments on the protection of human rights, most notably the Charter of Fundamental Rights of the European Union, is now an integral part of the national legal system.

International texts such as the European Convention on Human Rights are introduced to the domestic legal system through the provisions of Article 7 paragraph 5 of the Constitution of the Slovak Republic – Law No. 460/1992, as amended by other laws. Priority and supremacy of the international texts adopted and ratified by the Slovak Republic is granted in case of:

1. international conventions on human rights and fundamental freedoms,
2. international treaties for realisation of which no adoption of law is necessary (i.e. the so-called self-executing treaties),

3. treaties and conventions that convey rights and assign obligations directly to individuals and legal persons, all of which must be published in the Official Journal of Laws.

In line with the process of internalisation and europeisation of the national legal systems, the relationship between the domestic and international law in the Slovak Republic is presently ruled by the monist model giving priority to the international law. The monist model, however, applies only in relation to international treaties ratified after the adoption of the Constitutional Act No. 90/2001. Before the adoption of the instant act in 2001, the dualist model with certain elements of monism, giving priority to the international law, or the so-called mixed model, applied (Jankuv 2006, 355).

Human rights have a prominent place in the Constitution and therefore stand at the top of the national legislation pyramid – i.e. in case of conflict with other laws, the Constitutional provisions guaranteeing human rights prevail. They have a binding effect on all natural and legal persons, including the legislator. Public power acts, legislation and administrative orders are subject to review by the Constitutional Court. According to Article 125, the validity of any law or public act that is in discrepancy with the provisions of the Constitution is suspended and must be harmonised with the provisions of the Constitution including those guaranteeing human rights (Čič 1997, 419–423).

Slovak courts neither have the competence to interpret international human rights texts, nor do they routinely do so. They normally interpret and work with the provisions of Slovak law, not the provisions of the European Convention, for instance. This is based on the presumption that all Slovak legislation is in line with the international obligations Slovakia undertook by ratifying documents of the international human rights law and the country's commitment thereof seen in Article 1 paragraph 2 of the Constitution. Hence, according to Article 144 of the Constitution, Slovak judges are bound by all valid legislation, including international treaties that were ratified by the parliamentary body called the National Council. In practical terms, however, the latter would deserve greater awareness and recognition by the Slovak judiciary, as up until today it is not unusual that Slovak courts have to be explicitly reminded of the provisions of the international texts by the parties of the judicial proceedings, i.e. the litigating party or its attorney.

Given that Slovakia belongs to the system of civil law, jurisprudence has no binding effect, as no principle of precedent applies. However, in practice, the decisions of the Supreme and Constitutional Court of the Slovak Republic are published, often referred to and even implicitly followed. We can therefore speak of their *de facto* even though not *de iure* authoritative force.

The formalism of the judiciary in Central and Eastern Europe and an overall lack of judicial activism, if compared to countries like India or South Africa in era of *post*-apartheid societal transformation, are also reflected in the application of the human rights doctrine and interpretation of rights, which tends to follow and contour the already-established traits. Consequently, judicial positions, but also the academic scholarship, tend to limit themselves to the European rather than the global context, and strictly legal – if not legalistic, technical, interpretation of the

existing texts and usage of mechanisms. The latter usually deal with the relationship between the existing or competing systems and structures, such as interplay between the system of protection of human rights of the Council of Europe and the one of the European Union, represented by the European Court of Human Rights in Strasbourg and the Court of the European Communities in Luxembourg. Despite the lack of judicial activism, the interpretation of rights by the Slovak institutions is usually in line with the international standards. This is so, not because of the thorough knowledge of the international texts or the close familiarity with the international jurisprudence, but because of the fact that most of the human rights legislation in Slovakia is a result of incorporation or was copied or modelled after the international texts. Provisions of the national and international human rights instruments therefore usually coincide and the domestic or national human rights doctrine vastly contours the international human rights law. Direct reference to international texts and international human rights jurisprudence is then still more an exception than a rule. Holistic understanding of the up-to-date international jurisprudence is relatively rare and reference to it is usually absent in court decisions, including those of the Constitutional and Supreme Court.

In this relatively conservative domestic setting, possibility of international human rights litigation for citizens of the Slovak Republic as well as other Central and East European states after 1990 has certainly been a plus. Among other things, it often provided the last and most efficient shield to uphold the universalism of rights *vis-à-vis* the reality of exclusion and discrimination against certain parts of the population, such as the "erased" people in Slovenia – denied their legal status and citizenship of the newly independent republic, or Roma – marginalised across the region, in various aspects of life.[6] In this social context, the international human rights framework, especially the one of the Council of Europe, has played a progressive role in reminding the transiting countries of Central and Eastern Europe of their human rights obligations. The regional system has also been more advanced and progressive when it comes to the interpretation, application, doctrinal grasp and elaboration of human rights jurisprudence. The regional and universal systems of protection of rights are regarded as parallel and complementary. However, given the fact that regional human rights instruments can better grasp regional nuances and provide more adequate and efficient standard of protection, it is the European Court of Human Rights that is being used as the main *forum* to which the victims of human rights violation in Slovakia turn to, after the exhaustion of domestic remedies. This is due to high professionalism of the judiciary of the European Court for Human Rights and specialisation of the Strasbourg court. Slovakia as a relatively new democracy is yet to build its own theory and practice of human rights and make them a living, vivid part of the domestic legal system.

[6] See *Kuric and others v. Slovenia* (2010, ECtHR), *D.H. v. Czech Republic* (2009, ECtHR), *K. H. and others v. Slovakia* (2009, ECtHR) and other relevant case-law of the European Court of Human Rights.

19.2 Cosmopolitan Vision

The universal conviction of the indispensability of human rights lays at the foundation of the United Nations, i.e. is *raison d'être* of the existence of the organisation, explicitly mentioned in the Preamble and Articles 1.3 and 55 of the UN Charter, elaborated in the Universal Declaration of Human Rights and other universal human rights conventions. Global universality is a matter of universal system and can be described as "universality in law" as distinguished from what may be termed as "universality in fact". The former, formal universality is certainly a characteristic of all three systems: universal, regional and national, while substantive, material universality reflected in the fulfilment of rights on an everyday basis, remains a challenge, especially on the global level. As mentioned, the gap between the declared universality and the one actually realised, is obvious when we keep in mind the huge numbers of people worldwide who are deprived of fundamental rights, including the right to life as a result of starvation, safety or access to basic healthcare.

From this point of view, it is certainly easier to achieve universality within each society, i.e. usually a nation-state, which is routinely guaranteed by the prohibition of discrimination and the principle of equality – at least in law, meaning that no parts of society or individuals remain without rights or have lesser rights than their co-patriots. But in times of global interdependence, the thesis on responsibility for the protection and fulfilment of rights and the Kantian ideal of treating every human as an end in him- or herself, is to be upgraded from the obvious, local obligations towards the family, community and country, towards the world at large, asserting our responsibility also towards those whom we do not know. The claim that no moral basis for distinguishing between domestic and global scheme exists and that the national borders are of no fundamental moral importance, is characteristic of the school of thought known as moral cosmopolitanism. For cosmopolitans, state as such has no intrinsic value and while special obligations towards family, friends and fellow nationals are allowed, they should not exclude or seriously diminish the obligations we have towards humanity and the world as a whole. Otherwise we subscribe to inconsistency and double standards of treating fellow citizens one way, and citizens of another states another. The term "cosmopolitanism" originates in Stoicism and originally represented an identity thesis or cultural cosmopolitanism, as recognition and openness to cultures worldwide; an attitude or voluntarily adopted identity of "being a citizen of the world". Cultural cosmopolitanism, nevertheless, does not necessarily entail belief in equal worth and equal concern for all humans; this belief established itself only as part of *moral cosmopolitanism* and its thesis about global responsibility, stemming from global theory of justice (Brock and Brighouse 2005, 2).

Cosmopolitanism and the human rights doctrine share some of the theoretical foundations, the first of them being individualism, meaning that the ultimate units of concern are human beings or persons rather than family lines, tribes, ethnic, cultural, or religious communities, nations or states. The second one is universality in attaching equal concern to every human being not only regardless categories one cannot influence such as race, sex, ethnicity or geographical origin, but also of merits, for

instance working *vis-à-vis* not working, or of abilities, such as being literate or illiterate. This universality *in personam* is then reinforced by the third requirement of the cosmopolitan claim – generality as the equal status of all humans enjoying global recognition. Persons are therefore ultimate units of concern for everyone, not only for their compatriots, fellow religionists, or such. Generality is universality in relation to the extended circle of duty-bearers; it is universality of global responsibility. This recognition of global responsibility as the existence of our common duties towards all human beings, stemming from a cosmopolitan belief in the equal worth of all individuals, resonates in works of Christian Barry, Charles Beitz, Simon Caney, Andreas Follesdal, David Held, Charles Jones, Andrew Kuper, Jon Mandle, Darrel Moellendorf, Onora O'Neill, Kai Nielsen, Martha Nussbaum, Kok-Chor Tan, principally and intensely Thomas W. Pogge, but in addition to many others, also Jacques Derrida (see Derrida 2001) and Amartya Sen, who in response to the question "Who should assist?", provides a typical cosmopolitan answer: "Anybody, that is – *whoever can*."[7]

Universalism has had a long tradition and solid grounds in political moral philosophy and the theory of human rights – which is, in fact, a *sub*-category of universalist theories. In other words, while not all universalist theories embrace human rights, all human rights theories are universalist in nature. Universalism, on the one hand, tries to resolve the question of whether there are universal moral values and what these may be; something that can be termed as "universalism of content". The major challenge then lies in the justification of values that can be claimed universal (see Caney 2005).

Despite this twofold nature of universalist doctrine and the questions it provokes due to lack of consent, moral conviction and legitimate acceptance of a particular value scheme as universally valid, the universalists, including cosmopolitans, believe that people coming from different cultures can converge on basic ethical questions and agree on certain moral values. "Some moral requirements are set by universally human, historically constant and culturally invariant needs created by human nature. Many of these needs are physiological: for food, shelter, rest and so forth; other needs are psychological: for companionship, hope, the absence of horror and terror in one's life and the like; yet other needs are social: for some order and predictability in one's society, for security, for respect and so on" (Kekes 1994, 49–50). Martha Nussbaum's "human goods" follow a similar path and include: life – as the ability to live a full life; bodily health as healthy life, including sufficient food; bodily integrity meaning freedom from violence and respect for personal choices concerning sex and procreation; senses, imagination and thought, emotions, practical reason, affiliation – including friendship and respectful treatment, caring for other species, and the capacity for play and control over one's environment in both political and material sense (Nussbaum 2002, 117–149).

The problematic part, however, is not as much the one of content, as much as the one of *process of achieving legitimacy* through discursive action leading to consensus.

[7] Sen in: Sengupta et al. (2005, 74).

Such a search for universalist political morality, still largely observed in the context of Western democracy, appears in writings of Jürgen Habermas, asserting the universal validity of values through the consent of free and equal persons in what he terms "the ideal speech situation".[8] This situation sustains both the universalism of persons – as the conditions and rules of the ideal speech situation apply to all – and the universalism of justification, when the consent is the consent of free and equal persons. Many others, including Abdullah An-Na'im, share the belief in "overlapping consensus on some moral values" that may appear in a variety of cultural forms, but do not lose the characteristics of universal human goods (An-Na'im 1987, 1–18). However, the practical realisation of achieving such a consensus in global context, given the lack of anything close to a global democracy, is sometimes problematic. It is then nothing of a surprise that the *anti*-universalist critique is – almost as a rule – the one against the *pseudo*-universalism of seeking to impose on, usually in form of Eurocentric or Western hegemony (Appiah 1992, 58). In other words, "there does seem to be overwhelming evidence that we all share common vulnerabilities, a common maldevelopment and a fragile planet. *A universalism framed in the arrogance of empires has to be resisted, but the possibilities inherent in connections, in shared vulnerabilities and solidarities, remain to be explored*" (Walker 1988, 135). This echoes the so-called Third World scholarship of Shaheen Sardar Ali, Samir Amin, Upendra Baxi, Mohammed Bedjaoui, Bhupinder Chimni, Kéba Mbae, Obiora Okafor, Abdul Paliwala, Balakrishnan Rajagopal, Shirin Ray, Christopher Weeramantry and others speaking on behalf of the global South with radical brilliance and impassioned authenticity, reminding us of lives and struggles of the deprived, the subaltern – who often fall out of all structures, including those to protect codified human rights, and follow an independent path or create social movement to reclaim and live their rights through daily action.[9]

In fact, what the Third World scholarship, including the Third World Approaches to International Law (TWAIL) and moral cosmopolitanism have in common goes beyond the human rights violations and poses a question on how our social world and various societal realities are structured – i.e. how do the laws, conventions, practices and social institutions distribute power, mask and reinforce the existing inequalities and dissolve resistance.[10]

Cosmopolitan "institutional moral analysis" is then an assessment of whether the course of events might have been different if the existing rules or social institutions were different or functioned differently. Nevertheless, the analysis does not stop there. It includes examination of whether agents responsible for adoption, implementation and sometimes even worldwide export of the rules could have foreseen that the rules would lead to harm and could have modified them or replaced them by rules that would not cause such or other harm. Viewing events as part of a broader

[8] See Habermas (1992)

[9] See Douzinas (2000) and Baxi (2002)

[10] See Rajagopal (2003) and Anghie et al. (2003)

institutional and legal framework does not allow for separation of the intra-national, domestic and international, worldwide dimensions of justice. Quite the contrary – the cosmopolitan global justice approach surpasses the traditional distinction of theorising justice within a state from that of global scale. It does so by applying the institutional moral analysis to the world and humanity as a whole (Follesdal and Pogge 2005, 5) which follows the line of aspiration enshrined in the Article 28 of the Universal Declaration of Human Rights, envisaging a social and international order in which all rights and freedoms set forth in the Declaration can be fully realised.

Being concerned with structural injustice and oppression, cosmopolitans often refer to John Rawls and his "Theory of Justice", promoting an understanding of rights that would stem from and would be reinforced by fairness of social institutions, including responsibility of those who uphold such institutions, i.e. responsibility of anyone involved in their imposition (Pogge 2002, 46). The problem of "engendered injustice"should thus not merely be portrayed as a basis from which a moral appeal for the "need to help" or "need to assist those in need" is made. According to Thomas Pogge, the debate largely focuses on the extent to which affluent societies and persons have obligations to help others worse off than themselves. What the debate often ignores is that we, as beneficiaries and supporters of a global institutional order that substantially contributes to their destitution, are further and more significantly related to the poor on a global level. The responsibility therefore lies with us rather than the poor. Given the dominating position of the Western powers, it is the affluent Western states that could redesign this orde (Pogge 2002, 11–15).

It is an order in which 15% of the world population is undernourished, every tenth child in the developing world dies before reaching the age of five and one quarter of the world's children work outside their homes, while the 200 richest people more than double their net worth every 4 years, to more than one trillion; the assets of the top three billionaires nowadays exceed the combined GDP of 50 least developed countries, which are home to 600 million people. One third of all human deaths are due to poverty related causes, all of which could be prevented or cured through food, safe drinking water, basic medicines or vaccination. All together, over 250,000 people, mostly children, have died since the end of the Cold War due to poverty reasons. The names of these people, if listed in the style of the Vietnam War memorial in Washington, DC, would cover a wall 350 miles long (Pogge 2002, 97–98). At the same time, the extreme wealth concentrated in the hands of very few, points out an inequality in distribution rather than a lack in the resources necessary to deal with pressing global issues. As, for instance, the additional cost of achieving and maintaining universal access to basic education basic health care adequate food, safe water and sanitation for all represents less than 4% of the combined wealth of the 225 richest people of the world. So despite the alarming numbers, poverty is solvable today. The required shift in income distribution would be small and the opportunity cost for the developed countries barely noticeable. It is estimated that around 1% of the GDP of the OECD states

could well solve the extremities of world poverty, satisfying, at least, the basic needs of all (Pogge 2002, 96–99).

However, causing a third of all human deaths, world poverty is now so severe and so extensive that one cannot even say with confidence that poverty would be worse in a global Lockean state of nature in which all human beings have access to a proportional share of the world's natural resources. Notwithstanding the developing countries' access to the global market, the tariffs on manufactured goods produced there are on average four times higher than in case of the rich states, putting the former in a substantially disadvantaged position within the global competition. Lockean natural uncontrolled access to a proportional share would therefore ensure more justice than the present, well-elaborated system of international trade – excluding, while placing additional burden on the developing *via* sanitary and technical requirements, the operational cost of implementation, the required bureaucratic structures etc. According to the UNCTAD estimate, the developing countries are losing some $700 billion annually as a result of the protectionist policies applicable to the markets of the developed OECD states.[11] This example points at schizophrenic attitude and double standards of championing the opening of markets worldwide, while protecting our own. This means turning the general rule into an exception when it comes to its very advocates. Benefits of free trade can then be enjoyed by the rich, while the same opportunity – to compete under the same rules and conditions – is being denied to the poor. Doctrinally, this situation cannot be justified, except for serving a purpose, *our* purpose. Have we, therefore, created a global system of trade, or have we globally expanded the system from which we benefit? At this point the discourse shifts, contouring the claims and using arguments that remind us of those of the Third World advocates of the New International Economic Order and the solidarity rights, including the Right to Development; arguments that it is not only that we are doing too little, but that we are *doing too much* to sustain the global injustices. Our responsibility for keeping peoples of the developing countries in the trap of underdevelopment is therefore a responsibility for an active behaviour of commission, not only omission of *non*-assistance in case of need. Expressed in Foucaultian terms of power dynamics, "when agents competitively pursue their interests within a framework of rules, these rules themselves and their adjudication, typically become objects of competition and may then be deformed by stronger parties to the point where the framework becomes manifestly unfair" (Pogge 2002, 11).

Universalism, like any doctrine and action based on principles, cannot be defined formally. "It is not a moral position with a clearly defined content, but an *approach* – a general schema that can be filled in to yield a variety of substantive moral positions" (Pogge 2002, 94). What is required, principally, is "*systematic coherence in morality*: the moral assessment of persons and their conduct, of social rules and states of affairs, must be based on fundamental principles that hold for all persons equally" (ibid.). In the context of international law this entails public control over

[11] UNCTAD, *Trade and Development Report 1999* (New York: UN Publications, 1999).

the socio-political and economic systems; democratisation extended to geopolitical and market arenas[12] and the concept of democratic inclusion functioning as a principle to guide the elaboration, application and invocation of the international law.[13] In other words, the cosmopolitan ideal calls for a common re-consideration and re-conceptualisation of the international law towards the one in which *people*, rather than states, corporations or other power-entities, matter.

A concern for the human is also reflected in the cosmopolitan preference within the interpretation of rights. As for nature and content, cosmopolitans do not endorse Hart's position of strong rights, whereby having a right presupposes the ability to claim it – excluding, *inter alia* babies from having the rights (Hart 1995, 175–191). Instead of such a legalistic approach, it is Alan Gewirth's extensive and complete conception of rights that is endorsed – a conception independent of any expression of will, where, for instance, a man who is now in a coma would have his rights violated if his will is overturned or he is kept alive despite his prior instructions.[14] Analogically, maiming of an infant child is certainly a violation of her rights, despite the fact that she cannot protest in her state of infancy.

19.2.1 Struggles and Achievements

In relation to the outside world or broader societal frameworks and realities, the rights in the cosmopolitan perspective are – to use John Rawls' phrase – "political not metaphysical" (Rawls 1985, 223–252). This is to stress that the adjective "human" goes beyond the "natural as given", i.e. beyond perception of rights as an ontological status, independent of human efforts, decisions, strivings and sacrifice. Quite the opposite: it is to remind us that the system of human rights has not come out of the blue, but it is a result of a series of political struggles – against feudalism, discrimination, exploitation and power in its various forms.

And the struggle continues, among other, against instrumentalisation of human rights within the hegemonic ambitions of major powers and the subjugation of rights to what is principally the market fundamentalism and power-centered international order, often turning rights into a value-added label rather than the central theme and the very reason why and for whom all the market, the state and the international community are in existence. Corporate-driven development contours the structures and priorities of power rather than principles of human rights that tend to question and hold power accountable. States cease to effectively guarantee rights to their citizens, but compete with each other to "guarantee rights" of corporations, capital and foreign investment. Vandana Shiva's critique of "market and corporate-friendly

[12] See Falk (1995)

[13] See Marks (2000).

[14] See Gewirth (1981).

rights" (Shiva 1999, 87–109) as well as Upendra Baxi's account of "trade-related market-friendly human rights" (Baxi 2002, 132–166), express the irony of human rights remaining high on the international agenda, yet effectively disappearing from true concern and people's lives.

But precisely because of the above, the struggle continues. Provisions of international human rights law are only part of the means, the energy and commitments within the mosaic of realisation of rights. Their contribution, however, is a crucial one, especially if the adoption of international human rights instruments is to stand for the legitimacy of values, principles and aspirations that human rights represent. This is most obviously the case in the UN Convention on the Rights of the Child, for which the scope of expressed consensus – the widest ever achieved – implies a legitimate basis for a new international order respecting the Convention. In other words, the normative weight of the Children's Convention goes far beyond the East/West or the North/South divide, advocating for a system characterized *inter alia* by the unquestionable interdependence and universalism of all rights,[15] by a spirit of peace, dignity, equality and solidarity, by special consideration for children living in exceptionally difficult conditions[16] and by an obligation of states to undertake measures for the realization of economic and social rights of their children by utilising the maximum of available resources and, where needed, to use the framework of international co-operation (Article 4 of the UN Convention on the Rights of the Child)[17]. The Convention can therefore be perceived as a "global social contract", a legal framework overcoming the territorial, statist limitation in the sphere of children's rights. Philosophically speaking, despite the fact that minors do not have electoral rights and cannot decide what type of socio-political and economic system they prefer, the Convention ensures, *inter alia* the right to education, leisure and healthcare as well as equal rights for disabled and refugee children. It thus represents a legal consensus of a global child-friendly regime based on justice and equity, announcing an era of cosmopolitan realization of all rights of all children (see Verhellen and Weyts 2003).

Respect, protection and fulfillment of human rights, especially those guaranteed globally, do not occur in a vacuum. If this was the case, humankind would not need to formulate any principles of *inter*-state, international co-operation neither would we need to conceptualize anything worth being called the "international community". A strictly state-centered human rights doctrine could rely on democratic principles within each state. The daily reality across the globe, however, points at the legitimacy of the principle of international co-operation and assistance in cases where the state party to the Convention does not have sufficient resources to secure fulfillment of rights of its children. The cosmopolitan understanding of rights, enshrined in the principle of international solidarity for the benefit of individual children regardless of their nationality and origin – i.e. all children worldwide – resonates there.

[15] See Articles 23, 24, 26, 27, 28, 31, 32 and 36 of the UN Convention on the Rights of the Child.

[16] See the Preamble of the UN Convention on the Rights of the Child.

[17] See Article. 4 of the UN Convention on the Rights of the Child.

19.3 From Human Rights to Justice, from Global Justice to the Universalism of Rights

If "human rights discourse cannot exist or endure outside of the webs of impassioned commitment and networks of contingent solidarities" (Baxi 2002, 15), human rights today cannot exist outside the framework of global inequalities; neither can they succeed without the striving for social justice. As has been proven, for example in neoliberal social experiments in *post*-1990 Eastern Europe, what is required for people to exercise their paper rights, is both the capacity and the resources, or in other words – *transformation of resources into human agency* (Einhorn 2006, 179). As has been well documented, privatization of public services tends to lead to paralysis rather than advancement, and even to regression of social and economic rights for relatively large parts of populations.[18] It is therefore not by chance that the United Nations Human Development Report 2000 has been calling for "a set of *social arrangements* – norms, institutions, an enabling environment – that can best secure enjoyment of rights".[19] The *globally enabling environment* is then likely to arise hand in hand with the pursuit of global justice.

The ideal of global justice is, like all ideals, a lighthouse to navigate human action in constant approximation; a continuing, if not a permanent project, rather than a concrete goal to be accomplished by a particular date. It is a constant aspiration, a journey that is itself a destination, not unlike the Kantian ideal of the perpetual peace. Utopian to many, utopian if we read it as a promise of Heaven to come without challenges, obstacles and efforts. Our engagement with the universalism of human rights should be more than anything, a determination for perpetual search and sincere reflection, for perpetual striving and commitment – in little daily action, in constant work, even in preparedness for sacrifice.

Achieving human well-being through living values of peace, dignity, tolerance, freedom, equality and solidarity as well as the determination to promote social progress and better standards of life that are enshrined in the UN Charter, are certainly not a minor aspiration (Schrijver 2006, 9–10). Neither are universal protection and the daily enjoyment of human rights by everyone and all, envisaged a long time ago in the Universal Declaration of Human Rights. But the question is – if not this, *what then?*

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[18] See Chossudovsky (1997).

[19] UNDP (2000, 73) in Einhorn (2006, 180).

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Chapter 20
Human Rights as a Pillar of Transformation: A Polish Perspective

Ewa Łętowska

20.1 Preliminary Remarks – The Perspective of This Chapter

20.1.1 Introduction

The title of this report reflects an extremely hazy perspective. The very notion of "human rights" is unclear. Is it a philosophical concept or a legal one? And if only the latter, then which one: the one defined by acts of international law or by one of the doctrinal interpretations? If it were the question of legal acts, their universal nature is not unequivocal either.

Most often the universal dimension concerns – geographically – the UN acts, binding on the UN or world "scale". But for instance, the European Convention on Human Rights (ECHR) is perceived rather as a regional act, even though in Europe it can now be treated as a universal one. Perhaps it is the question of axiological-cultural universalism, which has a bearing on particular regional acts? Human rights themselves are divided into generations, recognised according to the time of their appearance in the history of ideas and in international circulation and by the intensity of their effect (their own mechanisms ensuring particular laws, their execution and diverse methods of shaping the standards of behaviour).

Firstly, human rights are directly and indirectly touched on in several treaties and international agreements, generally speaking, in the acts recognised as international law; they differ in character, in subjective scope, in range, and they function (and bind) differently as sources of law. They are concerned with different groups of people – from the point of view of "universalism" – women, children, employees, migrants, aborigines, foreigners, the handicapped, etc. In this case, universalism can

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be understood as protecting “someone”. Human rights acts may concern protection “against something”, against certain practices (tortures, discrimination of all sorts, etc.). One can then talk about “universalism”, referring the term to the subject of threat. However, universalism may concern not only the subject, object and scope of the act, but, for instance, their “common core” within the framework of the acts concerning human rights. Most often we talk about universalism of human rights in this sense, having in mind their being rooted in man’s dignity.

One can also talk about “human rights” as having in mind the universality, not of regulations, but of the practical standard, determining the actual existing protection. In this case, it will be possible to associate the notion of “universalism” with the question of place, time and reasons of diversity (universalisation) of the standard.

Secondly, the notion of “universalism” has its own dimension in time and space. Next to the static dimension, where one describes and analyses the “existing state” (descriptive approach), there exists a dynamic dimension which refers to the course of the universalisation of human rights in different regions and epochs.

Thirdly, the binding effect also comprises a range of possible meanings. One can speculate whether it is the question of the “binding” nature of particular acts (types of acts) concerning human rights (where and how, with what effect, according to which model they are implemented in countries’ systems), or of their implementation (or the “obligation to apply”, i.e. for whom, in relation to whom, in what way, with what consequence in case of violation of that obligation etc.).

20.1.2

For about 20 years, Poland has been undergoing a systemic transformation to bring it closer to European democracies. Human rights (the UN pacts) and the European Convention have played and are still playing the part of axiological yeast. Thanks to human rights, Poland – and possibly also other countries of Central and Eastern Europe – universalise (axiologically and ideologically) their own legal system. The condition for access to the Council of Europe is the attainment of a definite level of protection of human rights. Three issues will be presented in this chapter in regard to this (apart from the information in the following section of the chapter depicting the “state of things” concerning the implementation by Poland of acts of international law, including examination of the acts regulating human rights). Therefore the chapter deals with human rights as a tool, thanks to which the Polish legal system has gained a category of fundamental constitutional rights. In the process of transformation, particularly in the 1990s, human rights played an important role as a dynamising factor in the transformation (Sects. 20.3 and 20.4 of this chapter are devoted to this issue).

The remaining two parts (Sects. 20.5 and 20.6) will deal with specific conditions and obstacles to the saturation of the social practice with the standards human rights. I believe that the description of the implementation of particular acts or the analysis

of their contents, are considerably less important than pointing out the causes actually influencing their application in practice. The chapter shall concentrate on the European Convention on the Protection of Human Rights and Fundamental Freedoms. It is the only Act provided with an extensive mechanism – accessible to victims and at the same time having a direct influence on the states (state organs) which have violated human rights. Because of this, it is an act which has the greatest chance of exerting a real influence on the improvement of the social practice in regard to human rights. I consider this improvement to be the main goal which should be served by the initiatives undertaken internationally aimed at working out and implementing normative acts and acts regarding human rights.

20.2 Acts of International Law Concerning Human Rights and the Polish Legal System: Some Facts

20.2.1

Article 87 of the Polish Constitution of 1997 provides, following a monistic model, that ratified international agreements are incorporated into the Polish legal system (general incorporation), where they appear as one of the generally binding sources of law. Acts regarding human rights belong to the category which the Constitution itself (Article 89 par. 1 points 2 and 5) defines as requiring ratification. According to Article 91, after the ratification and promulgation, the ratified agreement is applied directly, "unless its application depends on issuing an act" (i.e. if the agreement is not self-executing). Furthermore, in Article 91, par. 2, the Constitution stipulates that an agreement ratified in agreement with an act has a higher force than the act but not higher than the Constitution. Furthermore, Article 9 of the Constitution specifies that Poland observes international law by which she is bound. Article 188 par. 1 states that the Constitutional Tribunal examines the conformity of international agreements to the Constitution (thus, it examined, for example, the conformity of the Treaty of Association with the EU to the Constitution of Poland). Before ratifying an international agreement, the President may apply to the Constitutional Tribunal to examine the agreement's conformity to the Constitution – Article 133 par. 3. There has been no practice so far of the exercise of this right.

20.2.2

In 1977 the Pact on Civil and Political Rights and the Pact on Economic, Social and Cultural Rights and in 1993 the Convention on the Protection of Human Rights and Fundamental Freedoms were ratified.

20.2.3

The Constitution of 1952, previously in force, did not regulate clearly the place of international law (including human rights) in the system of sources of law and their relation to domestic law. In practice international law was not a dynamising factor in the domestic law system. Courts did not apply international law (including human rights) directly, pledging obedience first of all to domestic law.

20.3 Human Rights as a Substitute for the Human Rights of an Individual in the Pre-transformation Period and the Source of Constitutional Inspiration in Central and Eastern Europe

In Poland (and this can probably be generally attributed to all post-communist countries) human rights, at a certain point, became a substitute means of conveying the values which are protected by fundamental laws in the countries of mature liberal democracy. In Western Europe it was the very principal laws and the experience in applying and executing them which paved the way for human rights in their normative shape. Without a fixed concept of the rule of law and fundamental laws, the European Convention on Human Rights would not have come into being. In Poland it was the other way round. The Constitution of 1952 (altered in this respect only in 1997 by the Constitution which is presently in force) did not include civil rights and freedoms in the form of fundamental laws as subjective rights, which would serve citizens, who could refer to them in court. The Polish constitution of 1952 was rather a paternalistic manifesto of the authorities' good intentions towards the society. It did not create instruments to place at the disposal of the citizen looking for protection of his constitutional freedoms and rights. No claims issued from it and there were no organs to which one might take legal proceedings for violations of the constitution. There was no legal inspection of the administration (it was only introduced in Poland in 1980). There was no constitutional judicature either (it was introduced in 1986). The courts were thus accustomed to the lack of criticism towards the legislator and the organs of administration. It was true even when the legislator clearly went beyond his accorded competences and the administration (not infrequently arbitrarily) interfered with the rights and freedoms of the individual. In this situation it was precisely the human rights (in particular the Pact on Civil, Political and Personal Rights and later also the European Convention) that paved the way along which rights of the individual came to Poland.

In Western Europe fundamental rights found their way to constitutions thanks to the idea of the rule of law and the development of intellectual culture inspired by that idea. On the other hand, in 1950 the European Convention of Human Rights came into being, because fundamental rights of the individual were well anchored in the constitutions of the advanced European democracies. In Poland things were

different. In the pre-transformation period, human rights first became a slogan for political opponents of the previous regime. It then came to the ratification of Pacts (1977) and the European Convention (1993), before achieving, after still more years, the constitutionalisation (1997) of the fundamental rights of the individual in the Constitution itself.

Thus the road to fundamental constitutional rights in Poland led through human rights, which is an example of the characteristic reception (universalisation!) of European thought and legal culture. Universalisation and prescriptivism of human rights in Europe became the source of constitutional inspiration – for the use of domestic legal systems – for the Central and Eastern part of that continent.

20.4 Human Rights Taking Root in the Consciousness of the Players of the Legal Life

20.4.1

I shall start with a digression. In 1983, one of the most notorious rulings of the Polish Supreme Court (the SC) appeared which was both controversial and commented on widely. It denied the dismissed state functionaries all judiciary protection, leaving them only the possibility of appeal to their superior. This attitude was met at the time in Poland with universal criticism from the scientific circles. Commentators especially condemned the ruling, which was not a credit to the legal thought, because of its formalistic and evasive substantiation. Not only was the ruling wrong, but it in fact reversed the advancement of law. Yet nobody thought to quote directly Article 14 of the Pact on Civil and Political Rights (it had been ratified by Poland in 1977), providing the right to a court hearing as the right granted to each individual. Commentators knew both human rights Pacts and the fact of their being ratified, as well as the contents of those Acts, but they did not use that argument, instead criticising specific ruling of the court. For it was not a tradition in Polish legal thinking to be able to efficiently attack on any ground anything that issued from an act. The constitution lacked principal rights and human rights were not considered a real factor shaping the establishment's way of thinking or the judges' mentality.

In 1991 the Polish Supreme Court happened to judge a problem similar to the one of 1983. The question involved whether – in a case of moving a judge to a different court (the National Judiciary Council decides on this and its ruling is conclusive) – the judge is entitled to the protection of the court or not. Answering the question in the affirmative, the SC substantiated its stand: "The right to enjoy the protection of an independent court, or – to put it differently – the right, accessible to all on equal principles, to a fair trial, in front of an impartial, independent court, is the characteristic feature of each democratic rule of law." "…the possibility to enjoy judiciary protection is a permanent value, independent of influences of favourable circumstances or an economic crisis, social relations, state of law-abidingness or civil awareness.

No consideration and especially the argument referring to the realities of a historic period may justify restriction of the access to court, just as no reasons may justify restriction of rights and freedoms …"

The Supreme Court's ruling from 1991 came only 9 years after the previous one, but in the way of thinking, they are separated by a whole epoch. And it was not the Constitution which decided this (as it has only regulated the rights of the individual on the constitutional level as subjective rights since 1997). The reason for the change, visible in the judicature of the Supreme Court, was the awareness that human rights are a real borderline for the common legislator's freedom; also the awareness emerged that courts have the duty to be governed in their interpretation by the judicature (standard) issuing from human rights.

20.4.2

In the judicature of the highest judiciary instances in Poland in the period preceding the accession to the system of the Council of Europe and before the voting on the Constitution, first the Supreme Court (and only later the Constitutional Tribunal!) started referring in their judicial decisions to human rights, the European Convention and even to Strasburg's judicial decisions, treating it as a source of interpretative inspiration. This took two forms: either it induced the courts to revise the hitherto existing interpretation (re-interpretation), or, sensibilising them axiologically, it induced new interpretations or interpretations "in the new spirit". Thus the European Convention, not binding in Poland at the time, inspired criticism towards the common legislator and universalised its axiological premisses, influencing the legal system.

20.4.3

After the ratification of the EC (1993), since the Constitution in force at the time (from 1952 until 1997) and the constitutional practice did not provide clear solutions concerning the hierarchy of domestic and international law, nor did they pronounce themselves in favour of a direct application of international law by courts (the presently binding Constitution of 1997 contains both principles *expressis verbis*), the Supreme Court, acting *ex proprio vigore*, declared the Convention to be the binding model. It did so in the verdict I ARN 45/93, 7 February 1994, which stated: "Norms of international law may and should be applied in the domestic legal proceedings and they do not require any additional transforming actions. However, it concerns only such norms …in which …the possibility of such application issues from their content or other premisses accompanying the concluding". In a different ruling, the Supreme

Court directly quoted Article 8 of the EC, as well as the necessity to make the assessment of whether the prohibiting regulations issued (concerning the consumption of alcohol in public places) did not constitute excessive interference (the principle of proportionality, previously unknown in Polish judicature) from the point of view of Article 8 par. 3 EC, as they contained regulations "whose contents were excessive, arbitrary, irrational, unnecessary in a democratic society, infringing the fundamental civil rights and freedoms or human rights". In further rulings the Supreme Court stated that "from the moment of Poland's accession to the Council of Europe, the judiciary of the European Court of Human Rights in Strasburg may and should be taken into account with the interpretation of Polish law" – III ARN 75/94, 11.1.1995, OSNAP No. 9/1995, point 106.

20.4.4

The establishment of the institution of the Commissioner for Human Rights in Poland (functioning from 1988) was also important for the promotion of human rights. Firstly, because the Commissioner used in her activity the standards defined in acts of international law (Pacts on Human Rights, the European Convention) as the standards with which to assess the Polish law, its interpretation and practice. Owing to that, critical remarks contained in the Commissioner's official addresses to the parliament and the administration and disseminated by the media, promulgated the standards of human rights and placed the local practice in opposition to them. Secondly, the Commissioner drew attention to the discrepancy between the formal binding of human rights acts and the practical results of that binding. This peculiar, practical "agnosticism" in the perception of human rights in Poland, has not been overcome to this very day. The Commissioner stressed very strongly that "she observes alarming agnosticism (…) lack of knowledge or conviction that the contents of the Constitution (Pacts) have to be taken into account when making law and applying it 'on a daily basis'"; "that the Constitution (Pacts) have to be a decisive criterion for the assessment whether a specific action can be considered 'proper' or 'improper'".. … During her work in 1990, the Commissioner, willing to work towards the improvement of the state of things, endeavoured (especially when making general addresses) to point out the discrepancy between the Polish law and practice, and the European standards. The reference to those models of proceeding also concerns the European Convention of 1950, not binding as yet, to which Poland is aspiring to accede. Against the background of the Convention there exists extensive judicature of the European Tribunal which the Commissioner endeavours to use, including in her addresses references to the European standards. She undertakes to accustom the recipients of her addresses to the idea of the existence of these models and to change their attitude of acceptance of the existing reality, shaped by the current practice and low rank regulations.

20.4.5

Promotional activities of this kind, carried out by the Supreme Court, the Chief Administrative Court, the Constitutional Tribunal and the Commissioner, supported by the opinion-forming academic circles, were the factor in Poland in the nineties which initiated the changes in axiology, shaping the interpretation of law. It probably also has to do with the circumstance that at the time a group of new judges, coming from the academic circles, more open to the problems of human rights, started work in the courts of the highest instance (it was with their rulings that the changes started). Nevertheless, it must not be concealed that there are political and ideological groups in Poland who question the legitimateness and the need for the axiologising of the legal system, making use of human rights: "The conflict is inevitable between our legal-natural philosophy of common good and the liberal religion of human rights. The conflict is inevitable with the false religion, usurping the status of the religion *de facto*… It is a religion which has its fundamentalists who look for the absolute rules of their faith in their own feelings and not in codified principles. Fundamentalists who strive to overthrow democracy (the nation's sovereignty) and to establish the ideological rule of supranational institutions…Bearing in mind the fact that in the form of Human Rights we have to do with an attempt at a destruction of Christian civilisation and its institutions, the Christian-National Union has opposed in the Parliament the recognition of the Strasburg Court of Human Rights as fit to determine the binding force of Polish acts or verdicts of Polish courts".

20.4.6

Presently in the judicature of supreme courts: the Supreme Court, the Chief Administrative Court and the Constitutional Tribunal, the EC is applied as a model influencing the interpretation and assessment of the correct interpretation of Polish law. However, it is an open question whether it happens in all cases when it is both possible and desirable. Certainly the practice of lower courts does encourage optimism in that respect: the inspirational activity of the EC is felt, but only faintly, here to this very day. This means that human rights standards, formed by the European Convention, do not work "universally" within the Polish judicative. They are more visible in the practice of the courts of the highest instances, although here too one can notice a break-up of the consistent trend supporting the thesis about the universal and prescriptively binding character of human rights acts. Presently one feels certain regression of the interest in the problems of human rights among the players of the legal life – it is partly caused by the fact that presently the attention of courts is occupied more by the problem of the application of European (Community) law, which the Polish courts also

need to get accustomed to; at the same time, committing an error in that area brings further reaching and faster initiated consequences than possible violations of human rights.

20.5 Difficulties with Universalisation by Polish Courts of the Standards of the European Convention

20.5.1

Tradition requires that the legal system be perceived as a hieratic and monocentric structure, functioning within the state borders. Meanwhile, contemporarily, instead of the hieratically built monocentric model, there appears (at least it is clearly visible in Europe) a multicentric model. It is characterised by a multitude of centres of decision with regard to the making and interpretation of law. Moreover, it is a cross-border model. In our times, in one country, one territory, there coexist, entirely legally, with regard to making, applying and interpreting law – external, borderless centres, valid for several countries. Not only does that disturb the traditional vision of legal order but also additionally entangles it in ideological and political questions (disputes about sovereignty). The multicentric character of law and its interpretation is at present not only a fact, but indeed a necessity, and that is so because of the international cooperation and inspection (the common market). This situation requires tools making that coexistence possible: settling collisions, resolving conflicts, conducting the dialogue, without disturbing the very principle of several centres sharing the same field. In this respect, the art of interpreting law gains a new dimension and new goals which it must meet. It now includes not only (1) the explanation of law (clarification), (2) not only the co-construction of the legal system (getting out norms from the legal system, within the decision-making margin of the subject which interprets that law, operating according to the rules which make that system – *Rechtsfindung*), but (3) the duty to reach the final goal which those interpretational efforts are to serve (e.g. the effet utile, the order of a friendly interpretation of the community law). The incorporation of the interpretation's goal into its notion, particularly when the goal is the respect of certain principles, considered crucial for the European order, shaped by the community law – takes diverse forms of appearance against the background of the community law (effet utile, direct efficiency of the community law, complete harmonisation, granting domestic courts the status of community courts with particular duties, etc.). That universalisation of the goal of interpretation concerns also the duty of interpretation in the domestic order in the way favourable towards the respect for human rights. For there exists a conflict between a particularistic interpretation of law and the global outlook of the European Court of Human Rights which can be overcome thanks to a true interpretational dialogue between local centres and the Court of Human Rights.

20.5.2

The subject of inspection by the European Court of Human Rights in Strasburg is the violation of human rights by any of the domestic authorities (the legislator, the executive, and the courts). The inspection concerns only the ascertainment of the violation and the assessment if it has its source in the violation of human rights and freedoms defined by the European Convention as the subjective rights of the individual. The role and competences of the Polish Constitutional Tribunal are different. The Tribunal examines the congruity of the Polish regulations with the Polish Constitution (inspection of the legislative). However, the activity of the executive and the courts is exempt from its inspection. Thus the object of assessment by the Constitutional Tribunal (assessment of the positive law itself, of the regulations) is different from the assessment by the European Court of Human Rights (assessment of the results of the behaviour of the legislator, the executive, and the courts, which take the form of the violation of the subjective rights of the individual). The consequence of the Constitutional Tribunal's ruling is a disqualification of the regulations and their removal from the legal system. The consequence of the European Court of Human Rights' ruling on the other hand, is the ascertainment of the defective behaviour of the state ("the individual is right, not the state") and a facultative granting of a financial compensation to the wronged person. On the other hand, the consequence of the ruling concerning violation of human rights is not any direct change in the legal system of the country where the violation has occurred.

The Constitutional Tribunal is bound to the European Court of Human Rights with a ratified international agreement. That is why the Tribunal interprets the contents of the Constitution through the ECHR standards. The ECHR judicature is quoted in the Constitutional Tribunal's rulings as a co-determinant (along with the Constitution itself) of the inspection standard. Nevertheless, it does occur that the standard defined by the Constitution is higher than that of the European Court of Human Rights. That is the case of the right to a court hearing (Article 45 of the Polish Constitution and Article 6 of the ECHR). In such cases the Constitutional Tribunal contents itself with the inspection of constitutionality, taking the higher standard as the measure with which to evaluate. However, the subject of inspection is different in the case of the Constitutional Tribunal and that of the European Court of Human Rights; the inspection of constitutionality concerns the conformity of law with the Constitution; with regard to the ECHR inspection – it is the violation of the subjective right of the individual, protected by the Convention.

The Polish constitutional complaint, although filed by the wronged person him/herself, does not tally as to its subject and range with the complaint filed in Strasburg. For it is always a complaint "against the regulation" and not against the verdict based on it. Thus if in the Polish Constitutional Tribunal a constitutional complaint has been filed containing the charge of unconstitutional application of the law (the court and not the legislator has violated human rights), then the Tribunal must dismiss the complaint as it has no competence to consider it. This situation justifies of course a complaint to Strasburg. The difference between the competences of the

Polish Constitutional Tribunal and the ECHR contains a trap for someone looking for protection. Usually he does not know if the reason for the violation of his subjective right (the wrong sustained) is a faulty regulation or an incorrect application of a good one. If he then thinks that the reason for the violation rests with the law, he should (in order to exhaust the domestic procedures) first file his complaint in the CT and then go with his case to Strasburg. If his judgement is wrong (i.e. if the CT rules that the proceedings of the court are the reason of the violation) he will miss the deadline to take his case to Strasburg (as the deadline will be counted from the date of the verdict and will run out while the case – to no effect – is dealt with by the CT). On the other hand, if directly after receiving the verdict or the administrative decision he files a complaint in Strasburg (convinced that it is the case where the Polish court and not the legislator is "guilty") – he can risk being accused of not having exhausted the internal procedure which is the necessary condition for taking a case to Strasburg. In this case the wronged person – due to taking his case to the Court of Human Rights too soon – will miss the time limit within which he may take his complaint to the Constitutional Tribunal. The trap is not an illusory one: see the *Szot-Medyńska* versus Poland case where precisely that situation took place.

An ECHR ruling concerns – firstly – the consideration of whether any of the rights issuing from the European Convention has been violated with relation to the applicant. Secondly, the direct result of the assessment that this was indeed the case is awarding (facultative) the wronged person a financial compensation for such a violation. However, the domestic law of the country which the ruling concerns has to introduce into the domestic order (the legal system, the functioning of the state organs and the courts) such changes which will prevent violations in future. The ECHR verdicts should be executed by domestic authorities as carefully as possible (this is a complex problem in itself). The domestic system should also reverse the consequences of the violation with respect to the injured party (e.g. institute proceedings *de novo*). The necessity to undertake these actions (both within the scope of prevention and specifically) is, in my opinion, a constitutional responsibility of the state authorities, issuing from the duty to respect the international obligations taken on (concerning the respect for human rights). Thus drawing conclusions from the ECHR verdict is a domestic matter: considering the scope, adequacy, necessity and proportionality of the steps undertaken (concerning the change of legal regulations, application of law, including interpretation, instituting specific proceedings *de novo*, organisation of courts). That is precisely how the question of relations between the ruling of the ECHR and domestic courts is presented in the verdict of the Polish Constitutional Tribunal of 18th October 2004, P 8/04. In accordance with that verdict, using the contents of the Convention to reconstruct the inspection model, a direct indication in the conclusion of the judgement – the reference to the European Convention – was abandoned. "It was done also in order to avoid the suggestion that the Constitutional Tribunal had been inspecting the situation from the point of view of the violation of a particular individual's rights – in the event where it had not been doing so because that kind of inspection in this case ought to be carried out by a common court of law and – possibly – by the Court of Human Rights."

20.5.3

In the Polish legal system, the regulation of consequences of a verdict concerning the violation of the European Convention by Poland is clearly regulated only for those situations in which the source of the violation were criminal law proceedings (art. 540 § 3 of the code of penal proceedings). There is no similar regulation in civil or judicial-administrative law proceedings. Worse still, when it comes to civil cases, in the case of the Supreme Tribunal's judicature there is a visible tendency to negate the successive consequences of verdicts stating violation of human rights by Poland (when the source of the violation resulted from the action of the judicative). It is not a question of the argument whether in such cases the proceeding or a part of it should be instituted *de novo* and what tools, existing *de lege lata,* are suitable for this, or whether in each case these tools are identical and whether (in which cases and on what principles) all action should be limited to compensatory restitution. On the other hand, it is unacceptable that the court which committed the qualified (by the Tribunal of Human Rights) violation of human rights should treat the verdict, returned in Strasburg, as a non-effect occurrence. From that point of view, the deliberate standpoint of the Polish Supreme Court, for example, refusing all restitution activity (despite the available possibilities of interpretation) after the verdict from the Court of Human Rights concerning the violation of the Convention by the verdict of the Supreme Court must cause criticism. In fact, it means a refusal of a dialogue serving the universalisation of human rights.

20.6 The Problem of Historical Revindication and Human Rights

20.6.1

In the countries undergoing a transformation, the premises of the dialogue, the fulfilment of which is the duty of the ECHR itself, are equally important for the universalisation of human rights. In comparison with the earlier period, at present the ECHR is characterised by a greater activism of its own and at the same time by less tolerance towards legislators and domestic courts. This means that the ECHR presently tends to exert more pressure on domestic powers, promoting universalisation of its own vision (scope, shape, contents) of human rights. The Court of Human Rights has a detailed competence, a subsidiary one at that; it only rules on violations of subjective rights expressed in the Convention and only after the exhaustion of the domestic proceedings. The less efficiency in the protection of human rights in the domestic practice, the greater the quantitative influx of cases to Strasburg, which in turn paralyses the efficiency of that international court. The ECHR is thus truly interested in a dialogue with the domestic courts, in order to sensitise them interpretatively to the problems of the protection of human rights – for then the number of

cases directed to Strasburg will decrease. The only trouble is that one may have the impression of a certain brusqueness with which the ECHR treats interpretative efforts of the domestic centres.

20.6.2

The problem is – as one might suppose – the insufficient knowledge of the ECHR itself concerning the specific character of some particular but systemically important phenomena. Among them is historical revindication which the ECHR has not encountered before. A characteristic feature of "new democracies" – and of Poland among them – is taking to Strasburg complaints about violation of human rights, most often of property, with reference to such historical revindication. These are cases where what is being questioned is the deprivation (limitation) of property (as a rule it concerns real estate), as a result of the post-war change of the political system. From the point of view of present standards of human rights, these are undoubtedly cases of violation of article 1 of the second additional protocol of the ECHR. Those cases are a problem for the ECHR, making the effective dialogue with domestic centres of interpretation more difficult. These matters are very difficult for Western lawyers to understand as they have not encountered such phenomena at all. They concern the situation where now, after many years, there is an intention to repair historical changes, e.g. in the scope of the confiscation of property, nationalisation or other forms of taking property into the public sector, executed after the Second World War, within the framework of the construction of the socialist system. At the same time, different historical processes are treated alike. One has to mention the nationalisation, the agrarian reform, the effects of the Polish borders being moved West (which involved, for example, the exodus of the German population from Poland and the abandonment of real estate on Polish territory), the consequences of the migration of people from the Polish borderlands in the East, which had been incorporated into the Soviet Union, the consequences of the resettlements of people by foreign armed forces, the problem of the abandoned Jewish property, and also the specific problem of the so called Spätaussiedler (people who, as autochthons of German descent, were able to leave Poland in the 1970s). The confiscation of property was carried out both in a statutory and in an administrative way. In the light of the standards of the time, those acts were sometimes legal (which does not mean that they can be considered as such at present); on the other hand, at times they violated even the contemporary law. At times the confiscation of property might be taken as matching even the present standard if it had not contained promises of compensation, made at the same time, (later either not kept or kept only partly). In many cases, people seeking compensation today present completely unverified titles of property (the problem occurs in the well known case of *Broniowski v Poland*). In many cases, complaints filed in Strasburg remain in conflict with the rights of other persons. The degree of legal complexity of those cases, the consequence of the lapse of time exceed significantly the

current experiences of the ECHR, concerned with excesses of "bad administration" or errors of courts or the legislator. In the case of historical revindication, we face processes happening on a huge scale, within the space of several scores of years during which an axiologically different economic policy was consciously conducted. Standards of property protection concerning those cases of historical revindication must be considered from the perspective of history and with due respect to the situational diversity of the cases, collectively referred to as historical revindication. Yet one has the impression that the Tribunal treats domestic partners with nonchalance. It can be observed, for instance, in the incomplete and superficial reports on the attempts to solve the problem in the domestic forum. Description of the course of cases, presented according to the chronology of individual decisions, do not provide information about what purpose those decisions served. Consequently, drastic errors are committed, e.g. in the scope of insufficiently thorough inspections of the premiss of subsidiarity.

20.6.3

The tardy handling of revindication accounts and a failure to fulfil the obligations undertaken in the past towards the repatriates is an obvious breach of the Convention by the Polish authorities and such tardiness requires compensation. However, ascribing Poland the responsibility for the violation of property and also for the damage to that property caused by the actions of the Soviet or German authorities (as in certain situations concerning the claims of the repatriates or the displaced) is less self-evident. Doubts also arise when the situation of persons who have not yet received any compensation (i.e. those persons towards whom the State simply did not fulfil its duties) is compared to that of those who received certain compensation, (though only partially) during the 40-year period after the war. The assessment of the size of compensation ought to be more thorough. For instance, for the property left outside the borders of the country (the Bug river property) the claimants demand compensation also in cases when the removal of property was carried out not by the Polish but by the Soviet authorities, prior to people's relocation to Poland (this theme features in the *Broniowski* case). Over the years, in several categories of revindication cases the courts (e.g. the Supreme Court in Poland) worked out a standpoint which was a compromise between contradictory axiological demands which ordered the critical evaluation of the "former" law, the excesses of "former" practice and at the same time to limit the restitution aspirations in the name of legal safety, and - last but not least – of measuring economic interests of all concerned. Knowledge of those efforts would have led the ECHR to better understand the problems of revindication, to establish a dialogue and by the same token to universalise the standards of the protection of property applied by the European Court of Human Rights and the domestic courts.

20.7 Conclusion

Human rights are far from exhausting their potential. First of all they are being confronted with new challenges: punitive prosecution of violation of human rights, the problem of terrorism, the pressure on the state to undertake positive actions concerning the fulfilment of human rights, which means considerably broader and more expensive activities than just refraining from interference with those rights or removing dangers they face (negative actions). However, human rights at the same are drawing into their orbit much larger circles of the social life players (the growing importance of non-governmental organisations). Universalisation of human rights demands that all authorities be active promoting and carrying it out, while axiologically consolidating interpretation of law applied in the spirit of human rights becomes the instrument of that universalisation.

Chapter 21
Human Rights Protection in a New EU Member State: The Czech Example

Pavel Šturma

21.1 Introduction

The Czech Republic, a successor of the former Czechoslovakia, is a sovereign, uniform state, based on the rule of law and respect for the rights and freedoms of man and citizen (Article 1, para. 1, Constitution of the Czech Republic of 16 December 1992).[1] In accordance with Article 1, para 2, the Czech Republic is required to comply with its obligations arising from international law.

However, the protection of human rights in the Czech Republic as a member state of the European Union is based on various sources arising from three different legal orders: (1) Czech law, namely the Constitution, (2) international treaties on human rights and (3) EU law, in particular the EU Charter of Fundamental Rights. Of course, interrelations of such three legal orders may cause a number of problems or at least misunderstandings.

Therefore, this Chapter will focus first on the constitutional basis of the protection of fundamental rights (Sect. 21.2), then on the position of international human rights treaties in the Czech legal order, taking into consideration the case law of the Czech Constitutional Court (Sect. 21.3), and finally on the recent discussion concerning the EU Charter of Fundamental Rights, in particular the so-called Czech opt-out from the Charter (Sect. 21.4).

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[1] See the Constitutional Act No. 1/1993 Coll., of 16 December 1992, the Constitution of the Czech Republic.

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21.2 The Constitutional Basis of the Protection of Fundamental Rights

The above mentioned statement in Article 1, para 1, of the Constitution is a binding guideline for all organs of state power. However, the constitutional bill of human rights is not directly included in the text of the Constitution but in the Charter of Fundamental Rights and Freedoms, first adopted in the Constitutional Act No. 23/1991. This bill of human rights of the Czechoslovak federation was subsequently adopted as a part of the "constitutional order" of the newly independent Czech Republic (Article 3 and Article 112, para. 1 of the Constitution of the Czech Republic) (Sládeček et al. 2007, 35–37). The Charter of Fundamental Rights and Freedoms was again promulgated as such – i.e. as a part of the constitutional order of the Czech Republic – by the Declaration of the Presidency of the Czech National Council (then Czech Parliament) of 16 December 1992.[2] However, this act of promulgation is merely of a declaratory nature (Pavlíček 1995, 30).

This appears to be an unusual way of incorporating the list of human rights into the Constitution. It may be explained by the constitutional development of the Czech Republic and the former Czechoslovakia after the so-called Velvet Revolution of 1989. The adoption of the modern and comprehensive constitutional list of human rights was considered a matter of priority for the new democratic regime in Czechoslovakia. While the preparation of the new Constitution to replace the outdated Constitution of the Czechoslovak Socialist Republic of 1960, as amended by the Constitutional Act on the Czechoslovak Federation of 1968, was rather a complex issue, complicated mainly by disputes concerning the distribution of competences between the Federation and two national republics, the drafting and adoption of the Charter of Fundamental Rights and Freedoms appeared to be much less controversial. It was prepared during 1990, passed in the Federal Assembly and entered into force on 8 February 1991.

The Constitutional Act No. 23/1991 includes not only the text of the Charter but also some other (introductory) provisions. According to paragraph 2, "[i]nternational conventions on human rights and fundamental freedoms, ratified and promulgated by the Czech and Slovak Federal Republic, shall be generally binding on its territory and take precedence over statues." This is the very first constitutional clause on the incorporation of certain international treaties into the internal legal order.

At the same time, however, the substantive content of the Charter, i.e. the rights and freedoms, took inspiration from international human rights treaties, such as the International Covenant on Civil and Political Rights (1966), already binding on Czechoslovakia,[3] but also the European Convention on Human Rights (1950), at

[2] See the Declaration of the Presidency of the Czech National Council on the promulgation of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, No. 2/1993 Coll.

[3] Published under No. 120/1976 Coll.

that time not yet ratified.[4] Many rights and freedoms in the Charter closely correspond to provisions in human rights treaties. It is also possible to view the content of the Charter as a kind of adaptation of international obligations into a document of constitutional value.

With regard to the Charter itself, its Preamble refers, *inter alia*, to the recognition of inalienable natural rights of the human person, rights of citizens and the rule of law. The Charter is divided into six chapters. Chapter 1 (General Provisions) guarantees certain fundamental rights, in particular the principle of equality (Article 1), the general prohibition of discrimination (Article 3, para. 1) and the right of everyone to freely choose his/her national identity (Article 3, para. 2). The Charter next differentiates human rights and fundamental freedoms (Chapter 2), rights of national minorities (Chapter 3), economic, social and cultural rights (Chapter 4) and the right to judicial protection and other legal remedies (Chapter 5), the last chapter being reserved for final and interpretative provisions.[5]

Chapter 2, which lists the fundamental human rights and freedoms (Part 1), seems to be of special importance. Those rights are directly applicable, i.e. they are enforceable on the basis of the Charter itself, therefore differing from some other rights embodied in the Charter, enforceable only within the limits of laws (Sládeček et al. 2007, 38–39). They include e.g. the right to life (Article 6), the integrity of person (Article 7, para. 1), the right to freedom (Article 8), the protection of human dignity and private and family life (Article 10), the right to property (Article 11), the freedom of movement and residence (Article 14) and freedom of thought, conscience and religion (Article 15).

Part 2 of this chapter includes political rights, which are also considered to be directly applicable, e.g. freedom of expression and information (Article 17), the petition right (Article 18), rights of assembly and association (Articles 19 and 20) and the right to participate in government (Article 21).

Chapter 3 of the Charter provides for rights of citizens who belong to national and ethnic minorities, e.g. the right to enjoy their own culture, receive and impart information in their native language and to associate in national associations (Art. 25, para. 1), the right to education in their language and to use their own language in official relations (Art. 25, para. 2). According to the Commentary, some rights may be applicable directly on the basis of the Charter, some others only within the limits of ordinary laws (Ibid., 39). The extent and conditions for their implementation are laid down in Act No. 273/2001, on rights of persons belonging to national minorities.[6]

Chapter 4 includes, for example, the right to free choice of profession (Art. 26, para. 1), the right to associate freely for the protection of economic and social interests (Art. 27), the right to adequate material security in old age and during periods of

[4] The ECHR was ratified in 1992 and published under No. 209/1992 Coll.

[5] However, Article 43 provides, quite surprisingly, for asylum which may be granted to aliens persecuted for realization of political rights and freedoms.

[6] This Act also implements the obligations of the Czech Republic arising from the 1995 Framework Convention for the Protection of National Minorities, published under No. 96/1998 Coll.

work incapacity (Art. 30), the right to health protection (Art. 31), the right to education (Art. 33), the protection of the fruits of creative intellectual production (Art. 34, para. 1) and the right to environment and information about the status of environment (Art. 35). The rights embodied in this Chapter may be invoked only within the limits of implementing laws, as was pointed out in Article 41, para 1 of the Charter.[7]

The right to judicial protection embodied in Chapter 5 is of a very important nature. First, Article 36 provides for everyone's right to seek protection of his/her right before an independent and impartial court or another organ. The extent of judicial review is wide, in particular the fundamental rights and freedoms under the Charter must not be excluded from such review. Article 38 includes the right to a lawful judge and other guarantees of a fair trial. Other articles of this chapter lay down additional rules applicable in criminal proceedings. Although the conditions and details of procedural rights have to be regulated by law, most rights under Chapter 5 are considered as directly applicable in the case law of the Constitutional Court (Sládeček et al. 2007, 39).

Fundamental rights and freedoms fall under the protection of the Constitutional Court of the Czech Republic. This court was established under Article 83 of the Constitution as a judicial organ to ensure the protection of constitutionality. As such, it is separated from the general system of judiciary. It pursues the tradition of concentrated review of constitutionality, typical of European countries, developing the model set up by H. Kelsen and first realized in the Czechoslovak Constitution of1920. In the period 1939–1990, there was no Constitutional Court in the former Czechoslovakia. Although the Constitutional Act on Federation of 1968 provided for it, the implementing law was not passed. It was not until 1991 that the Constitutional Act No. 91/1991 on the Constitutional Court of the CSFR was adopted. Due to the dissolution of Czechoslovakia, the first and last Constitutional Court of the CSFR acted for only a short period between February and December 1992 (Ibid., 662–665).

According to Article 83 of the Constitution and on the basis of the implementing Act on the Constitutional Court,[8] the first Czech Constitutional Court was set up in July 1993. Under Article 84 of the Constitution, the Constitutional Court consists of 15 judges nominated for 10 years. They are nominated by the President of the Republic with the consent of the Senate, i.e. the upper chamber of the Parliament. The qualification criteria for a judge of the Constitutional Court are Czech citizenship, personal integrity, being of the age required for eligibility to the Senate (i.e. 40 years), university law education and at least 10 years' activity in any legal profession.

In terms of its competences, the Czech Constitutional Court has relatively large powers, including the abstract and concrete review of the constitutionality of laws or other legal acts, disputes concerning competences of state organs and organs of territorial self-government, the preliminary review of the constitutionality of an

[7] Cf. Filip (1997), Pavlíček (1995, 305–307).

[8] Act No. 82/1993 Coll., on the Constitutional Court.

international treaty under Article 10a and Article 49 of the Constitution (before its ratification), etc.

From the perspective of fundamental rights protection, however, the most important competence relates to constitutional complaints against final decisions and other interferences (actions or omissions) by public authorities with fundamental rights and freedoms guaranteed by the Constitution. The constitutional complaint is the most frequently invoked constitutional proceeding. Although the position was left unclear in the wording of the Constitution, the Act on the Constitutional Court recognized the standing of not only natural persons, but also of juridical persons. An applicant has to exhaust any remedies available in Czech law (including actions before general or administrative courts). Constitutional complaints may only be based on the alleged breach of "constitutionally guaranteed" rights and freedoms, i.e. those guaranteed by the constitutional order, namely the Charter of Fundamental Rights, the Constitution and other constitutional laws. In this context, human rights treaties have played a particular role (see below). On the contrary, a complaint cannot successfully invoke an infringement of "simple" rights guaranteed by regular law, unless it also amounts to a violation of constitutionally guaranteed rights and freedoms (Sládeček et al. 2007, 703–707).

It is worth noting that a constitutional complaint may be joined with a petition to declare null and void, wholly or partly, a law which is contrary to the constitutional order and which has, through its application, given rise to the event causing the complaint.

21.3 International Human Rights Treaties in the Czech Legal Order

The Constitution of the Czech Republic of 1992 (which entered into force as of January 1st, 1993) did not contain any reference to the concept of "international law" in general. This omission can be explained by the fact that the *travaux préparatoires* of the new draft constitution had to be accelerated due to the forthcoming dissolution of Czechoslovakia in autumn 1992, and that this legislative work obviously followed the model of the first Constitution of the Czechoslovak Republic of 1920. At the time of the "First Republic" (1918–1938), there were no constitutional rules on the relationship between international law and internal law. The case law of the highest judicial authorities at that time (the Supreme Court and the Supreme Administrative Court) was based on a strictly dualistic approach. This lacuna in the constitutional texts alongside the dualistic practice continued after World War II and during the period of the socialist Czechoslovakia from the 1940s to the end of the 1980s.

The Constitution of the Czech Republic of 1992 remains notably silent on the issue of international customary law, as well as obligations arising from unilateral acts and binding norms adopted by international organizations. Article 10 referred exclusively to one category of ratified and promulgated international treaties: human rights treaties. This situation was far from satisfactory.

However, the amendment to the Constitution adopted in October 2001 (effective from June 1st, 2002); the so-called "Euro-amendment"[9] brought some very important changes. First of all, the new Article 1(2) of the Constitution deals in general terms with the relationship between international law and internal law. It states as follows: "The Czech Republic respects obligations binding on it which arise from international law." At first glance, this provision seems to cover all international law regardless of its origin (custom, treaty or binding decisions of international organizations). On balance, this provision is of a purely declaratory nature. According to some commentaries, it does not even bring any change to the existing legal situation, because the obligation of the Czech Republic to respect its international obligation could be deduced from the constitutional concept of the state of law (rule of law).[10]

It is true that the Chamber of Deputies of the Parliament deleted from the Governmental project of Article 1(2) the important wording "rules of international law", when referring to customary international law and general principles of law, and left merely "international obligations". This concept is often linked with the content of treaty law in a broad meaning, not necessarily only the treaties subject to Articles 10, 10a and 49 (see below). However, the correct interpretation may lead to an intermediate, compromise solution. On the one hand, it is not doubted that Article 1(2) is declaratory and does not envisage the direct incorporation of general international law (customs, general principles, etc.) into the Czech internal legal order. Consequently, individuals and other internal subjects will not be able to directly invoke rights arising from customary law. On the other hand, obligations arising from international law (irrespective of the source) are binding on the Czech Republic, including its public authorities (e.g. the Government, the Parliament and the Constitutional Court). All state authorities are supposed to act in conformity with international obligations in their executive, law-making or even judicial activities, at least on the supreme level of the hierarchy of power (for example, governmental or judicial). Last but not the least, the placement of the provision on international law at the very beginning of the Constitution (its first Article) is also an interpretative guide. Therefore, all other constitutional norms should be interpreted in the light of this basic rule.

With regard to international treaties, until the 2001 amendment, the Constitution of 1992 only provided for the incorporation (direct effect) in the Czech law of treaties on human rights and fundamental freedoms. The former wording of Article 10 (valid until the end of May 2002) stated that "the ratified and promulgated international treaties on human rights and fundamental freedoms binding on the Czech Republic shall be directly applicable and have primacy over laws". However, the Constitution did not give any guidance concerning the internal status of other international treaties. The eminent position reserved for only one category of treaties due to their subject matter was introduced into the constitutional order for the first time in 1991 (by the constitutional act introducing the Charter of Fundamental Rights and Freedoms).[11]

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[9] See the Constitutional Act No. 395/2001 Coll.

[10] Cf. Filip (2001, 4).

[11] See the Constitutional Act No. 23/1991 Coll.

Similar provisions can only be found in the constitutions of the Slovak Republic (a legacy of the last Czechoslovak Constitution) and of Romania (where, however, other treaties are also covered by the constitutional provisions). The originality of Article 10 of the Czech Constitution, although taking a step forward in comparison with the previous situation (until 1990), has, during the last decade, created more and more problems of interpretation. Therefore, the insufficient regulation of the "international dimension" in the Czech Constitution was rightly criticized.[12]

Consequently, the abovementioned 2001 amendment to the Constitution provides a new, substantially modified version of Article 10. It states that "promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply". This is the most important constitutional change since the adoption of the Constitution of the independent Czech Republic. It represents a shift from the predominantly dualistic system to a predominantly monistic system. On balance, the international treaties under the new Article 10 will not have a supralegal (constitutional) force, unlike the treaties on human rights according to the old Article 10. The hierarchical position of certain treaties (standing above regular laws and on the level of constitutional laws) seems to have been replaced by the priority of application (so-called application hierarchy) of all duly ratified and promulgated international treaties should they depart from provisions in national laws. The new position of international treaties as a part of the Czech legal order applies not only to treaties ratified after June 1st, 2002, but to all international treaties ratified by the Parliament of the Czech Republic and even its predecessors, provided that the treaty is still binding. All courts, not just the Constitutional Court, have to apply international treaties, which form part of the legal order (under Article 10).

However, the amendment to the Constitution replaced the former category of treaties on human rights with the larger category of all treaties under Article 10 and therefore deleted the former treaties on human rights from the definition of constitutional order. On the basis of literal interpretation of the Constitution, the Constitutional Court would be prevented from using international human rights treaties as reference documents for the purpose of the review of constitutionality and possible derogation of laws.

Nevertheless, the ruling of the Constitutional Court, adopted a few weeks after the entry into force of the Euro-amendment of the Constitution,[13] declared a different view according to which "[t]he inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms… The guarantee of a general incorporation norm within the Constitution, and the rejection thereby of a dualistic concept of the relationship between international and domestic law, cannot be

[12] Cf. Malenovský (2000, 68–72).

[13] Constitutional Act No. 395/2001 Coll.

interpreted to mean that ratified and promulgated international agreements on human rights and fundamental freedoms are removed as a reference point for the purpose of the evaluation of domestic law by the Constitutional Court with derogative results. Therefore, the scope of the concept of constitutional order cannot be interpreted only with regard to Article 112 para 1 of the Constitution, but also in view of Article 1 para 2 of the Constitution and ratified and promulgated international agreements on human rights and fundamental freedoms must be included within it."[14]

Since the Constitutional Court did not change but rather confirmed this interpretation in other judgments, one can conclude that human rights treaties remain – along with the Constitution and the Charter of Fundamental Rights and Freedoms – a source of human rights directly applicable in Czech law and with a legal force prevailing over simple laws.

21.4 The Issue of the Opt-Out of the Czech Republic from the EU Charter of Fundamental Rights

The most recent catalogue of human rights arises for the Czech Republic, as a new member state of the European Union, from the EU Charter of Fundamental Rights. This document, adopted first in the form of a non-binding, political declaration in 2000,[15] has evolved into a legally binding text, by its inclusion in Article 6 para 1 of the Treaty on the European Union (TEU), as amended by the Lisbon Treaty. Once the Lisbon Treaty (2007) entered into force on 1st December 2009, the Charter of Fundamental Rights became a part of the primary law of the EU.

However, with regard to the Czech Republic, it is not so clear whether and to what extent the Charter produced the envisaged effect, i.e. new legally binding rights. Although the Czech diplomacy did not challenge any rights and principles embodied in the Charter, the issue of the so-called opt-out arose in the final stage of the ratification process. Of course, the Czech Republic was not involved in the drafting of the first version of the Charter adopted in 2000, as it was not, at the time, a member state. However, it did not raise any issues during the negotiation of the Lisbon Treaty, at which time the inclusion of the Charter, by way of reference in Article 6, was envisaged.

This issue was only brought to the table in autumn 2009 by the Czech President Vaclav Klaus as a condition for his signature of the instrument of ratification of the Lisbon Treaty. The timing was very important, because it was the last instrument of ratification required for the entry into force of the Lisbon Treaty.

Therefore, the Czech diplomacy tried its best in order to satisfy both President Klaus and all of the other member states. The only way out of the deadlock appeared

[14] Czech Constitutional Court, Judgment No. Pl. US 36/01, published under No. 403/2002 Coll.

[15] See doc. OJ 2000/C 364/01.

to be through the political decision of the European Council to include the words "Czech Republic" in the Protocol on implementation of the Charter of Fundamental Rights in Poland and the United Kingdom, annexed to the Lisbon Treaty.

Notwithstanding the formal legal value of this opt-out which still needs to be confirmed by the amendment of the Treaty on the next occasion (probably in the treaty on accession of Croatia to the EU or in another instrument), it is important to analyze the actual meaning of the Protocol in terms of the interpretation and application of rights, freedoms and principles in the Charter. In other words, are all or certain rights also binding for the Czech Republic?

Before answering this question, one should briefly analyze the EU Charter and the abovementioned Protocol. The Protocol is a short document annexed to the Treaty on the European Union, as amended by the Lisbon Treaty. It has the value of an international treaty. This implies that its interpretation should be governed by the rules on the interpretation of international treaties, codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969). According to Article 31, para. 1, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The context of the treaty comprises, in addition to the text, including its preamble and annexes, any agreement made between all the parties or any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. The Protocol on implementation of the Charter of Fundamental Rights in Poland and the United Kingdom meets these criteria and the Czech Republic sought the consent of other parties too.

What is the purpose of this Protocol? As appears in its preamble, "the Charter reaffirms the rights, freedoms and principles recognized in the Union and makes those rights more visible, but does not create new rights or principles". The contracting parties, "desirous of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom," have agreed on two provisions forming the Protocol annexed to the TEU and the Treaty on the Functioning of the European Union [OJ EU, C 306/156 (17.12.2007)].

The key provision of the Protocol, in particular from the viewpoint of the Czech President and his concerns regarding possible property claims against the Czech Republic from former Czechoslovak citizens related to World War II, is Article 1, para 1 of the Protocol: "[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms." The agreement reached at the European Council in October 2009 provides for the inclusion of the words "Czech Republic" after Poland and the UK.

This provision, however, reflects the fact that the Charter does not create new rights or competences for the EU institutions provided in the Treaties, i.e. today the TEU and TFEU (Article 51, para. 2 of the Charter). Therefore, the interpretative

assurance given to Poland, the UK and eventually to the Czech Republic cannot be questioned.

From the perspective of declared concerns motivating the Czech request for this opt-out, the most controversial and the least convincing reason seems to be the one behind the exclusion of social rights. According to Article 1, para 2 of the Protocol, “in particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law”. This provision was crucial for the UK as it concerns social rights embodied in Title IV (Solidarity), but it has nothing to do with protection of the Czech Republic against alleged restitution claims. Apparently, the Czech negotiators were only able to ensure the extension of the scope of the Protocol to the Czech Republic, without changing or modifying its content (i.e. it was an all or nothing scenario). Social rights in the Charter, particularly the limitation of their justiciability, were not the primary target but rather a kind of “collateral damage”, although the Czech President and Government probably did not regret this limitation. To be clear, this provision does not restrict social rights or exempt the above-mentioned states from obligations corresponding to those rights. It may only limit a progressive development of such rights by way of their judicial interpretation and application.

However, we should not overestimate the negative impact of this provision, at least for two reasons. Firstly, most social rights already arise from other international treaties, such as the European Social Charter (1961) and protocols thereto, or national legal documents, e.g. the Czech Charter of Fundamental Rights and Freedoms, and laws implementing EU law. Secondly, most social rights in Title IV have the nature of principles that do not have direct effect, i.e. they do not create justiciable rights above the limits set in national law.

Finally, Article 2 of the Protocol provides a confirmation of the interpretation according to the ordinary meaning of terms of the treaty: “To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom.”

It seems that this article only supports the ordinary interpretation which could be reached on the basis of Article 31 of the VCLT. Therefore this provision presents nothing more than a useful interpretative tool.

In order to evaluate the real importance of the so-called opt-out from the EU Charter of Fundamental Rights, it is necessary to analyze the Protocol in the light of the general (horizontal) provisions in Title VII of the Charter. As it is known, the Charter itself deals with its scope of application and relation to other international instruments.

Firstly, Article 51 of the Charter limits the scope of application of the Charter to the institutions of the Union and to the member states only in their implementation of Union law. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Under Article 52, para 2, the

rights recognized by this Charter, for which provision is made in the Treaties, shall be exercised under the conditions and within the limits defined by those Treaties.

Secondly, the drafters of the Charter found it necessary to avoid a risk of double standards of human rights in Europe and to ensure the coexistence of the Charter and the European Convention on Human Rights. In accordance with Article 52, para 3, the provisions of the Charter which correspond to rights guaranteed by the European Convention should be seen as having the same meaning and the same scope as interpreted by the European Court of Human Rights. In certain cases, however, the provisions of the Charter are recognized to possess a broader scope, as confirmed by the second sentence of Article 52, para. 3.

Thirdly, Article 52, as published in the modified version in December 2007, differs from the original version of 2000 to the extent that it includes new paragraphs of great importance for the interpretation of guaranteed rights and principles. Article 52, para 4 provides: "[i]nsofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions". According to Article 52, para 6 "full account shall be taken of national laws and practices as specified in this Charter".

Finally, the most important amendment to the Charter seems to be in Article 52, para 5, concerning the issue of direct effect (or the lack of direct effect) of certain provisions of the Charter. It reads as follows: "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."[16]

This provision was not originally a part of the Charter itself, but it was incorporated into this article during the negotiations of the so-called European Convention,[17] on the proposal of the UK delegation.[18] The statement appeared first in the Commentary of the Presidency of Convention, a kind of explanatory report to the original 2000 Charter, and was later re-drafted in the form of the current Article 52, para 5 of the Charter. It clearly differentiated between "rights" and "principles". According to this distinction, reflected also in Article 51, para. 1, rights shall be respected, whereas principles shall be observed.

[16] Syllová et al. (2010).

[17] The "Convention" was a consultative body consisting of experts from all member states, nominated by Governments, national parliaments, the European Parliament and the Commission, which drafted (between December 1999 and October 2000) the text of the Charter of Fundamental Rights. Cf. Charte des droits fondamentaux de l'Union européenne. Explications relatives au texte complet de la charte (2001, 5–6). The second so-called European Convention was set up in order to draft the Treaty establishing a Constitution for Europe; its Working Group II (2002–2003) agreed on the incorporation of the Charter and on certain adaptation being made to its general provisions. Cf. Alston and De Schutter (2005, 3–4), Syllová et al. (2010, 1150–1152).

[18] See doc. SN 2260/1/03 REV 1 (www.euroskop.cz).

In other words, the difference is rather that rights are given direct effect, whereas this is denied for principles. Principles can only be implemented through legislative or executive acts of the Union or member states when they implement Union law. On the basis of principles it is not possible to lodge direct actions against institutions of the Union or organs of the member states.

The above general provisions of the EU Charter may shed light on the actual meaning of the so-called Czech exception (i.e. accession to the Protocol on Poland and the UK) from all fundamental rights in general and from social rights (Title IV) in particular. First of all, and contrary to some discussions in the Czech media, nothing in the plain text of the Protocol seems to imply that the EU Charter of Fundamental Rights would not have a binding effect for the Czech Republic and its citizens. On the contrary, even before the entry into force of the Lisbon Treaty, the not yet legally binding Charter had important indirect effects in the sense that all organs and institutions of the EU evaluated all proposals of legislative acts against the standards of fundamental rights. In December 2009, the Charter became legally binding for all member states.

The situation of the Czech Republic would be the same as in case of Poland and the UK, although the reasons for the required opt-out were different. In particular, the UK was concerned about social rights, namely Article 28 (Right of collective bargaining and action). In any case, the conclusions of the analysis of the impact for the UK, elaborated already in 2008 by Committee on the EU of House of Lords, seems to be of relevance for the assessment of the so-called Czech opt-out.[19] This in-depth legal analysis, prepared on the basis of statements of the British Government and opinions of many experts (including judges, Law Lords, barristers, professors of international and EU law), brings a very realistic assessment of the impact of the Protocol.

First of all, according to this report, the Protocol is not an opt-out from the Charter. The Charter will apply in the UK although its interpretation may be influenced by terms of the Protocol (para. 5.87). The same should be true for the so-called Czech opt-out because it refers to the same wording of the Protocol. Moreover, it is difficult to imagine that other member states would agree to a stronger exception for the Czech Republic than that of the United Kingdom.

The report also supports the analysis that Article 1 para 2 of the Protocol comply with the distinction of "rights" and "principles". In addition, it is clarified that none of the provisions in Title IV represents a justiciable right. It seems to be unlikely that the Court of Justice of the EU would declare that Title IV of the Charter contained justiciable rights in respect of any member states, but the Protocol expressly excludes this interpretation in respect of states to which the Protocol applies.

The concerns about weakening the protection of social rights in the Czech Republic are not substantiated. Of course, such a development would be at odds

[19] The Select Committee on the European Union, The Treaty of Lisbon: an impact assessment (2008), at http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/6202.html

with the prevailing concept of the international protection of human rights, which is today based on the assumption that human rights are universal, indivisible and interdependent. Irrespective of nature or generation of human rights states are obliged to respect, fulfil and protect all human rights.[20]

The Protocol is more of an interpretative instrument than an opt-out. Moreover, the Czech Republic was and remains bound by the fundamental rights, including social rights, arising from the constitutional Charter of Fundamental Rights and Freedoms, many international treaties on human rights, as well as general principles of the EU law, without mentioning many national acts implementing directives and other sources of the EU.

There can be no doubt that interrelations between the constitutional, international and European protection of fundamental rights may sometimes be complicated, especially for a new member state, where all of the pillars of human rights have only recently been established or recognized. However, this problem can be overcome in practice, in particular through a cooperation and dialogue (instead of concurrence) between the Constitutional Court, the European Court of Human Rights and the Court of Justice of the EU

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[20] Cf. Nowak (2003, 48–50).

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Chapter 22
Multidimensional Protection of Universal Human Rights in Hungary

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22.1 International Approach

22.1.1 International Law Perspective

The core problem addressed by this paper is how the individual's inviolable and unalienable fundamental rights can be guaranteed in a globalised community, if we presume that a kind of "European and world democracy" may come into existence. In other words, how can the features of democracy, having developed within a national framework, be adapted to a post-state system of government? (Galgano 2006, 7, 9) It is necessary that mechanisms are available for legal defense in the case of any violation of a fundamental right for the legitimisation of international law and international public order.

According to Tomuschat, the international community has attained the positive international protection of human rights in three theoretical and historical stages. The first step is reaching a consensus with respect to the necessity of protection and the scope of the rights to be protected. The second stage is international codification, putting it into a treaty and national adoption. The third stage is establishing and operating a mechanism for the enforcement of rights. Even the universalist approach admits that whilst the first two steps have, by and large, been taken successfully, the third – and perhaps most important phase – has not yet been accomplished (Tomuschat 2003, 3). In addition, the system of international protection has to be treated as a dynamic system; it has to be continuously adjusted to the changing state of global reality (handling terrorism, crime, flow of data, environmental disasters, pandemics and crises).

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The system of protection may be criticized more harshly from a perhaps somewhat partialist and instrumentalist approach. Donelly pointed out that internationally recognised human rights create obligations for states, and international organisations call upon states to account for their fulfilment. If everybody has the right to *x*, in contemporary international practice it means: every state is authorized to and responsible for the application and protection of the right to *x* in its own territory. The Universal Declaration is the common standard of achievements for all peoples and nations – and for the states representing them. Covenants create obligations only for states and the international human rights obligations of states exist only in relation to persons falling under their jurisdiction. Although human rights legal norms have internationalized, their transposition has remained almost exclusively national. Contemporary international and regional human rights regimes are supervisory mechanisms monitoring the relationship between states and individuals. They are not alternatives to the essentially state concept of human (fundamental) rights. For example, in Europe (within the framework of the Council of Europe) the European Court of Human Rights (ECtHR) examines the relationship between states and citizens or residents on the basis of subsidiarity. The central role of states in contemporary international human rights structures is also indisputable with respect to the content of recognized rights. The most important participatory rights are typically (though not generally) limited to citizens. There are several obligations – e.g. in the area of education and social safety – which may be undertaken only with respect to residents and they apply to aliens only if they fall under the jurisdiction of the state. Foreign states do not have an internationally recognized human right obligation, for instance, to protect victims of torture in another country. They are not free to go beyond the means of persuasion in the case of foreign victims of torture. Contemporary norms of sovereignty prohibit states from applying means of coercion abroad against torture or any other human right violation (Donelly 2003, 34).

Naturally, it is true that the limitation of sovereignty, based on the prohibition of violence, has been complemented by the growing institutionalisation of international co-operation. The awareness of shared responsibility for the common interests of humankind has led to the formulation of the concept of international community. The protection of the individual – often against his own state – is at the centre of the co-operation. This is shown, for instance, in environmental protection or individual criminal responsibility at an international level. One of the main achievements of nineteenth century constitutionalism was the formulation of a set of uniform concepts with which individuals assess the state and states assess each other, and which is an approved standard in the international community. However, this type of universalisation of constitutional and human rights concepts also presents certain dangers at an international level. On the one hand, it is suitable for generalising partial political endeavours and interests enveloped in concepts. On the other hand, it is suitable for repressing the alternative ways of thinking about the community, rights and obligations, and democracy (Traisbach 2006, 9).

In regard to the international protection of human rights, the principle of complementarism should be emphasized, according to which it is primarily the state that is responsible for the protection of fundamental rights, but if it is incapable of or

unwilling to do it, the international community can take adequate steps in the interest of the protection of human rights.

22.1.2 National Law Perspective[1]

Among the sources of fundamental rights, one must mention international treaties relating to human rights recognized by the Republic of Hungary. The most important of these are the Universal Declaration of Human Rights (1948), the International Covenant of Civil and Political Rights (1966), the International Covenant of Economic, Social and Cultural Rights (1996), the Convention of Rome for the Protection of Human Rights and Fundamental Freedoms (ECHR 1950) and its Protocols, and the European Social Charter (1961). Human rights comprised in international treaties have been partly accepted and the promulgation of the above mentioned agreements guarantees that rules that have become part of national law should be applied by the administrative organs in Hungary.

Article 7(1) of the Constitution[2] provides that "The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law". This provision, at first sight, adopts a dualist approach towards international law. It is not unambiguous, however, as it does not declare the dualist approach explicitly, it is also silent about the possible solution of conflicts between international law and national law, about the problem of self-executing norms.

In regard to the 'harmonization' of domestic law, the question arising is which sources of international law should be taken into account when establishing

[1] Part 22.1.2 of this chapter is based on the manuscript written by Nóra Chronowski, Tímea Drinóczi, sent to Jan Wouters and André Nollkaemper and Erika de Wet. The edited version of the manuscript was published as Chronowski, N., Drinóczi, T. (2008) "A Triangular Relationship between Public International Law, EC Law and national law? The Case of Hungary", in: J. Wouters, A. Nollkaemper, E. de Wet (eds.), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States*, The Hague: T.M.C. Asser Press, 161–185.

[2] When the manuscript of this chapter was closed and submitted in 2011, the Hungarian Constitution in force was the Act XX of 1949, revised, *inter alia*, by Act XXXI of 1989. The latter amendment created a democratic constitutional order governed by the rule of law. After the 2010 parliamentary elections, the governing party alliance acquired the two-thirds majority of mandates in the National Assembly and announced the creation of a new constitution. This new constitution – the Fundamental Law of Hungary – came into force 1 January 2012. However, it contains more or less the same rules concerning the rank of international law in the Hungarian legal system. Article Q of the Fundamental Law provides that "Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law. Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation." Moreover, the Hungarian Constitutional Court is willing to apply its former case law and recall the previous rationale if the formulation of text in the Fundamental Law is the same as the wording of the former Constitution was. See 22/2012 (V. 11.) AB határozat (CC decision).

Hungary's 'international obligations'. The main sources are international treaties and general principles of international law, which involve customary international law, *jus cogens* and general principles of law (Bruhács 1998, 79–82; Bokorné Szegő 2003, 33–43; Quoc Dinh et al. 2003, 71). In light of the case law of the Constitutional Court,[3] the notion of 'general principles of international law', as it appears in the Constitution, should be taken to refer to customary international law and international *jus cogens*.[4] According to the Constitutional Court, the fact that the enforcement of an obligation undertaken at the international level appears as a constitutional obligation[5] means that the Constitution and domestic law should be interpreted so as to make the principles of international law prevail. Thus, in order to make Article 7 prevail, the Constitution, international legal obligations and domestic law should be interpreted together and in view of their correlation with one another.[6] More precisely, this obligation of interpretation means that the provisions of the Constitution and domestic law should be construed so that the general principles of international law can prevail.[7]

Since generally recognized principles of international law qualify as part of domestic law, their application in domestic law requires an automatic or general adoption (Bragyova 1997, 16; Zagrebelsky 1987, 120). This is justified by the view represented in legal literature, according to which the generally recognized principles of international law cannot be transformed but only adopted (Bodnár 1996, 23). Furthermore, a comparative analysis of more detailed provisions of a few other European constitutions with Article 7(1) leads to a similar conclusion.[8]

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[3] Because the Constitutional Court (CC) fails to use international legal terminology, it is difficult to construe from the resolution what the Court denoted under the general principles of international law. See 53/1993 (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 329.

[4] For a contrasting opinion see Bokorné Szegő (2003, 50). In her opinion the constitutions, since they refer to general principles of international law, leave open the question of whether they refer to customary international law, jus cogens, or both.

[5] For a similar view in Italian legal literature see Zagrebelsky (1987, 120).

[6] 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993, 323, 327.

[7] In the case examined in the resolution, according to Constitutional Court (CC), Article 57(4) and Article 7(1) of the Constitution should be interpreted with regard to each other. 53/1993. (X. 13.) AB határozat, (CC decision), ABH 1993. 323, 327.

[8] The expression 'generally recognized principles' of international law is applied, for instance, by the German Basic Law (Article 25) when it states that the general principles of international public law are part of the federal law and as such they have primacy and will directly entail rights and obligations for the inhabitants of the federal territory. Under Article 9 of the Austrian Federal Constitution, the generally recognized principles of international law form part of the federal law in effect. Pursuant to the Greek Constitution, the generally recognized principles of international law take priority over contradictory legal provisions. Article 8 (1) of the Portuguese Constitution states that general and common law principles of international law constitute part of Portuguese law. By virtue of Article 10 of the Italian Constitution, "the Italian law and order aligns with the generally recognized principles of international law." The conclusion we can draw from these formulations is the absolute priority of the general principles of international law over domestic law. However, Article 29(3) of the Irish Constitution also recognizes the generally recognized principles of international law, but adopts them just as principles of conduct against other countries.

A further question of who may interpret these international norms may arise, as they must be applied according to their international law content (Bragyova 1997, 19). However, this question is not problematic as the principles of international law introduced into national law in this manner must be enforced within the Hungarian legal system, and such enforcement is clearly the task of national courts. Thus, the courts should arguably apply the general rules of international law in light of the facts of the case, as specified by international law. However, in practice, customary international law does not have a role in the case law of Hungarian courts and even international treaties are rarely applied.

Hungary takes a dualist approach when considering international treaties and domestic law, because of its requirement to assure harmony.[9] The method applied for the transformation of international treaties into domestic law is the special adoption or transfer that is in practice applied in the case of self-executing international treaties. The other method is the special regular transfer, special in that it is done through execution, and regular, because the generally used (legislative) procedure must be applied. In the case of a non-self executing norm, legislators are thus required to create the executive rules needed – rules creating new organs and verifying authority of duty or procedure (Zagrebelsky 1987, 124; Bodnár 1996, 24; Bruhács 1998, 87).

In relation to the rank of provisions enacting international treaties in the hierarchy of norms, the first question is whether the international treaty enacted can affect the provisions of the Constitution. The answer is negative due to the Constitutional Court's competence to carry out an *ex ante* review of the constitutionality of provisions of international treaties.[10] If the Constitutional Court declares the unconstitutionality of an international treaty, it cannot be ratified until the unconstitutionality is repaired. The treaty enacted cannot have an effect on the Constitution because the Constitution requires two-thirds of the votes of Members of Parliament for its amendment. Thus the Constitution cannot be subject to an implied constitutional amendment. However, repairing the unconstitutionality may in some cases take a long time, since an international treaty may be bilateral or multilateral and its amendment will require the approval of all contracting parties. Because of this, an appropriate constitutional amendment may be needed.[11]

The primacy of international treaties in the hierarchy of legal sources is specified under Act CLI of 2011 on the Constitutional Court (CC Act). By virtue of the CC Act, it is up to the Constitutional Court to examine a conflict between national law and international treaties.[12] Article 42 of the CC Act expresses the legislature's will that domestic law should be examined with regard to its conformity with an international treaty and that if the former does not comply with the provision promulgating

[9] According to Németh (1997, 107), Article 7(1) is essentially dualist in character. A legal system which does not take a stand on the legal status of international legal norms explicitly is necessarily dualist Bragyova (1997, 15).

[10] Article 23(3) of the Act on the Constitutional Court.

[11] Cf. 4/1997 (22. 01.) AB határozat, (CC decision), ABH 1997.41.

[12] Article 32(1) of the Act on the Constitutional Court.

the international treaty, it must be revoked as unconstitutional. This means that the international treaty enacted in an act or government decree is superior to other acts/decrees, other legal provisions and other legal instruments of state administration. The principle of *lex posteriori* will therefore not prevail here. From this follows the absolute primacy of international treaties, which is simultaneously strengthened and weakened by the following provisions regarding the competences of the Constitutional Court. If an act enacting an international treaty conflicts with a legal norm of a higher level,[13] the Constitutional Court, pursuant to the CC Act, is not entitled to annul the former or the latter provision, but it will call upon the domestic organ that concluded the treaty or the domestic legislative organ to resolve the contradiction.[14] This is a carefully crafted solution that shows the intention to preserve the hierarchy of legal norms in the domestic legal system.

In summary, it must be noted that international treaties containing a general obligatory rule of conduct should be enacted in a provision corresponding to their content. In this way, they will be placed below the Constitution, and neither a provision of a lower level nor a subsequent provision of the same level may contradict them. Further, a provision of a higher level, except for the Constitution itself, may not be contradictory to a promulgating provision.[15] Any contradiction that may arise should be resolved not by the repeal of the higher-level provision but through the amendment of the international treaty or amendment of the higher-level provision itself. The latter solution is more frequent in practice.

22.2 Regional Protection Level

The Republic of Hungary is a member of the Council of Europe and the European Union. It follows from this that the legal documents of both regional organisations (European Convention on Human Rights, Charter of Fundamental Rights of the EU), and the judicial practice based on them have a binding force.

In regard to Hungary, the current challenge is also the reinforcement of the protection of fundamental human rights in the European Union. The core of the issue is how the two regional supranational mechanisms of the protection of fundamental rights can be harmonized following the entry into force of the Lisbon Treaty amending the founding treaties of the Union.

The directions of the development of the protection of fundamental rights in the Union were mainly already shown in the process of creating the constitution of the Union.[16] Working Group II[17] of the European Convention looked into two areas of

[13] E.g., a treaty published in a decree of the Government and conflicting with an Act of Parliament.

[14] Cf. Article 42(1) and (2) of the Act on the Constitutional Court.

[15] E.g., the promulgating provision is a governmental decree. If it contradicts an Act of Parliament, the procedure is followed according to the Act on the Constitutional Court mentioned above.

[16] On the basis of the mandate and the immediate antecedents see Szalayné Sándor (2003a, 10).

[17] CONV 354/02 Final Report of Working Group II. Brussels, 22nd October 2002.

research (which have already been indicated by legal scholars several times elsewhere). These two areas were as follows: on the one hand, giving binding force to the EU Charter of Fundamental Rights by incorporating it into the Treaty establishing a Constitution for Europe, on the other hand, the possibility of the accession of the Union to the ECHR. In addition, Working Group II dealt with the complementary issue of the possible activity of the European Court of Justice in the area of the protection of the fundamental rights of individuals. The Lisbon Treaty built these achievements into the Treaty on European Union (Article 6) and ensured the binding force of the Charter of Fundamental Rights of the European Union (CFR) (Frenz 2009, 45).

The Treaty on European Union, as amended by the Treaty of Lisbon, stipulates the authorization enabling the accession of the Union to the ECHR. Since each member state of the Union is a party to the ECHR, accession seems to be the most obvious solution to the issue of the improvement of the protection of fundamental rights. However, some obstacles arise, though they might be overcome. The accession itself is a political issue, the implementation of which falls under the competence of the European Council and this requires unanimity in respect of conditions and reservations. The accession also required the amendment of the ECHR itself because under its original provisions only states could accede to it. At the time of the adoption of the ECHR there was no prospect of the participation of any supranational organisation. The ECHR was amended by the 14th Protocol that entered into force 1 June 2010, and now its Article 59(2) makes it clear that "[t]he European Union may accede to this Convention". However, the authorizations in the EU Treaty and in the ECHR are just starting points, because a separate accession treaty is needed for the accession of the Union and that is followed by the ratification procedure of all of the EU members and contracting parties of the ECHR.

There were and are several political and legal arguments for adopting the ECHR. (1) The Union, which expresses its fundamental value system through the CFR, could politically verify the coherence between the CFR and the European system of the protection of rights perceived in a broader sense by the accession. (2) Individuals would enjoy the same level of protection against the acts of the Union as against the acts of the member states, which is especially justified by the fact that member states have transferred several powers to the Union. (3) The accession might establish harmony between the case law of Strasbourg and Luxembourg in the area of fundamental rights. This would not mean the violation of the autonomy of Union law or that of the competence of the European Court of Justice (ECJ), neither would it entail the creation of a hierarchical relationship between the courts because the ECJ would remain the highest judicial forum of the Union legal order, whilst the European Court of Human Rights, as a special court, would exercise a kind of external control over the fulfilment of the Union's obligations stemming from the ECHR. Thus the relationship of Strasbourg with Luxembourg could be the same as it is now with the constitutional courts and the supreme courts of the member states. However, when examining the relationship of the judicial forums to each other, the issue of the hierarchical relationship between the ECJ and the ECtHR cannot be excluded, since if Union citizens are not granted the adequate legal protection sought by them in the course of the ECJ proceedings – similar to the present situation where they are

not granted adequate legal protection by their member states – nothing will prevent them from turning to Strasbourg for legal remedy by referring to the European Convention on Human Rights. As the Union would be bound by the European Convention on Human Rights, the interpretation provided by the ECtHR would also be binding on it. All this would result in the primacy of the judicial practice of the ECtHR in fundamental rights matters over the judicial practice of the ECJ in similar matters, thus a process of unification might be predicted in the European protection of fundamental rights. This homogenisation would naturally result in positive consequences with respect to the protection of fundamental rights; however, it would eliminate the phenomenon which might best be called "integration sensitivity", which has always characterized the practice of the ECJ. When interpreting fundamental rights, the ECtHR could not take into consideration the current objectives of the Union, its structure (which – as it can be seen – is of great importance in the practice of the ECJ), and the level of integration since, concerning fundamental rights, it has to apply the same standards in respect of the Union and the other states parties to the European Convention on Human Rights. Nevertheless, all these issues can be resolved by the provision of the CFR referring to the harmony of interpretation,[18] under which only positive deviations may be made from the requirement of the same content and scope of fundamental rights: on condition the Union acquis guarantees a higher level of protection. (4) In addition to the direct connection, it will be possible for the Union to be a party in proceedings before the ECtHR in matters indirectly connected to Union law, i.e. in matters concerning the fulfilment of the Union obligations of member states (Arnold 2008, 37).

There are two possible practical and technical drawbacks to opening the forum in Strasbourg: the increase in the duration of the proceedings and in the caseload of the ECtHR. The court in Strasbourg is definitely approaching the verge of its capacity after the creation of the possibility of legal remedy for the citizens of the former socialist countries following the fall of the Iron Curtain. The possibility of referring Union proceedings to the ECtHR would make this situation even more difficult. Contrary to all this and considering the distinguished past of the ECtHR with respect to the protection and interpretation of fundamental rights, Strasbourg could significantly contribute to the Union's system of the protection of fundamental rights and could make it part of the broader mechanism of the protection of fundamental rights in Europe (Lock 2010, 778).

Ensuring the legally binding force of the CFR does not require any changes in respect of the division of competencies between the Union and its member states. This follows, on the one hand, from the guarantees pertaining to the scope of application stipulated in Article 51 of the CFR, and on the other hand, from the statement of the European Court of Justice holding that the protection of fundamental rights guaranteed by the Union cannot have the effect of extending the scope of the

[18] Articles 52 (3) and 53 of the Charter.

competencies stipulated in the Founding Treaties.[19] These requirements do not contradict the fact that certain fundamental rights laid down in the CFR pertain to areas over which the Union has no competence, since institutions acting with limited powers must respect the whole range of fundamental rights in the course of all their activities and acts. At the same time, lack of competence makes it doubtful as to what extent the institutions of the Union will be able to enforce the fundamental rights declared by the CFR (Pernice and Kanitz 2004, 18). The CFR goes to great lengths to take into consideration subsidiarity when making several references to the laws and practices of member states, addressing its provisions to the institutions and bodies of the Union as well as to the member states (however, only when the latter implement Union law). Nonetheless, it should be noted that the case law of the European Court of Justice, inspired by the constitutional traditions of the member states, has been built into the CFR; thus there are no substantial differences between this instrument and the constitutions of the member states (Blutman 2001, 38, Blutman 2010, 479).

It can be claimed that ensuring the binding force of the Charter and the accession to the ECHR are not alternatives, but rather they are complementary mechanisms which together make the system of the protection of fundamental rights complete at the Union level and make it more integrated at the European level. The accession does not have an impact on the division of competences between the Union and its member states; it would not mean the extension of Union competences and would not change the relationship of the member states to the ECHR either, since these are stipulated in special provisions of Article 6(2) of EU Treaty (Szalayné Sándor 2003b, 253–254). The Union will not become a member of the Council of Europe nor will it become a political actor of the system as it would only be party to the ECHR and only in respect of its limited competences. The representative by the Union to the court in Strasbourg (and to other control bodies of the ECHR) ensures the expertise required in cases involving issues of Union law. Under Protocol (8) of the Lisbon Treaty, special rules of participation have to be laid down in a separate agreement (Calewaert 2009, 783).

22.3 National Approach

22.3.1 Introduction

The change of regime taking place in 1989 resulted in a definitive modification in the relationship between the state and individual. The Constitution drafted at that time – although it has been modified on several occasions since then – is qualified

[19] C-249/96. *Grant v. South-West Trains Ltd.* [1998] ECR I-621, 45.

as a new fundamental law – in regard to its content.[20] According to the statement of the Constitutional Court, the modification of the Constitution proclaimed on 23rd October 1989[21] resulted in the coming into force of a practically new Constitution that has initiated a totally different and new quality of state, law and political system by settling that "the Republic of Hungary is an independent and democratic constitutional state".[22] Although in a formal sense – as a consequence of the characteristics of the constitutionalization of 1989 – the basic law still beared the mark of Act XX of 1949, the Constitution was the basic law of a democratic constitutional state that corresponds to the classical principles and values having evolved through the European democratic constitutional development.[23] The innate, inviolable and inalienable fundamental rights of the human have been recognized and guaranteed, their prevalence is safeguarded by new institutions – the Constitutional Court and parliamentary commissioners – and by the impartial functioning of jurisdiction devoid of any political influence.

Thus, in the Republic of Hungary, since the change of the regime, human rights have been regulated by taking the values of democratic constitutional statehood into consideration. Constitutional statehood – which in Hungary, according to the Constitutional Court, is a fact-finding mission and a program at the same time[24] – comprises in its basic values the defining of the relationship between nationals and the state authority, the guarantee of nationals' rights and freedom, the overall assurance of legal remedy and the development of legal security through the acceptance of the salient role of legal regulation. Due to the change in political systems, the characteristics of socialist constitutionalism have ceased to exist. Even though in socialist constitutions civic rights were settled by basic laws and

[20] In Hungary in 1989, the drafting of the new Constitution, as a result of the transition, was formally the amendment of the Constitution existing that time, and this was the Act XX of 1949. This amended Constitution – according to its preamble – was an interim constitution that was ascertained by the Parliament until the creation of a brand new constitution. Although the interim Constitution was modified by the Parliament several times during its lifespan, the drafting of a new constitution – except of some attempts – lagged behind for 20 years. Substantively, however, the 1989 amendment created a totally new constitution. The case law of the Constitutional Court developed a democratic constitutional culture on the basis of this text. As it has already been mentioned (see note 2), a constitution-making process started in 2010, the new Fundamental Law was adopted in April 2011, and it came into force 1 January 2012. The fundamental rights chapter was updated and some new rights have appeared as some achievements of the EU Charter were utilised. However, the collectivist approach of the Fundamental Law, the single ombudsman system and the exceptions to the norm-annulment power of the Constitutional Court may reduce the level of fundamental rights protection in Hungary.

As the manuscript of this chapter was submitted in February 2011, when the draft of the new constitution was still unknown, the analysis takes place on the basis of the former Constitution in part 22.3.

[21] See Act XXI of 1989 on the modification of the Constitution.

[22] 11/1992 CC decision. ABH 1992. 77 (80).

[23] On constitutional values see Ádám (1998, 33–88).

[24] ABH 1992. 77 (80).

their significance was also stressed, the practice of these rights was declared to be inseparable from the fulfilment of civic obligations, which means their enforcement depended on these conditions. Besides this, certain rights, especially genuine political freedoms, could either not be practiced at all – like the right to free establishment of parties or democratic suffrage providing competition for public power – or else they could "prevail" in a restricted form, under state control and supervision, like the freedom of association, assembly or expression.

The provisions of the Constitution relating to fundamental rights denote normative definitions. The norms of basic law are unambiguously material legal regulations which on the one hand, provide subjective rights – authority – for the individual (and the community) while on the other hand, denote the basic elements of the objective legal order of the constitutional system: they restrict and moderate state power and the degree of state encroachment. Due to the characteristics of basic law these norms can naturally bear different contents and functions depending on whether they denote freedom, participation in the creation of a political will or a demand relating to a service provided by the state and so on. An extremely important characteristic of the effective basic law is that it also comprises norms of guarantee, which draft the institutional obligation of state guarantee in respect of basic rights and set up well-defined requirements for the exercise of state functions regarding the tasks of state organs. This scope contains first of all the provisions of basic law prescribing the guarantee-elements of the system, safeguarding rights. Since the guarantee of human rights is the duty of the state, the prevalence of fundamental rights thus partly presumes the existence of state authority. State authority is partly inclined to self-restriction, which means that the possibility that the government in power could discretionally safeguard or limit rights has ceased to exist.

In respect of several fundamental rights, their constitutional regulation is restricted to provisions of a general and declarative nature. Thus, in order to safeguard the prevalence of fundamental rights, their regulation on a sub-constitutional level is also indispensable. Basic law itself disposes of the requirements relating to sub-constitutional regulation. In accordance with this, in the Republic of Hungary, the rules concerning fundamental rights and obligations are enforced by statutes; however the essential content of fundamental rights cannot be restricted. On the basis of the provision of the Constitution the following obvious conclusion can be drawn: in the Republic of Hungary fundamental rights and obligations can exclusively be regulated by laws, and consequently the right of detailed regulation belongs to the parliament. The second part of the provision, however, draws up the restriction of the restriction with a general force, by stating that the essential content of fundamental rights cannot be restricted by Acts of Parliament. Namely, legal regulations necessarily comprise the restriction of fundamental rights to a certain extent; nevertheless this restriction must not deplete the essential content of fundamental rights. The recognition of the essential content, due to its specific character and to the complexity and the correlation of certain fundamental rights, can naturally cause difficulties for the legislators. Deciding whether the essential content of the fundamental right has been verified by the legislator in a constitutional manner falls within the authority of the Constitutional Court.

As a consequence of the constitutional regulation of fundamental rights – since due to their extent, function and influential force they are differentiated and require frequent interpretation – in the Republic of Hungary the decisions of the Constitutional Court are also significant sources of fundamental rights. The catalogue of fundamental rights comprised in the Constitution is not regarded as a closed system by the Constitutional Court, since, through the interpretation of fundamental rights, the aspects of rights declared in the basic law referring to the given state of affairs are also explored. As a result, in respect of certain fundamental rights the category of *"maternal rights"* has been institutionalized: alluding to – mostly named – fundamental rights from which further rights can be deduced (Kilényi 1995, 44). With respect to revealing the content of fundamental rights and as to the extent of restriction, the Constitutional Court has enriched Hungarian constitutional law with significant doctrines. In relation to the restriction of fundamental rights, the so-called test of necessity and proportionality has been created, according to which, in a democratic society, a constitutional restriction is justified in order to defend another constitutional right if such a restriction is the only and adequate means of achieving such an objective. The objective obligation of the state for the defense of institutions is determined by the Constitutional Court as follows: the responsibility of the state is not confined to abstaining from the violation of rights but the conditions and institutions required for their effectiveness must also be developed. Objective legal defense is more wide-ranging than the concrete defense of a subjective right, since it exists even if no individual subjective right can be deduced from the fundamental right. The constitutional defense of fundamental rights is provided by both subjective and objective legal defense (Holló 1997, 167; Balogh 1999, 35). Thus, the practice of the Constitutional Court has partly tended towards the enrichment of the content of certain fundamental rights and has partly completed the catalogue of fundamental rights through the creation of independent fundamental rights.

22.3.2 The System of Legal Defense to Guarantee the Status of the Individual

In several of its provisions the Hungarian Constitution recognizes the issue of legal defense – in terms of both the fundamental right to defense, and the state duties connected to it. The regulations listed within the scope of fundamental rights will further be emphasized as well as the provisions of basic law which regulate state duties concerning legal remedy and control the system of institutions and forums will be referred to.

22.3.2.1 Legal Defense as a Fundamental Right

According to the Constitution the following right is regarded as fundamental: Everyone shall have the right to a fair hearing in a lawsuit by an independent and impartial court of law established by statute which shall decide, honestly, publicly,

within a reasonable time, on his rights and obligations, as well as on any criminal charges against him. This fundamental right puts the state under the obligation to provide a suitable judicial process in the field mentioned. This is not an unrestricted subjective right, but a general means for the state to legally safeguard the rights of citizens, since no statute can restrict its essential content. The right to judicial legal remedy must be interpreted in two contexts: on the one hand, as the right to turn to the court, which – in well-defined cases – makes it possible to take advantage of judicial legal remedy.[25] According to this, everyone has the right to a fair hearing in a lawsuit by an independent and impartial court of law, in the course of an honest procedure and within a reasonable period of time. On the other hand, this fundamental right – as an extremely significant guarantee of legal defense – also includes the provision that only judicial bodies can determine guilt.

The right to legal remedy is a fundamental right regulated by international agreements and guaranteed in the Constitution. From the right to judicial protection, it follows that legal remedy can be supplied; since there is no guarantee that the result of the judicial procedure will be right in every case. The right to legal remedy expresses the requirement that the judicial-sentencing branch of law should exercise its power in correlation with its function and the authority deriving from the separation of powers: if the judicial decision proves not to correspond to these provisions, then a legal remedy may be provided to guarantee the right of judicial protection. Nevertheless, the right to legal remedy is safeguarded "as stated in the Constitution" by the constitutional provision which is a reference to different ways of regulation, that is, in different procedures different forms of legal remedy can be applied.[26] The right to legal remedy – as a subjective right – denotes that the initiation of the procedure for legal remedy depends on the will of the person affected by the case: the initiation depends on his or her own decision, but also on the absence of initiation and the acceptance of the ruling of the court. The precise rules of the claim and the exercise of legal remedy are comprised in the acts of procedure.

22.3.2.2 Legal Protection as a State Duty

Legal protection – as a state function – in the Republic of Hungary can be exclusively practiced by courts of law. Nevertheless, this provision does not mean that no other organs can take part in jurisdiction, in some cases they cannot even be disregarded – but judicial activity – as a special manifestation of the application of law – is the duty of the courts, which is determined by the Constitution as follows: "[t]he law courts of the Republic of Hungary shall safeguard and provide the constitutional order, the rights and legal interests of nationals, they shall punish those who commit a

[25] The constitutional right of the party to a legal dispute to take his case before the court – similarly to other human rights – also includes his right not to utilize this right. ABH 1992, 59 (67).

[26] ABH 1992. 27 (31).

crime and control the lawfulness of administrative resolutions."[27] Thus courts of law decide definitively on whether a right has been infringed and during legal application they safeguard the effectiveness of provisions. The principle of the generality of jurisdiction is expressed in the statutory provision that the ruling of the court is binding for all.[28] The binding force of court decisions becomes effective, even if the court verifies its authority or lack of authority in a case. In this way, the law excludes the possibility that other organs could review the final decision of the court.

The Constitution assigns the public prosecutor's office an important role in the provision of legal defense. Consequently, the public prosecutor's office becomes an important aspect of legal protection: it promotes provisions to be complied with by state organs, by organs applying law outside the court, and by all of the organizations of society and by nationals.

The ombudsman of civic rights has a significant role in the network of legal protection established by the Constitution. The duty of the ombudsman of civic rights is to investigate actions of maladministration concerning constitutional rights that come to his knowledge, or to have them investigated and to initiate general or individual arrangements to remedy them. As a consequence of this, recourse to the ombudsman is an effective means of guaranteeing constitutional rights and maintaining the position of parliament over the administration.

Last but not at least, one must mention the Hungarian Constitutional Court as one of the most important elements of the system of legal defense. Although, according to the basic law, the duty of the Constitutional Court is only to review constitutionality of provisions and, in the case of unconstitutionality, to nullify acts and other provisions, there is a reference to the fact that at the same time the Constitutional Court will administer the duties delegated to its authority by laws.[29] From among the fairly wide sphere of authority of the Constitutional Court, the most significant rights with regard to legal defense should be stressed: subsequent norm control, constitutional complaints and the infringement of the Constitution through legislative

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[27] Const. Art. 51. (1) and (2).

The new Fundamental Law in Article 25(2) provides that Courts shall decide on criminal matters, civil disputes, other matters defined by laws, the legitimacy of administrative decisions, and the conflicts of local ordinances with other legislation.

[28] The courts thus, whilst deciding on individual cases restore the completeness of law. Their rulings are definitive and binding for all – i.e. the natural and legal persons as well as state organs.

[29] Constitution Art. 32/A (1) and (2). However, in November 2010, the power of the Constitutional Court was significantly restricted by an amendment to the Constitution. Pursuant to the amendment, the Constitutional Court shall not review constitutionality or annul the laws on state budget, taxes, customs, fiscal charges, conditions of local taxes, except if these laws infringe the right to life and human dignity, the right to personal data, the freedom of conscience and religion and the rights connected to citizenship. Due to this restriction, the Constitutional Court cannot give effective protection regarding, for example, the fundamental right to property, the right to social security, the freedom of enterprise; despite the fact that laws on public finances can potentially limit the economic and social rights.

The new Fundamental Law has maintained this restriction, thus the Constitutional Court is not able to guarantee effective remedy against infringement of individual rights by fiscal laws.

omission.[30] The procedure of the Constitutional Court – in cases laid down by law – can be initiated by anyone. Therefore it is an appropriate, determinative institution of individual legal defense.

22.3.3 The Development of National Regulation and Practice

After the review of constitutional regulations concerning the relationship between an individual and the state, one must note that some provisions could be improved.

The amplification of the catalogue of fundamental rights of the Constitution seems to be necessary. Although, during the reform of the Constitution in 1989, there was an effort to take international documents into consideration when defining fundamental rights, the Hungarian Constitution still lacks some basic rights which can be found in international documents. [31] These rights should be named in the basic law.[32] In order to make the content and limits of certain fundamental rights more precise, the findings of the Constitutional Court, generalized in the course of its practice, should be utilized and, in this way, certain basic rights could be drafted more precisely, increasing their normativity.[33]

In order to make the system of legal defense perfect, the provision of the Constitution, according to which claims deriving from the infringement of fundamental rights and complaints against state decisions in connection with the fulfilment of obligations could be enforced before the court, must be provided with a subsidiary character, both in civil proceedings (in its broad understanding) and in administrative actions (regardless of whether legal enforcement could be exercized under the general procedural rules or not). Due to the reform of the system of legal defense (sought to provide wider possibilities for people to turn to court) it seems to be reasonable to

[30] The scope of authority of the Constitutional Court also covers preliminary norm control, the review of whether provisions and other legal means of state direction coincide with international agreements, quashing the conflict of authority between state organs, between self-governments and other state organs and between self-governments and also the interpretation of the provisions of the Constitution. Further areas of authority can be established by laws.

[31] E.g. the rights of elderly, the rights of persons with disabilities, protection in the event of unjustified dismissal, right to marry, right to reconcile family and professional life, prohibition of death penalty.

[32] For instance the Constitution states in the case of persons suspected of having committed a crime and arrested, they must be brought to trial or released within the shortest time possible. However this right is not provided for minors deprived of freedom, the mentally handicapped, people having contagious diseases, alcoholics, drug-addicts, homeless persons and in the case of foreigners unlawfully residing in the territory of the country. Some other procedural rights of people suspected of having committed a crime are also lacking, e.g.: the right of the needy to a free defender appointed officially.

[33] However, the constitution-making process started in 2010 does not seem to follow this advice. The definition of the rights appeared in concise sentences in the concept of the new Constitution and the text of articles on certain fundamental rights in the new Constitution presumably will not contain more details and better guarantees than the present constitutional rules.

modernize the law of procedure and establish the administrative court, as a distinct court.[34] The rules for the election of constitutional judges and ombudsmen should be amended, because the present situation – whereby people holding these offices are elected by parliament – makes the enforcement of political viewpoints possible, which often leads to delays in filling the position. [35]

The relationship between the individual and the state was considerably modified by Hungary's accession to the European Union, especially concerning the enforcement of fundamental rights.

The 'preparedness' of the Hungarian system of fundamental rights can be taken into consideration from two points of view in connection with the EU membership of Hungary. On the one hand, respect for the principles included in Article 2 of Treaty on European Union and respect for human rights and fundamental liberties are the requirements of membership. In practice, this requires harmony between the European system of protection of human rights and the Hungarian system of fundamental rights. Hungary made important progress towards achieving this harmony through the promulgation and application of conventions that make up the pillars of the human rights system of the EU.[36] Despite certain deficiencies, the integration of human rights in Hungary can be regarded as successful.[37] On the other hand, we have to emphasize that the constitutional traditions of Hungary, as a member state, will inspire the protection of fundamental rights in the Union, as it is stated in Article 6(3) of the Treaty on European Union.

However, the Hungarian system of protection of fundamental rights and other constitutional traditions – in a narrow and positive sense – have only had a small period of time (approximately 20 years) to be ingrained, although they are enriched by the interpretation of the practice of the Constitutional Court and the Ombudsman (Parliamentary Commissioner). This is why the dogmatic and practical statement of the Hungarian standard of protection of fundamental rights is extremely important,

[34] We must note that the concept of the new Constitution in 2010 contains the establishment of the separate administrative court system.

[35] This situation could be changed by the stronger enforcement of professional points of view and with the amendment of nomination and election rules. However, in 2010 the rules of nomination for the post of constitutional court judges became worse than ever. Before the amendment to the Constitution the consent of parliamentary majority and the opposition was needed for the nomination. Since July 2010 the governing majority with two-thirds of mandates in the Parliament is able to nominate for this post alone, i.e. without the consent of the opposition. Thus the influence of certain political parties was increased, and professional considerations were effaced.

[36] E.g. European Convention on Human Rights, European Social Charter, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Agreements on protection of national, ethnic and linguistic minorities

[37] Many illustrious representatives of Hungarian legal theory analyse the harmony between the ECHR and the Hungarian regulation of fundamental rights, the relationship between the Hungarian jurisdiction of fundamental rights and the practice of Strasbourg, critically pointing out the deficiencies and omissions. In this report we should not examine the realisation of the harmony, but accept its existence. See more in Weller (2000, 289–322), Halmai and Tóth (2003, 161–168), Blutman (2001, 41–64).

just like the harmonization of the interpretation practice of those institutions that are providing legal protection (e.g. courts, public prosecutors, ombudsman, and constitutional court). Finally, a coherent protection and representation of constitutional standards of the protection of fundamental rights is also needed. The Hungarian system of fundamental rights may become a *'building block'* of the protection of fundamental rights in the Union, only by the fulfilment of these conditions mentioned above, so it may provide a referential point against the Union legislative act violating the Constitution.[38]

Membership of the Union does not create an obligation to amend the regulations on the fundamental rights in the Hungarian Constitution, except for the European right to vote. Despite this, the system of fundamental rights of the Union, as the result of the modern development of law, provides an orientation point for the inevitable improvement of the Hungarian constitutional regulation of the rights of humans and citizens.

To sum up*,* we can establish that an effort has to be made to create a better harmony between the regulation of the fundamental rights in the Constitution and the European system of protection of fundamental rights (Blutman 2001, 13–66). The latter 'is based on' its outstanding component, the ECHR, and the traditions of the member states.[39] The two European levels of protection of rights will not become two separate parts by the placement of the Charter of Fundamental Rights into primary law. On the contrary, one may assume a supranational integration as there are concrete proposals as to the accession of the EU to the ECHR. In regard to this, it would have been useful to extend the conception of Hungarian constitutional amendment with regard to the reform of the chapter on fundamental rights. Reform of the Constitution does not mean the acceptance of the regulations of the treaties literally, but in terms of some fundamental rights, it would have been better to create more precise, detailed and modern regulations which define the essential content of the rights which would help to determine the conditions and methods of their limitations.[40] The general rules relating to fundamental rights should be extended with regard to cases of limitations and concerning the requirement derived from the test of limitations, which have appeared in the practice of the Constitutional Court. For a more effective jurisdiction and protection of fundamental rights, it should be reasonable to combine the protection of the courts and the Constitutional Court by means of a constitutional complaint and the introduction of the control over the leading decisions made by the Supreme Court to unify judgments referring to fundamental rights. This would help the stabilization of the Hungarian system of protection of fundamental rights that seems to be important in the Union.

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[38] Against the acts of Community/Union – which go beyond the treaties, overrunning the limits of authorization and acting 'ultra vires', and not remediable by the institutions – the 'ultimate reasons' can be proved if the Union respects the national identity of the member state by the Article 4 (2) of the TEU. The protection of essential elements of constitutional establishment, especially the standard of protection of fundamental rights, belongs to the national identity.

[39] TEU Article 6(3).

[40] Blutman (2001, 23–24) draws attention to the fact that it is not reasonable and sometimes it can be disadvantageous.

22.4 Conclusion

In our opinion, the idea that fundamental rights can only be interpreted within the framework of the legal relationship between the individual and the state (internal public authority) should no longer be maintained. The original function of fundamental rights – at the time of their appearance i.e. their development from moral commands into constitutional norms – was, indeed, to limit the state and the public authority in a certain substantive dimension of the division of power. This function has not ceased to exist, it has merely been supplemented – depending on the flow of history and the democratization of the given state – with the necessity that fundamental rights prevail against "other" persons and organisations (in a given case against an international or supranational organisation), and the fact that everybody must respect the fundamental rights of others. Those exercising public authority are bound by fundamental rights and their duty is the subjective and objective protection of fundamental rights (Petrétei 2009, 428–433). In this respect, it does not matter whether it is a state, an international or an integration organ or organisation, which has public authority. It should be clarified, from both theoretical and practical points of view, whether the claim for the enforcement of fundamental rights – as universal rights – is also multidimensional if these rights are protected by a multidimensional norm system composed of constitutions and constitutional laws, regional and universal international agreements, supranational norms and precedents. If so, one may question how the claims for enforcement relate to each other. Where, and at what forum can a legal remedy be sought for a violation of a fundamental right committed by whom? What qualifies as a violation of a fundamental right, in other words, what activity (legislation, legislative omission, another act of public authority, or another act) has caused it? "What" (factual situation) qualifies as a violation of a fundamental right? In the terminology of internal constitutional law any unconstitutional statutory restriction is obviously a violation of a fundamental right, however, if the restriction is of an international or supranational legal origin (violating domestic constitutional law), who will have to bear responsibility for it?

All things considered, the issue is similar, though not identical to, the phenomenon where the violation of fundamental rights – under the conditions of a constitutional state – is not committed by the representatives of public authority but by businesses and other organisations and mainly by citizens to the detriment of other persons, which leads to the issue of third party effect (Drittwirkung). In private law relations the effect of fundamental rights is only indirect, in other words it prevails through the activity of legislation – so called radiant effect (Petrétei 2009, 428–433). However, in an international public law context – when the act of an international public authority violates a fundamental right – the guarantee specifying who is bound by the fundamental right must be found by defining the nature of the legal relationship. The states are bound by the – usually constitutional – rule to fulfil their international obligations as well as by the obligation to protect human rights. In a case when a state can actually influence the process of creating the international regulation, its responsibility for the violation of the fundamental rights can be established (i.e. if the state fails to do everything that can be expected of it regarding its

obligation to protect fundamental rights). In a case when a state is not able to influence the content of the international norm, the international organ – as an international legislator – is be responsible for the protection of human rights, and the guarantees for the establishment of its responsibility must be provided. These guarantees can be provided either by establishing a certain legal remedy procedure or by declaring the obligation of the general protection of human rights at the level of the basic norm of the international organisation and designating a forum authorised to norm control. At the same time, fundamental rights cannot be regarded as absolute; the protection of fundamental rights is nowadays an issue of balance. The re-interpretation of the horizontal application of fundamental rights in defence of the individual but with regard to the requirements of – globalised – community coexistence may be a new challenge for both the science and the practice of constitutional law.

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Chapter 23
Croatia: Developing Judicial Culture of Fundamental Rights

Siniša Rodin

23.1 Introduction

Commitment to the protection of fundamental rights has always been a topic central to the process of building the state and identity of modern Croatia. After decades of communist rule, the idea of fundamental rights offered an opportunity for definition of a national identity. However, what followed in the 1990s can best be described as a bifurcation of normative and identity-building traits. On the one hand, all relevant legislative instruments, starting with the Constitution itself, enshrined powerful normative guarantees of fundamental rights. On the other hand, political discourse and practice relied on historic references to Croatian statehood stemming from the seventh century, and to the right of Croatian people to establish an independent nation state (Croatian Constitution, Preamble).

The Constitution itself, in a separate chapter, introduced an extensive bill of rights, to be protected by a reformed constitutional court which was vested with the power of abstract, concrete and accessory (constitutional complaint) constitutional review. Since 1991, the Constitutional Court has undergone a significant evolution in its approach to the protection of fundamental rights. Starting from its early approach to the application of international law which I have earlier characterised as "dualist inertia",[1] the Constitutional court has become a sophisticated interpreter of fundamental rights and a national leader in the application of the European Convention on Human Rights (ECHR). However, while ECHR standards have become a standard trait in the reasoning of the Constitutional Court and an instrument occasionally used to quash the decisions of ordinary courts, concerns were expressed that the human rights jurisprudence of the Constitutional Court is formalistic and

[1] See Rodin (2009a, 37–47).

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not genuinely motivated by the protection of fundamental rights.[2] In that context, I will suggest that the Constitutional Court seems not to use the case law of the European Court of Human Rights (ECtHR) as persuasive authority in reasoning, but quotes de-contextualised normative parts as a justification of decisions in individual national cases. In other words, practical recourse to fundamental rights is mainly instrumental.

This is not to say that the Croatian authorities did not react positively in order to meet the requirements of the ECHR. However, it is my suggestion that the reactions were of a "trouble-shooting" nature and not systematic, and that, substantively, did not genuinely contribute to the strengthening of fundamental rights guarantees.

In the first part of this chapter I will first address the issue of how the jurisdiction of the Constitutional Court in respect of fundamental rights changed due to the demands of the ECHR. I will proceed with a discussion of how the Constitutional Court addressed three issues: indirect discrimination, right to an impartial judge, and the principle of proportionality. Finally, I will present my conclusions.

23.2 Admissibility of Constitutional Complaints

The main mechanism for the protection of fundamental rights before the Constitutional Court is the constitutional complaint procedure. The mechanism itself has been introduced by Articles 28–30 of the Constitutional Court Act of 1991 (Official Gazette 13/91). The popularity of the constitutional complaint procedure and the lack of meaningful docket control provisions imposed an ever-increasing case burden on the Constitutional court. According to the statistics provided by the Constitutional Court, some 39,261 constitutional complaints were brought by December 2009, and 32,067 were decided in the same period.[3] The influx of constitutional complaints has not subsided despite significant restrictions on access to the Constitutional Court.

The reaction to the increased influx of cases was a restriction of access to the Constitutional Court. Firstly, a 2002 Amendment to the Constitutional Court Act dismissed the possibility of filing constitutional complaints against legislation, even in cases where an individual would be directly concerned.[4] Secondly, the Constitutional Court itself restricted access to its docket by developing its current position, namely that constitutional complaints are admissible only for the protection of rights which are explicitly listed in Chapter III of the Constitution, entitled "Protection of Human Rights and Fundamental Freedoms". This approach rendered claims for the

[2] For Article 6(1) of the Convention see e.g. Rodin (2010, 1 et seq); for Article 10 of the Convention see Đurđević (2011, 152–189).

[3] http://www.usud.hr/uploads/PRIMLJENI-RIJESENI%20PREDMETI-311209.pdf, visited on January 9th 2011.

[4] See Article 62 of the Constitutional Court (Amendment) Act (2002), Official Gazette 29/2002 of 23 March 2002.

protection of certain constitutional values, particularly those under Article 3 of the Constitution (fundamental constitutional values) inadmissible in their own right. In its current practice the Constitutional Court declares inadmissible constitutional complaints based on Article 3, as these "do not contain human rights and fundamental freedoms that are protected by the Constitutional Court in the constitutional complaint procedure within the meaning of Article 62(1) of the Constitutional Court Act."[5] However, in July 2010 (decision U-III-3491/2006), the Constitutional Court applied the rule of law guarantee of Article 3 in order to assert property rights of the Croatian Academy of Sciences and Arts, which is a state establishment acting in the public interest. This created an awkward situation in which the rule of law guarantee is afforded to state establishments while there is still no confirmation that the same path will be followed in cases concerning individuals.

Access to the Constitutional Court was further restricted when Parliament, in response to an increasing influx of cases, created a jurisdiction of ordinary courts to decide on the right of a person to a trial within a reasonable time. Admittedly, the Constitutional Court Act did not originally envisage jurisdiction of the Constitutional Court in cases of breach of the right to a *fair* trial within a reasonable time. Much later, on March 15th 2002, reacting to the increasing number of cases addressed to the European Court of Human Rights claiming a violation of Article 6(1), and more directly, in response to the judgment of the ECtHR in *Horvat v. Croatia*,[6] Parliament adopted the Constitutional Court Amendment Act.[7] This amendment addressed the issue of the non-existence of adequate legal remedies in cases of excessive length of legal proceedings, which constituted a violation of Articles 13 and 6(1) of the Convention. Accordingly, a new Article 59a of the Constitutional Court Act was adopted,[8] extending recourse to the Constitutional Court via a constitutional complaint procedure. The complaint procedure became available even before the exhaustion of other existing legal remedies in cases where the lower courts did not decide a pending matter within a reasonable time, as well as in cases where individual rights were manifestly infringed, and where the individual could face "grave and irreparable consequences." The same article also vested the Constitutional Court with power to specify for the lower courts the time within which a decision on the merits had to be delivered, and with a power to award "adequate compensation" to the victims of unduly lengthy proceedings.

Subsequently, in 2002 in *Slaviček v. Croatia*,[9] the ECtHR clarified that recourse to the Constitutional Court under the newly introduced provisions amounted to a remedy that had to be exhausted within the meaning of Article 35(1) of the Convention.

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[5] For recent decisions see e.g. U-III-1095/2006 and U-III-1090/2008, point 9 of the decision.

[6] Decision No. 51585/99 of 26 July 2001. Particularly § 48 of the judgment.

[7] Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu (Constitutional Law Amending and Supplementing the Constitutional Law on Constitutional Court). Official Gazette 29/2002 of 22 March 2002.

[8] Article 59a became Article 63, following publication of the consolidated version of the Act.

[9] Application No. 20862/02 of 4 July 2002.

While the amendment relieved the ECtHR of some pressure, Article 6(1) cases started to accumulate before the Croatian Constitutional Court. In essence, the cure to the problem of ensuring a trial within a reasonable time addressed the symptoms and not the cause of the disease which was plaguing courts of ordinary jurisdiction. As such, a backlog of Article 6(1) cases re-emerged before the Constitutional Court.

Reacting to this development, Parliament created ordinary courts' jurisdiction to decide Article 6(1) cases. Accordingly, in late 2005 Article 6(1) infringement cases were added to the list of cases falling within the jurisdiction of ordinary courts pursuant to the new Articles 27 and 28 of the Law on Courts.[10] Since then, infringements of the right to trial within a reasonable time have fallen within the jurisdiction of the ordinary courts. While it can be argued that this transfer of jurisdiction to ordinary courts contributed to increased efficiency, it also detracted from the power of the Constitutional Court to set standards in this area. In any case, as the latest information shows, the backlog of pending civil cases before ordinary courts is still on the rise.[11]

23.3 Indirect Discrimination

The concept of indirect discrimination was, until recently, completely alien to the Croatian legal system. It was first introduced by the Gender Equality Act[12] and, subsequently, by the Non-discrimination Act,[13] both instruments implementing EU equality *acquis*. However, the application of the concept by ordinary courts is incoherent and not transparent.[14] It is also ignored by the Constitutional Court.[15] Improper application of equality standards by Croatian courts gave rise to the *Oršuš* case, which came to be one of the most important recent pieces of litigation before the ECtHR.

The *Oršuš* saga concerned children belonging to a Roma minority who were, allegedly, due to their poor knowledge of the Croatian language and, allegedly, according to the applicable professional standards, placed in Roma-only classes in a number of elementary schools in Međimurje County in northern Croatia. That practice was challenged on the ground of a violation of Article 2 of Protocol No. 1 of the Convention, either taken alone or in conjunction with Article 14 of the Convention.

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[10] Zakon o sudovima (Law on Courts), Official Gazette 150/2005 of 21 December 2005.

[11] Interim report from the Commission to the Council and the European Parliament on reforms in the field of judiciary and fundamental rights (negotiation Chapter 23), Brussels, 2 March 2011, COM(2011) 110, 4.

[12] Zakon o ravnopravnosti spolova (Gender Equality Act), Official Gazette 116/2003 as amended 82/2008.

[13] Zakon o suzbijanju diskriminacije (Non-discrimination Act), Official Gazette 85/2008.

[14] See e.g. judgment of the Supreme Court No. Revr 277/07-2.

[15] Keyword search of the Constitutional Court's web site using keywords "indirect discrimination" (Croatian: inidrektna diskriminacija; posredna diskriminacija) does not return any results.

After having exhausted legal remedies before the ordinary courts, applicants brought a constitutional complaint before the Constitutional Court. The Constitutional Court, *inter alia*, found that:

> …none of the facts submitted to the Constitutional Court leads to the conclusion that the placement of the complainants in separate classes was *motivated by or based on* their racial or ethnic origin.[16]

By using the words "motivated by or based on", the Constitutional court clearly indicated that the concept of discrimination, in its view, depended on the existence of discriminatory intent.

Soon after the judgment of the Constitutional Court, the First Section of the ECtHR delivered a judgment upholding the decision of the Croatian Constitutional Court (Judgment of 17 July 2008). Similarly to the Constitutional Court, the First Section defined discrimination on the ground of intent, rather than on the ground of discriminatory effect, and in that way failed to recognise the concept of indirect discrimination, which was embraced by the Grand Chamber in *D.H. v. Czech Republic*. However, the Grand Chamber of the ECtHR, having established the indirect discrimination of Roma children, reversed the First Section judgment on March 16th 2010, invoking its earlier position adopted in *D.H. v. Czech Republic*.

Leaving the internal conflict concerning the understanding of discrimination within the ECtHR aside,[17] the relevance of the *Oršuš* saga lies in the fact that the Croatian legal tradition has difficulties in accepting the concept of indirect discrimination and shifting the burden of proof in discrimination cases. Discrimination is traditionally linked to intent, which is difficult to establish, and the concept of indirect discrimination is traditionally unknown, as is the shifting of the burden of proof in discrimination cases. It does not come as a surprise that it was intent on which the Constitutional Court relied in the *Oršuš* case.[18]

My second objection to the Constitutional Court's attitude is that the decision not to accept indirect discrimination was a deliberate policy choice. While the Constitutional Court throughout its opinion relies on elements of the case law of the ECtHR, e.g. on extrapolated segments of the judgment of the ECtHR's First Section in *D.H. v. Czech Republic*, in order to justify its conclusion that statistical data is not sufficient to establish discrimination, it completely ignores cases indicating the possibility of relying on the concepts of the shifting of the burden of proof and indirect (or *de facto*) discrimination, for example *Nachova* or *Zarb Adami*, which were pleaded by the applicant. In other words, the Constitutional Court had two paths available, both present in the reasoning of the ECtHR. Between the two, it chose the one which ignored indirect discrimination and the shift of the burden of proof.

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[16] Decision No. U-III-3138/2002, of 07. 02. 2007, published in the Official Gazette No. 22/2007 of 26 February 2007 (translated by the ECtHR, Grand Chamber, Oršuš and Others v Croatia, Application no. 15766/03, § 60 of the judgment); emphasis added.

[17] According to my interpretation, there is disagreement between judges from post-communist States and judges from "old democracies." To this point see: Rodin (2009b).

[18] Decision No. U-III-3138/2002 point 7.3 of the decision.

Third, in *Oršuš*, the Constitutional Court invoked the "beyond reasonable doubt" standard, allegedly applied by the ECtHR in order to support the finding of the ordinary courts that there was no inhuman and degrading treatment of Roma pupils.[19] However, as the ECtHR emphasised in *Nachova*,

> …The Court has held on many occasions that the standard of proof it applies is that of "proof beyond reasonable doubt", but it has made it clear that that standard should not be interpreted as requiring such a high degree of probability as in criminal trials. It has ruled that proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[20]

In other words, the Constitutional Court, instead of shifting the burden of proof, introduced a much stricter standard requiring the applicants to satisfy a criminal law standard. In doing so, the Constitutional Court relied on a selection of cases that corroborate its concept of discrimination, leaving aside case law leading to the contrary conclusion.

23.4 Right to Impartial Judge

A similarly selective reading of the ECtHR case law can be detected in the area of the application of the right to an impartial judge under Article 6(1) of the Convention where certain interpretations of the Convention introduced by the Constitutional Court also depart from the reading of the ECtHR.

Apparently relying on *Mežnarić v. Croatia* (Application no. 71615/01, Judgment of July 15th 2005) the Constitutional Court developed a doctrine according to which participation of the same judge in a criminal trial chamber and his or her previous involvement in a previous decision on detention in respect of the same person, almost automatically leads to an infringement of the right to an impartial judge, as guaranteed by Art 6(1) of the ECHR.[21] At the same time, the Supreme Court holds a more flexible opinion according to which the described situation, on its own right, may, but must not necessarily compromise the impartiality of a judge.[22] Seemingly,

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[19] The Constitutional Court relied on the beyond reasonable doubt standard expressed by the ECtHR in Ireland v. UK, judgment of January, 18, 1978, Series A, br. 25, 64–65, § 161.

[20] See § 166.

[21] Decision of the Constitutional Court No. U-III-41640/2009 of April 29, 2010. As the Constitutional Court specified in point 4.2. of its judgment, "…in the concrete case, Judge E.D. acted as a judge of the County Court in Pula which delivered the contested judgment (No. K-69/07-140 of March 19, 2008). The same judge, however, was a member of the non-trial chamber of the County Court in Pula that delivered the decision No. K-69/07-38 (Kv-385/07) of November 23, 2007, concerning extension of detention in respect of the appellant" (translated by Author). For an exhaustive analysis of this line of cases decided by the Constitutional Court in which the Constitutional Court found violation of Article 6(1) of the ECHR, see Rodin (2010).

[22] Judgment of the Supreme Court of June, 2, 2010 No. I Kž-84/10-8 in case against Branimir Glavaš and others http://www.vsrh.hr/CustomPages/Static/HRV/Files/VSRH_I-Kz-84-2010-8.pdf visited on July 31, 2010. In words of the Supreme Court, "…that fact, standing alone, in absence of other negative indicators of his or her impartiality which were absent in this case, cannot be a reason to recuse a judge on grounds of Article 36(2) of the Criminal Procedure Act…" (translated by Author).

the position of the Supreme Court reflects the case law of the ECtHR more accurately. However, what is more important is the fact that the two courts diverge on interpretation of the ECHR and the relevance of the case law of the ECtHR.

23.5 Case Law of the Constitutional Court

In its decision No. U-III-41640/2009 of April 29th 2010, the Constitutional Court upheld a constitutional complaint and annulled and remanded a judgment of the Supreme Court[23] and a corresponding judgment of the Pula County Court. The Constitutional Court decided that the two judgments infringed the applicant's right to an impartial judge, as guaranteed by Article 29(1) of the Constitution[24] and Article 6(1) of the Convention. The reasoning of the Constitutional Court heavily quotes the case law of the ECtHR, and reaches the conclusion that there is an irrebuttable presumption that the mere fact that the same judge has decided on the merits and, previously, on detention concerning accusations against the same person, means that the impartiality of a judge is compromised.[25] The judgment came sixth in a line of cases where the Constitutional Court attempted to interpret the Constitution in light of the Convention based on its understanding of the case law of the ECtHR following the decision in *Mežnarić v. Croatia*. A brief analysis of the six cases shows that some of them were decided in line with the reasoning of the ECtHR, but that some were not.

In the first case, decided in early 2008,[26] the Constitutional Court found that the impartiality of a judge was compromised by the fact that the same judge who sat on the first instance panel also sat on the appeal panel in the same case.[27] In the second case, decided in early 2009,[28] the Court found the breach of this fundamental right in the fact that the same judge who decided the case at a lower instance then decided the case again as a judge of the Supreme Court. In addition, the Court found that material breaches of criminal procedure had been committed by the same judge.[29] While these two judgments were, by and large, in line with Convention case law, in the third decision, the Constitutional Court established such a breach on the ground that the same judges were deciding on both detention and on the merits (Decision of the Constitutional Court No. U-III-3872/2006 of July 7, 2009, § 5.1). The same was the situation in a case decided on July 7th 2009 (Decision of the Constitutional Court No. U-III-3880/2006). In contrast, in its decision of July 29th 2009,[30] the Constitutional Court decided that a judge who acted as a president of a non-trial chamber in a

[23] Judgment of the Supreme Court No. Kž-574/08-6 of January 21, 2009.

[24] The constitutional provision giving effect to Article 6(1) of the ECHR.

[25] Point 4.2 of the Decision.

[26] Decision of the Constitutional Court No. U-III-2383/2005 of February 13, 2008.

[27] *Id.,* point 5 of the decision. This judgment is in line with the ECtHRts case law.

[28] Decision of the Constitutional Court No. U-III-5423/2008 of January 28, 2009.

[29] *Id.* point 6.2 of the decision.

[30] Decision of the Constitutional Court No. U-III-3543/2009.

county court, who decided on detention, and who ordered surveillance and phone tapping in respect of the same person, is impartial. In essence, what follows from this line of cases is that requirements under Article 6(1) of the Convention do not preclude the same judge from deciding on multiple procedural and protective measures, but do preclude a judge from deciding on protective measures and on the merits.

While in reaching its conclusion the Constitutional Court apparently relies on Convention law, I would argue that the case law of the ECtHR leads to a different conclusion. In other words, the doctrine adopted by the Constitutional Court is an autonomous doctrine which does not follow the reasoning of the ECtHR.

23.6 Case Law of the European Court of Human Rights

The leading case on the right to an impartial judge, concerning Croatia, was the above-mentioned *Mežnarić v. Croatia*, where the ECtHR established a violation of Article 6(1) on the ground that a judge of the Constitutional Court had previously acted as legal counsel of the applicant's opponent at an earlier stage of the proceedings. This situation has to be distinguished from that which arose in the Constitutional Court's decision of April 29th 2010, since in *Mežnarić* there was a clear conflict of interest, while in the latter-mentioned case there was not. In other words, in the 2010 case there was no subjective element of partiality, which can only lead to the conclusion that the Constitutional Court's decision was based on an objective element test, i.e. on whether any legitimate doubt in impartiality is excluded.[31]

According to the Constitutional Court's understanding of the ECtHR's case law,[32] the objective criteria compromising the impartiality of a judge are as follows:

- when a judge has previously decided on issues that are closely related to the decision on the merits (*Hauschildt v Denmark*, judgment of May 24th 1989. § 51–52);
- when, after having decided at first instance, the same judge sat on appeal (*De Haan v the Netherlands,* judgment of August 26th, 1997. §§ 51, 54);
- if the same judge participated as a member of a non-trial chamber deciding on the indictment and, following that, as a member of a trial chamber (*Castillo Algar v Spain,* judgment of October 28th, 1998, §§ 47–49);
- if the same judge presided over a judicial criminal panel after having acted as a prosecuting officer in the same case (*Piersack v Belgium*, judgment of October 1st 1982. §§ 30–31).

However, on a closer look, none of the cited cases are applicable to situations involving participation of the same judge in making a decision on detention and,

[31] The ECtHR refers to *Fey v Austria*, (judgment of February 24, 1993, Series A no. 255, p. 12, §§ 27, 28 i 30) and *Wettstein v Switzerland* (Application no. 33958/96, § 42, ECHR 2000-XII).

[32] Decision of the Constitutional Court No. U-III-41640/2009 of April 29, 2010, see point 4.1 of the decision.

subsequently, on the merits of a criminal case. These are situations which are, according to the Constitutional Court, protected by an Article 6(1) guarantee.

In *Hauschildt v Denmark* the ECtHR found a violation of Article 6(1) because the same judge had made 15 decisions concerning detention and solitary confinement in respect of the same person and acted as a member of the trial chamber later on.[33] However, the ECtHR made clear in § 50 that the fact that the same judge was acting in pre-trial decisions and on the merits, taken alone, is not sufficient to reach a conclusion on the impartiality of a judge.

In *Fey v Austria,* the ECtHR applied the same reasoning to the Austrian inquisitorial system. Invoking *Hauschildt*, the Court concluded in § 30 of the judgment that the same reasons must be relevant in an inquisitorial system like Austria's. The decisive factor is the scope and nature of pre-trial measures that a judge has the power to take. In other words, as long as the role of a judge is separate from the role of the prosecution, there will be no violation of Article 6(1).

In *De Haan v the Netherlands,* the established violation of Article 6(1) was based on the fact that the same judge was deciding on the merits at first instance and subsequently on appeal. This case has to be distinguished from the situation in the Constitutional Court's decision of April 29th 2010, since in *De Haan* both instances were deciding on the merits, while in the Croatian case the first instance was not.

In *Castillo Algar v Spain* the ECtHR found a violation of Article 6(1) on the ground that two out of the three judges who were deciding on the merits of accusations had previously acted within a chamber that confirmed the indictment, where, according to Spanish law, the indictment is considered *prima facie* evidence of guilt.

Finally, in *Pieresack v Belgium*, there was a combination of the state attorney's role and the role of a judge in one person, and the ECtHR did not have difficulty in establishing a violation.

All the four judgments cited by the Constitutional Court are based on the objective test. One of them (*Piersack*) concerned combination of the roles of judge and prosecutor, and the other two (*De Haan* and *Castillo Algar*) concerned participation of the same judge in different stages of proceedings, in a situation in which both stages concerned a decision on the merits. The remaining case (*Hauschildt*) concerned a violation on the ground of additional circumstances, unrelated to the pre-trial participation of the judge. The question remains what these judgments have in common with the facts of the case decided by the Constitutional Court on April 29th 2010.

Apparently, the Constitutional Court quotes but does not necessarily follow the reasoning of the ECtHR, the main difference being an almost automatic exclusion of a judge who participated in pre-trial decision-making. Interestingly, the Croatian Supreme Court is of a different opinion and follows the reasoning of the ECtHR to the effect that participation in pre-trial decision-making on detention does not automatically preclude a judge from deciding on the merits (Judgment of the Supreme Court No. I Kṭ 84/10-8 of June 2, 2010).

[33] See § 20 of the judgment.

23.7 Principle of Proportionality

The principle of proportionality is not indigenous to the Croatian legal system. It was, for the first time, introduced by a Constitutional amendment of November 9th 2000[34] and inserted as section 2 of Article 16 of the Constitution. Since then, the proportionality provision reads:

> Each restriction of liberties or freedoms has to be proportionate to the nature of the need for a restriction in each individual case.

Unclear as it is, the provision does not follow the wording of the ECHR: prescribed by law, having a legitimate aim and necessary in a democratic society. Apparently, the bare constitutional provision leaves enough space for the interpretation that any social exigency could justify restriction of rights and liberties, as long as state action can be taken to be a least restrictive alternative.

This provision has been applied extensively by the Constitutional Court, not always in a coherent way. During the mandate of the first president of the Court, Judge Jadranko Crnić, the Constitutional Court developed a position that the principle of proportionality is a universal constitutional principle. The same position continued during the mandate of President Smiljko Sokol.[35] However, this original position was gradually eroded. On the other hand, in its recent practice, the Constitutional Court introduced the legitimate aim requirement, although not the appropriateness review (Decision No. U-III-3491/2006 of July 7, 2010, Official Gazette 90/2010).

Today, the website of the Constitutional Court reveals 41 cases involving the issue of proportionality. Seven of them were constitutional complaints which resulted in an outcome favorable to the applicant. Another seven were abstract constitutional review cases that resulted in a declaration of incompatibility with the constitution. Remaining cases were dismissed.

It would go beyond the aims of this chapter to discuss the entire proportionality law of the Constitutional Court in detail. I find it more appropriate to present a case study which sheds light on the attitude of the court towards the application of the proportionality test.

On November 15th 2007, the Constitutional Court adopted a decision[36] rejecting a constitutional complaint brought against a decision of the High Misdemeanor Court[37] affirming an administrative decision (No. PRI 342-35/05-03/48, urbroj: 530-03-02/03-05-7 of August 31, 2005. No. PRI 342-35/05-03/48, urbroj: 530-03-02/03-05-7 of August 31, 2005). The contested decision was adopted in misdemeanor

[34] Odluka o proglašenju promjene Ustava Republike Hrvatske (Decision on Promulgation of Amendment of the Constitution of the Republic of Croatia), Official Gazette No. 113 of November 16, 2000.

[35] See e.g. Decision No. U-I-673/1996, of April 21, 1999, Official Gazette 39/1999.

[36] Decision No. U-III-4584/2005. The decision was adopted by the chamber composed of Judges Klarić (president), Hranjski, Kos, Krapac, Matija, Mrkonjić, Potočnjak, Račan, Rajić, Sokol, Šernhorst and Vukojević.

[37] Case No. Gž-5194/05 of September 20, 2005.

proceedings against the applicant who was charged for illegal boat chartering and punished by a fine of approximately 1,100 € and confiscation of his yacht. The applicant claimed an infringement of the proportionality principle under Article 16(2) of the Constitution, since the value of the confiscated vessel was significantly higher than the punishment which the severity of the offence required. In a short passage, the Constitutional Court dismissed this proportionality argument, saying that:

> …confiscation of a vessel by which an infraction was committed is based on Article 1008 section 2 of the Maritime Code, providing for mandatory confiscation of a vessel by which the offence was committed. Accordingly, Article 16(2) of the Constitution is not applicable to constitutional review of the contested measure.

In his dissenting opinion Judge Krapac stated:

> …when powers of the Constitutional Court are understood properly, in the context of criminal lawmaking and their application, the principle of proportionality, despite its public-law rationality, represents a limited instrument of constitutional review. Where the legislature, motivated by public consensus (expressed through public media) about the repression of attacks against certain social values….has prescribed sanctions as restrictive norms, those norms may not be controlled by the constitutional court according to the principle of proportionality, since they have to be measured against criminal policy which lies within the competence of the legislature….[38]

On the other hand, Judge Sokol, in his dissent, considered the proportionality test applicable as a matter of principle but not in the present case. In his opinion, the principle must be invoked in abstract constitutional review proceedings, which must be instituted in order to challenge the contested law. According to his opinion, this cannot be done in the course of the constitutional complaint procedure. Judge Sokol's position is probably based on Article 62(1) of the Constitutional Court (Amendment) Act of 2002,[39] which excluded the previous possibility to bring a constitutional complaint against regulatory acts. Since the 2002 amendment, a constitutional complaint is permissible only against individual acts. As a matter of comparison, a constitutional complaint against regulatory acts has been permissible in Germany since 1957 (BVerfGE 6, 32). This rule has been confirmed in a continuous line of cases decided by the Federal Constitutional Court.[40]

Finally, Judge Potočnjak dissented by invoking his earlier dissent,[41] taking the position that Article 16(2) had to be applied.

Generally, it can be said that the Constitutional Court does not apply the proportionality principle as a fully developed test. Moreover, this case is a good example of the selective application of this principle, that is, non-application in certain procedural situations, notably when an infringement originates from a regulatory act. In other words, there is a bifurcation between application of the test in constitutional

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[38] Translated by Author.

[39] Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu, (Constitutional Court Amendment Act) Article 25, Official Gazette 29/2002.

[40] See e.g. BVerfGE 80, 137 (Reiten im Walde).

[41] Decision No. U-III-59/2006 of November 22, 2006, Official Gazette 132/2006.

complaint proceedings and abstract constitutional review, the two avenues of protection being understood as separate by the Constitutional Court. What is also visible is a dissonance of judges' opinions with regard to the substantive areas in which the proportionality principle is applicable, leading to the conclusion that the principle is not understood as being universally applicable.

23.8 Conclusion

There are significant differences between the interpretation and application of fundamental rights by the Constitutional Court and the ECtHR. The intensity of judicial review applied by the Constitutional Court is weak and remains mainly at the level of rationality review. The Constitutional Court does balance the public interest with fundamental rights but has not developed standards of enhanced scrutiny (e.g. strict scrutiny analysis). Differences in interpretative approach sometimes lead to interpretations that depart from regional and/or global standards of fundamental rights.

As far as substantive standards are concerned, there are problems reconciling divergent standards of the ECHR and those arising under implemented EU law. For example, the ECtHR itself is still struggling to accept the concept of indirect discrimination and the shifting of the burden of proof in discrimination cases. While these concepts are systematically applied by the European Court of Justice and are enshrined in relevant primary and secondary EU law, within the ECtHR there is a doctrinal rift between the Grand Chamber which only recently[42] has begun to endorse the same standards as the ECJ, and trial chambers, which have a different approach. This difference has contributed to the doctrinal confusion that burdens Croatian courts when it comes to deciding equality cases.

The case law of the Croatian Constitutional Court also reveals a problem of selective reading of the Convention. As can be seen from the examples above, the Court inclines to follow cases that correspond to its own precepts of equality, public policy and judicial independence. Whether this can be taken as an infant decease or as a more fundamental problem remains to be seen. One tendency is, however, clearly visible. Whilst the vocabulary of fundamental rights is becoming increasingly visible, there is still no evidence that the Croatian judiciary has properly embedded the vocabulary of human rights into a liberal understanding of the state. There is little evidence of fundamental rights having an effect when they confront what is understood as a "state interest." All three case studies bear witness to that effect. Proof of discrimination is subject to a difficult-to-establish criminal law standard, proportionality analysis is inapplicable in areas where state (public) interest is said to exist, and the concept of the impartiality of a judge is understood rather mechanically, without proper consideration being given to other relevant interests.

[42] See cases *D.H. v. Czech Republic* and *Oršuš v. Croatia* cited above.

While it cannot be said that the Croatian judiciary or the Constitutional Court are hostile to fundamental rights, the fact remains that their proper social function still needs to be discovered. In the absence of a liberal tradition, judicial reasoning remains formalistic, and fundamental rights guarantees are not understood as *Abwehrreche*, defending the core of individual liberty against State intrusion, but merely as guarantees of positive law prescribed by the State (Rodin 2005, 1–22; Ćapeta 2005, 377–396).

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Chapter 24
The Implementation of the Human Rights Universality Principle in Ukraine

Alla Fedorova and Olena Sviatun

24.1 Introduction

For many countries today, human rights are the supreme value recognized by the international community. The effective development of the society is possible only in the event of all activities of State bodies being concentrated on the liberation of personality and the strengthening of the fundamental rights and freedoms of an individual. The social value of the human rights and freedoms is determined by the fact that it constitutes one of the forms of human dignity. As a result, a human being is recognized as the highest value. The promotion and protection of human rights is the mandatory condition for the complete and comprehensive prosperity of an individual. Only when residing in the aforementioned environment, is the human being capable of choosing his own life style, exercising his interests and developing his skills.

The preambles of basic documents on the protection of fundamental human rights such as the Universal Declaration of Human Rights (UDHR) from 1948 and the International Covenants of 1966 provide that recognition of human dignity attributed to all human beings; equal and inalienable rights are the foundation of freedom, justice and universal peace. This thesis is the basis for the development of human rights originating from the dawn of human civilization. Nevertheless, activities concerning the development of international human rights standards and their recognition and consolidation began in the second half of the twentieth century when the United Nations Organization (UNO) was founded and the UDHR was adopted. The Declaration was the result of the World War II and the first internationally acknowledged act in the sphere of the human rights law. The UDHR, the universal treaties in the field of human rights protection adopted later and the world

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experience of the progress of society made it possible to determine a list of basic principles of human rights law. The principle of universality is considered to be the most important of the abovementioned principles.

24.2 The Universality of Fundamental Human Rights and Freedoms

Debates on the universality of human rights have continued for several decades. Each time this issue gains new momentum as the concept of human rights has changing dynamics of the definitions of sovereignty, national jurisdiction, cultural autonomy etc. (Alston and Steiner 1996, 192). In 1993 the international community sought in the Vienna Declaration to clearly emphasize the cogency of universal human rights. Particular emphasis was placed on the notion that the universal nature of these rights and freedoms cannot be subjected to discussion. Human rights universality was considered to be the obligation of all States to promote and to protect human rights. Moreover, this concerns the general respect, promotion and protection of all categories of rights for all humans.

Fundamental human rights and freedoms are indeed universal, they are attributed to everybody. Universal values are the important in determining all the public activities in any State regardless of their form of government, political regime, level of social and economic development, culture and tradition. The people living in the different countries of the world are united not only by language, culture etc. but also by the understanding that they are human beings, that the life, rights and freedoms of each person are valuable. The human being is vested with certain rights just by the fact that they are human. The universality is based on the inalienability of the rights and dignity of every person. Those rights that are important to every person were accepted as the basis for international human rights standards. Universal human rights standards are enshrined in international treaties, covenants, conventions and charters that set out legal rules for States in the sphere of human rights protection.

The provisions of the 1948 Declaration are adopted in or influenced most national constitutions. The modern States often cite the Universal Declaration, quote it or make reference to it. The UDHR is also used for the interpretation of the domestic laws regarding human rights protection. Thus, the Constitutional Court of Ukraine has referred to the provisions of the UDHR on several occasions[1] despite the absence of any references to it in the Constitution of Ukraine.

However, taking into consideration the principle of universality, it should be mentioned that universal international standards are minimal standards as they are the result of compromise achieved by *quantum satis* of States with different legal

[1] Decision of the Constitutional Court of Ukraine No. 8-rp/2010 of March 11, 2010 in the case upon the constitutional petition of 46 People's Deputies of Ukraine concerning the official interpretation of the notions "the highest judicial body", "superior judicial body" and "cassation challenging" contained in Articles 125 and 129 of the Constitution of Ukraine; Decision of the Constitutional Court of Ukraine No. 23-rp/2009 of September 30, 2009 in the case upon the constitutional petition of citizen Holovan' Ihor Volodymyrovych concerning official interpretation of provisions of Article 59

systems, views and traditions that succeeded in reaching a settlement for their different positions. The ability to reach such an agreement proved the universal recognition of human life value to the entire international community. Accordingly, fundamental human rights and freedoms would constitute a world value, universal heritage and the foundation for the progress of society. And this should consolidate different traditions in the understanding of law.

However, it is necessary to point out that the universality principle does not challenge the existence of differences and cultural diversity. Thus, in 1966 the General Assembly adopted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which itemized the relevant provisions of the Universal Declaration of Human Rights. Over 150 States have ratified the abovementioned Covenants. That gives us reason to view their provisions as universal. The situation is similar to the number of States Parties established with other documents on universal basic human rights such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (adopted 1966, entry into force: 1969), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (entry into force: 1981), the United Nations Convention Against Torture (CAT) (adopted 1984, entry into force: 1984), the Convention on the Rights of the Child (CRC) (adopted 1989, entry into force: 1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) (adopted 1990, entry into force 2003) etc. Thus, the provisions of these universal instruments are binding on States that have ratified them. The rules of law set out in those documents are universal and constitute a part of the universal conception of human rights.

However we should consider the sufficient number of declarations and reservations made by the States upon ratification of the abovementioned documents regarding their inability to respect certain obligations as a result of them contradicting national constitutions and legislation. For instance, while ratifying the Convention on the Rights of the Child, France made a reservation that the Article 6 cannot be interpreted as constituting any obstacle to the implementation of the provisions of French legislation relating to the voluntary interruption of pregnancy. A large number of reservations were made by the USA. Many experts point out that while having ratified universal human treaties, the United States, nevertheless, does not assume the majority of obligations originating from those documents. The European Court of Human Rights (ECtHR), whose jurisdiction was recognized by all Member States of the Council of Europe including Ukraine, solves this problem in a radical way. While handling cases, the Court delivered a decision that all declarations to the ECHR made by the Member States, which contradict the purpose and the subject of the Convention, constitute reservations which have no legal effect.

of the Constitution of Ukraine (case on the right to legal assistance); Decision of the Constitutional Court of Ukraine no.3-rp/2009 of February 3, 2009 in the case upon the constitutional petition of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine on conformity with the Constitution of Ukraine (constitutionality) of the specific provision of Article 211.2 of the Family Code (case on age difference between an adoptive parent and a child). Official website of the Constitutional Court of Ukraine: http://www.ccu.gov.ua/en/doccatalog/list?currDir=12169

Another issue is related to the problem of recognition and implementation of the universal human rights standards by the States that are not parties to certain universal treaties. Taking into account the practice of the non-member States, these documents cannot be considered as universal (e.g. the USA refused for a long time to ratify the International Covenant on Economic, Social and Cultural Rights).

It is worth considering that "the Universal Declaration was adopted by the General Assembly on 10 December 1948 by a vote of 48 in favour, 0 against, with 8 abstentions (Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, USSR, as well as Yugoslavia, South Africa and Saudi Arabia)" (Ghorpade 2011).

Charles Malik of Lebanon – one of the drafters of the UDHR – characterized the content of the Declaration as follows: "The Declaration is a complex product of all cultures and nations that have united their wisdom and views. The Atlantic World gave priority to civil and political rights; similarly the Soviet bloc countries gave priority to economic, social and cultural rights; Latin American countries dedicated themselves to the rule of law; the Scandinavians emphasized the gender equality; India and China supported non-discrimination, especially for oppressed, under-developed and vulnerable humans, they were also interested in the right to education; those with predominantly religious outlook were willing to protect religious freedoms" (Гнатовський and Поєдинок 2009, 19).

December 13 1948 the central Soviet newspaper "The Pravda" published an article with the address of the famous Soviet lawyer and statesman Andrey J. Vyshinskiy at the UN General Assembly session concerning the drafting of the UDHR. In his address Mr. Vyshinskiy stated: "As it could be expected the Anglo-American majority adopted the Universal Declaration of Human Rights, rejecting all suggestions of the Soviet Union… It is an obvious example of the fact, that the Declaration will be used to cover the pattern of human rights violations and inhuman living conditions for millions of ordinary people in the Western countries" (Вышинский 1948).

A striking proof of existing antagonisms in the approaches to the content of human values in different countries of the world is the statement of the Iranian representative to the United Nations, said Rajaie-Khorassani, when he expressed in 1982 the position of his country regarding the Universal Declaration of Human Rights by saying that the UDHR was "a secular understanding of the Judeo-Christian tradition, which could not be implemented by Muslims without violating the Islamic law" (Littman 1999). While the Islamic Republic of Iran condemns torture; it does nevertheless consider that corporal punishment and the death penalty do not classify as torture if they are applied on the basis of Islam and according to the decision of the Islamic court.

The application of the death penalty to persons under the age of 18 in the USA is not considered a violation of the universal right to life. Every year the US publishes reports on human rights practices in almost every country of the world but has practically never provided any written information on human rights practices in its own country.

Since the establishment of the UNO Ukraine was actively involved in promoting respect for human rights. Thus, Dmytro Z. Manuilsky – the head of the Ukrainian delegation at the UN Conference on International Organization in San Francisco – was the Chairman of the First Committee, which elaborated the Preamble and Chapter 1 (Purposes and Principles) of the United Nations Charter (Кулеба 2007, 168). Moreover, the renowned Ukrainian expert in international law – Volodymyr M. Koretskyi was

a member and the First Deputy of the Chairperson of the UN Commission on Human Rights (1947–1949) and played a key role in drafting Article 1 of the UDHR: "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"* (Онищук 2009, 30). Ukraine was also quick to ratify universal documents on human rights protection: the International Covenants were ratified in 1973, the CERD – 1969, the CEDAW – 1981, the CAT – 1987, the CRC – 1989.

Nevertheless, the actual implementation of the abovementioned universal human rights standards in Ukraine in Soviet times cannot be said to have been successful. "The disregard for human rights in the USSR can be explained by the Soviet concept of human rights: Unlike Western theories, where it is the individual who is the beneficiary of human rights which are to be asserted against the government" (Lambelet 1989, 61–62), Soviet law declared that the State is the source of human rights.

Since independence the situation in the sphere of human rights protection has changed dramatically. For instance, the Ukrainian Parliament Commissioner for Human Rights (the Ombudsman of Ukraine) Nina I. Karpachova declares constantly that the UDHR laid the foundations for the development of the human rights standards system and although its provisions at the time of adoption were not legally binding, they are universal for all countries (Карпачова 2009, 4).

24.3 The Relationship Between Universality and Cultural Diversity

Thus, taking into account the abovementioned examples, it is possible to support the representatives of cultural relativism. They maintain the position that different traditions and cultures influence in a different way key points of value and the understanding of the universal values content – human life being one of them. On the other hand, this means that different countries of the world conduct different human rights policies and practices.

These examples and the history of the adoption of international human rights instruments indicate that in spite of their democratic features, they comprise different wordings and interpretations concerning their political, social and economic content. Therefore, the universality of the rights set out in basic human rights documents would depend on the specific features of the State concerned (even for the States that had ratified them). And the rights and liberties set out in the universal documents would be implemented in every State in the appropriate historical form.

In this case, it is mandatory to prove the legal binding force as international custom for such rules of law. The current international law recognizes that due to general State practice, *opinio juris* concerning the UDHR content, the latter has acquired the character of international custom, regardless of its initial declaratory character.

Indeed, nowadays few people would doubt that at least major provisions of the UDHR are considered to be universally recognized principles and rules of international law and certain State obligations in the sphere of fundamental human rights protection constitute *erga omnes*.

Consequently, it is the customary law to provide obligations for those States that are not parties to the universal documents regarding human rights standards. In that case, the States that didn't ratify even basic international covenants or conventions on human rights could be engaged by the international obligations according to customary law. Accordingly, the universal character of customary law turns it into the indispensable source of human rights law.

In general, the globalization of the modern world entails (with some exceptions) the universal character of those human values that substantiate the social transformation of the society. The values that define the democratization and liberalization of the world acquire the universal sense. Those values are freedom, equality, justice, tolerance, natural human rights etc.

Recognition of these values at the national level, development of international legal standards and their implementation into the domestic law of the majority of States are the demonstration of universality that at the same time co-exists with cultural and national diversity. According to Prof. Vsevolod V. Mytsyk, a prominent Ukrainian legal scholar, the abovementioned notion gives some experts the reason to affirm the relative universality of the fundamental human rights (Мицик 2010, 53).

Since the declaration of its independence in August 1991, Ukraine defined membership in the United Nations as one of its foreign policy priorities. Ukraine firmly adheres to the purposes and principles of the UN Charter, substantially contributing to the Organization's activity in the fields of maintenance of international peace and security, disarmament, economic and social development, protection of human rights, strengthening of international law etc. Nowadays, Ukraine takes active part in the UN activities in the sphere of human rights protection. Ukraine's election to the newly established Human Rights Council in 2006 and its re-election in 2008 testified to the high international authority as well as universally recognized contribution and potential of our nation in the field of human rights. Observing its obligations concerning human rights protection, as a UN Member State, Ukraine made much progress in bringing its legislation into conformity with international rules and standards, reinforcing the legal remedies at the national level, reforming the court system, strengthening the role of human rights organizations and raising the legal culture.

24.4 Universalism and Regionalism in Europe

When analyzing mechanisms of human rights protection existing in the world, one can draw a conclusion that nowadays the most efficient are the regional mechanisms of human rights protection. It is easier to establish new common criteria in the framework of regional mechanisms due to the common traditions and cultures.

Regarding this issue, the authors would like to support the position of the well-known Russian Prof. Stanislav V. Chernichenko. Prof. Chernichenko noted that universal standards can be in line with regional standards but in the field of legal practice, it is regional standards that make more progress than the universal (Черниченко 2000, 10).

The International Covenant on Civil and Political Rights adopted 1966, the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 1950, the American Convention on Human Rights, adopted 1969, and the African Charter on Human and Peoples' Rights, adopted 1981, protect one group of human rights – civil and political rights. However, even though there is a special Committee entrusted with the task of interpreting the Covenant interpretation, such an international mechanism is less effective than the European regional mechanism of human rights protection of the ECHR.

The decisions of the European Court of Human Rights are legally binding for case parties, its interpretations are a significant source for all contracting parties of the Convention. Those features characterize the European Convention as an effective, legally binding and "live" rule of law. Having delivering thousands of judgments throughout the last, the European Court of Human Rights (ECtHR) made a precise interpretation for every right provided for by the Convention and its Protocols according to current trends and realities that prevail in the Council of Europe Member States.

Handling the applications from the alleged victims of human rights violations, the Court not only takes individual measures but also obliges the state-violators to take general measures. Moreover, although the Convention provides the State Parties with freedom to choose those measures, the case-law of the ECtHR indicates that the Court insists on amending national legislation and improving the domestic remedies. Over the past few years the European Court of Human Rights has developed a new procedure, known as the pilot-judgment procedure, as a means of dealing with large groups of identical cases that derive from the same underlying problem. The pilot judgment is therefore intended to help the national authorities to eliminate the systemic or structural problem highlighted by the Court as giving rise to repetitive cases. In doing this, it also assists the Committee of Ministers in its role of ensuring that each judgment of the Court is properly executed by the respondent State[2] (European Court of Human Rights 2009, 11).

Representative of this matter is the case *Y.M. Ivanov v. Ukraine*[3] (European Court of Human Rights 2010, 12). In handling hundreds of identical cases concerning Ukraine, the Court ruled that the problems in the functioning of the judicial authority in Ukraine are complex and large-scale and that Ukraine must introduce into its legal system, within 1 year at the latest from the Court's judgment becoming final, an effective remedy to secure adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic judgments and complied with the key criteria

[2] European Court of Human Rights (2009), The Pilot-Judgment Procedure. Information note issued by the Registrar. http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf#xml= http://www.search.coe.int/texis/search/pdfhi.txt?query=pilot&pr=Internet_D&prox=page&rorder=500&rprox=750&rdfreq=500&rwfreq=500&rlead=500&rdepth=250&sufs=1&order=r&mode=&opts=&cq=&sr=&id=4a51065d82

[3] European Court of Human Rights (2010) Information Note no. 123 on the Court's Case Law, October 2009, Strasbourg: Council of Europe, 27.

set in the Court's case-law. Ukraine was also required to grant redress, including, where possible, unilateral remedial offers or friendly settlements, to all current applicants in such cases whose applications were submitted to the Government. In the event that no redress was granted, the Court would resume its examination of all similar pending applications. Pending the adoption of the above measures, the Court would adjourn the proceedings for the same 1-year period in all Ukrainian cases lodged after the delivery of the present judgment and concerning solely the non-enforcement or delayed enforcement of domestic judgments (Юдковская 2009). The delivery of such judgments by the ECtHR indicates that the Court tries to solve the structural and general problems in the national legislation and case-law of the Member States actively influencing the implementation of the appropriate European standards at the national level.

The question arises as to whether there is a possibility of creating similar mechanisms of human rights protection at the universal level. We would view this more as a rhetorical question and it could not be answered in the affirmative. The former UN Commission of Human Rights at the time of the UDHR drafting consisted of representatives drawn from different philosophic, ideological and religious traditions, representatives of different countries from all continents, legal systems, and political landscapes. Nevertheless the international community succeeded in reaching compromise on common traditions but their content stayed undefined.

Thus, in introducing minimal standards at the universal level, arising from the values that are inherent to all mankind, those are given, usually, general, abstract definitions. That, in turn, makes it possible for the States capable to use wording with the relevant content that corresponds to the culture and traditions of the country or region.

The European region has the most effective and authoritative regional human rights protection system, which consists of the mechanisms and procedures for the protection of human rights implemented on the continent. Human rights are a cross-cutting issue for all major European institutions: the Council of Europe, the European Union and the Organization for Security and Cooperation in Europe. However, the position, given to human rights in the work of these organizations is different.

Thus, until the Lisbon Treaty came into force, giving a legally binding effect to the EU Charter of fundamental rights, the EU's own human rights protection system did not exist. As an exception, only fragmentary aspects of human rights and individual mechanisms to protect such rights (mostly the group of socio-economic rights of EU citizens) were considered. The ensuring of socio-economic rights was necessary for the realization of freedom of free movement. The absence of a human rights protection system in the European Union over a long period had been explained by its economic development goals, with the protection of human rights being a minor aspect. At the same time, Ukraine is not an EU member state, nor a candidate. Therefore the protection of human rights in the EU may be available only to citizens of Ukraine as citizens of third countries who legally reside in the EU. However, the rights of the citizens of non-EU Member States are significantly limited in comparison with the rights of the EU citizens.

An important role is attached to the human rights issue by the OSCE, which determines human rights protection as an integral component of the new European security system in the twenty-first century. The human rights protection sphere had its development in the 1990s with the adoption of the Paris Charter for a New Europe. The Charter proclaimed the common values of European home: human rights and basic freedoms, democracy and rule of law, economic freedom, social justice, clean environment. However, the problem of security in Europe remains the main goal of the Organization. Therefore, taking into account the primary focus of the Organization, we should note that its functioning mechanisms have no significant impact on the development of regional human rights standards or on forcing the member States to implement the already established ones. Ukraine, being a member of this Organization since 1992, actively participates in the discussion on current issues of European security and supports the improvement of the institutions and mechanisms of the OSCE, strengthening the role of the Helsinki forum in the European security sphere and the enhancing of the preventive and peacemaking potential of the OSCE. One of the initiatives of the Organization is the monitoring of democratic elections in Member States, including many years of such work in Ukraine.

Within the Commonwealth of Independent States (the CIS), in which Ukraine also participates, it is worth noting the adoption of the Commonwealth of Independent States Convention on the rights and basic freedoms in 1995. However, the latter has not ever acquired any importance. Moreover, the refusal to ratify it was one of the requirements of the Council of Europe that had been put forward to Ukraine when joining the Organization.[4]

Thus, the foundation of the European human rights system has been developed within the frameworks of the Council of Europe due to the creation of effective mechanisms. The basic principle of the Council of Europe, since its foundation in 1949 to the present day, is the protection of pluralistic democracy, the rule of law and human rights. The protection of human rights is not only one of the three basic principles of the Organization, but also an important direction for development. Since it was founded, the Council of Europe has constantly been defending the belief that human rights are universal, indivisible and are the basis of any democratic society.

Supporting and developing universal principles, the Council of Europe is one of the examples of powerful, influential and effective regional formations. However, regional and national standards must operate in harmony with universal, detailing and developing them. In 1946, Winston Churchill declared that the "firm goal of the Europeans should be building and strengthening the United Nations. Within the

[4] Parliamentary Assembly of the Council of Europe, Opinion No. 190 (1995) on the application by Ukraine for membership of the Council of Europe, paragraph 12 iii: "…pending further research on the compatibility of the two legal instruments, not to sign the Commonwealth of Independent States (CIS) Convention on Human Rights and other relevant CIS documents, given the fact that individual applications submitted under this convention might render impossible the effective use of the right to individual application under Article 25 of the European Convention on Human Rights…" http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta95/EOPI190.htm

framework and under the leadership of which we must revive a common European family, the first practical step to which should be the Council of Europe. Council of Europe will implement the idea of United Nations…" (Заблоцька, Федорова, Шинкаренко 2007, 16).

Furthermore, it should be noted that according to the majority of Ukrainian experts, universalism and regionalism can only give the best results when coexisting together in the modern understanding of law and rights, intersecting and preserving their nature at the same time. Today it is obvious that the Council of Europe not only details and develops the universal principles and standards, but also sets its own, European, which are then implemented at the universal level. For example, while the International Covenant on Civil and Political Rights was adopted in 1966, and entered into force from 1976, the Convention on Human Rights and Fundamental Freedoms of 1950 had already entered into force in 1953 and from 1954 to 1959 the European Commission on Human Rights and the European Court of Human Rights became operational. The European Social Charter of the Council of Europe, adopted in 1961, and the European Cultural Convention of 1954 also outstripped the universal document on the same issues – the International Covenant on Social, economic and cultural rights (dated 1966, entered into force in 1976).

One of the illustrative examples of the successful development of problematic human rights standards within the Council of Europe is the adoption in the 1990s of the following documents on the protection of rights of national minorities: in 1992 – Charter for Regional or Minority Languages, in 1995 – the Framework Convention for the Protection of National Minorities, which was the first ever legally binding multilateral document that dealt with the rights of minorities. Within the UN there was no consensus on minority rights, which had been reflected in Resolution 217 (III) of 1948, which adopted the Universal Declaration of Human Rights. In its core it determined that the UN could not remain indifferent to the fate of minorities; however, given the impossibility of developing a unified decision on this complex issue, which had specific aspects in each country, and taking into account the universality of the Declaration, it was decided not to include special provisions concerning minorities into the Declaration. The UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minority Rights, Ad Hoc Working Group and other relevant bodies have achieved after decades of work that the Article 27 on the rights of minority be included in the Covenant on Economic, Social and Cultural Rights as well as the adoption of the Declaration on rights of persons belonging to national, ethnic, religious and linguistic minorities in 1992.

The protection of the rights of minorities is an extremely relevant issue in Ukraine, since our State has turned out to be the only former Soviet State to recognize the deportation of the Crimean Tatar people as a crime and declared their repatriation to Ukraine. However, despite political statements, 5-year programs etc., the process of repatriation is taking place in the absence of special legislation that would have been called for to address the issue of return, resettlement, land allotment, most social problems, language issues, education, the guarantee of the preservation and development of the Crimean Tatar people, etc. It was only in 2009 that the OSCE High Commissioner on National Minorities and the President of the EU Committee of

Regions expressed their recommendations regarding the necessity of adopting special laws, which have though not yet been considered (Джемілєв 2010, 15–16). However, fulfilling its obligations imposed by the Council of Europe, Ukraine has ratified all of the above listed major documents of the Council of Europe on the issue. Although, according to the Constitution of Ukraine, the ratified international treaties constitute part of the national legislation, the problem with their implementation and use remains, along with the problem of the adoption of special legislation to protect the rights of national minorities in Ukraine.

Thus, it is clear that within the regional unions it is easier to find compromise solutions in any field, including human rights, and implement them. The successful implementation of the system of preventive visits of independent experts to control the standards of the European Convention for the Prevention of Torture in the penitentiary institutions has given an impetus for the adoption of additional protocols to the UN Convention against Torture.

However, regardless of the fact that the prohibition of torture is the basic instrument of human rights protection, particularly envisaged in Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights, the increasing violations of rights in Ukraine can be attested by the dozens of decisions of the European Court of Human Rights and by the reports of international and national human rights organizations. Inhumane conditions of detention while in custody, torture of detainees and prisoners, beatings, lack of access to medical services and the spread of infections and diseases in prisons are, unfortunately, common practice in Ukraine. Ukrainian investigators, courts and prosecutors still use the Criminal Procedure Code of Ukraine from1960 in their work. Designed for the needs of the Soviet repressive system, overloaded with numerous later changes, the Code complicates justice and creates conditions for human rights violations.

According to the results of the sociological monitoring carried out by the Kharkiv Human Rights Group in 2009, 18% of participants believe that the use of unlawful violence in the work of law enforcement representatives is very common, and 31% of participants considered this practice rather widespread, whereas 30, 1% of law enforcement representatives agree that violence against detainees is one of the methods for disclosure and investigation of crimes. The estimated number of people beaten during arrest is about 600,000 per year (including information for 2009). The number of persons who suffered prolonged detainment in unsuitable places (corridors, offices, cars) reached 300 000 in 2009. A further strengthening of the control of the legality of the arrest and processing order in 2005 led to a spread in the practice of processing detainees (who can not then get out of the law enforcement department) as invited, delivered or visitors. There has been an increase in the cases of entries not to be recorded in the police departments' logs. "In 2009, 45% of participants among the prisoners admitted that they had been put into pre-trial confinement only 3 or more days after their date of arrest (Кобзин 2009, 33–36)." The human rights defenders also note an increase in the trend transferring the facts of illegal violence from the stage of arrest to the stage of investigation, blackmail is getting more and more prevalent (approximately 400,000 persons per year).

The public response was triggered by the events of May 2010, linked to the death of student Ihor Indyla who was killed in the district police department. According to the law enforcement's explanation, Mr. Indyla fell several times and injured himself.[5] The demonstrations of protest and demand to punish the guilty were held in Kiev and in 18 cities of Ukraine. The situation surrounding the investigation of this incident also drew the attention of the rapporteurs of the Monitoring Committee of the Council of Europe, who came to visit Ukraine.

The authors believe that demanding attention from the Council of Europe and the world community to the problems of tortures and inhumane treatment used by Ukrainian authorities will help to overcome the complex massive violations of one of the fundamental universal human rights – the prohibition of torture.

Indeed, the support from international institutions in translating the recognized global and regional standards into the legislature of the States, which have recently entered the path of democratization, seems particularly important. Thus, Ukraine became independent in 1991 after the collapse of the Soviet Union and stepped towards building a legal democratic State that shares European values. Realizing that an important component of a democratic State and democracy, in general, is the protection, the consolidation and the guaranteeing of human rights, the 1996 Constitution proclaimed the principle of priority of rights and freedoms, and the human was recognized as the highest social value. The Constitutional provisions sometimes even textually repeat the provisions of the fundamental international legal documents – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and Covenant on the Social, Economic and Cultural Rights, the European Convention on Human Rights and Fundamental Freedoms. Experts of constitutional law from the Council of Europe have recognized the Constitution of Ukraine as the most democratic of all the new constitutions of Europe. The humanistic orientation of the Constitution of Ukraine is based not only on the modern concept of human rights, but also meets the generally accepted international and European standards of human rights, reflecting European values and commitments that were taken during the accession to the Council of Europe.

24.5 Status of Observance and Protection of Human Rights in Ukraine

Acquiring membership in this Pan – European organization was one of the main goals in the process of integration of an independent Ukraine into the European political and legal area in the early 1990s. Since Ukraine's accession to the Council of Europe on November 9, 1995 and the entry into force of the European Convention of Human Rights for Ukraine, the European Court has delivered hundreds of judgments

[5] Human Rights in Ukraine. Information Portal of the Kharkiv Human Rights Group: http://www.khpg.org/index.php?id=1275002918

against Ukraine, related to violations of many provisions of the Convention, including: the right to life, liberty and security of person, the right to a free trial, the failure to implement the decisions of the national judicial institutions, freedom of expression, the right to an effective legal protection, the right to protect property; the violations of the ban of tortures, inhuman or degrading treatment and punishment, etc. have been systematically detected.

As of today, Ukraine has acceded all four basic documents of the Council of Europe on human rights: in 1997 it ratified the European Convention on Human Rights and Fundamental Freedoms of 1950 and the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987, in 1998 – the Framework Convention for the Protection of National Minorities of 1995 and in 2006 – the European Social Charter (revised).

Ratification of certain documents (19 international agreements, including major papers in the field of human rights protection, except the clear commitment to join the European Social Charter) concluded the list of requirements for Ukraine's accession to the Council of Europe. Since the late 1980s almost similar requirements to ratify a number of key documents have been put forward by the Council of Europe to all States in order to include the existing standards and values in the national legislatures of the new members of the Organization. During 15 years of membership in the Council of Europe, Ukraine has revived the democratic traditions, implemented into the national legislature the basic legal portfolio of Europe. Having accessed the membership in the Council of Europe, Ukraine incurred itself to a number of commitments in the sphere of reforming legislation on the basis of norms and standards of the CE. An overwhelming number of those commitments have already been fulfilled. Ukraine has signed and ratified the 77 international legal documents of the Council of Europe; another 19 treaties of the Council of Europe have been signed but not yet ratified.

Still there are a number of provisions of national law, which remain to be put in line with the standards of the Council of Europe, in particular: the authority of prosecutors, judicial reform, adopting the new Criminal Procedure Code (the draft of which is under consideration in the Parliament of Ukraine). The main directions of the cooperation between Ukraine and the Council of Europe, particularly in the fields of human rights protection, judicial reform, fighting corruption and social cohesion, constitute the basis for the Council of Europe Action Plan for Ukraine for 2008–2011, approved by the Committee of Ministers in July 2008. The Action Plan is unprecedented for the content and level of funding. Its budget is around 25 million Euros.

Thus, the implementation of regional European standards not only contributes to further integration into European political and legal space, but also promotes the adherence of Ukraine to the universal human rights standards.

24.6 Conclusion

In general, Ukrainian legal science supports the concept of the principles of universality, indivisibility and interdependence of human rights. Recognition by Ukraine of the universality and world value of basic human rights and freedoms as the basis

for further development of the world derives from European traditions, European philosophical views, which are closely related to Ukrainian history.

How to ensure the overall human rights in the world of cultural diversity?[6] The answer is never simple and unequivocal. However, we must agree that none of the cultures replaces the international achievements in the sphere of human rights protection; culture can be a platform with human rights integrated into it, supporting the commitment to and respect for such rights. Still, the international standards are to be integrated into the national legal plane.

One can argue as to whether the modern concept of human rights is solely a product of Western philosophical, religious and legal thought, which ignores the peculiarities of other nations and cultures (mostly the Judaic and Islamic views). Thus, Professor V. Mytsyk agrees that "the idea of universality of human rights is historically based on Western philosophical and political views on the human world …" (Мицик 2010, 20). Indeed, it has to be acknowledged that the Western concept is, more than any other, aimed at protecting human dignity and human life. However, it is obvious to most Ukrainian experts that the idea of existence of universal human rights is mandatory for all mankind. There are different cultures, traditions, but for a decent existence a human being needs some common conditions. Therefore, the universality of human rights does not contradict the displays of cultural relativism (Мицик 2010, 53).

Protection of a human being as the highest value is certainly recognized in Ukraine; this value pervades Ukrainian constitution. While at the present stage of human development international documents call on States to abandon the death penalty, and the States gradually eliminate it, Europe has already become the first region free from the death penalty. A European state, Ukraine, has long since shared the European values; this has also been reaffirmed after its come-back from nearly a century of totalitarianism. Regional European values do not contradict the universal ones, but develop them. It also must not be forgotten that it is at the regional level, and particularly by the European regional institutions, that the most effective legally binding mechanisms for the protection and implementation of these values were created.

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